



Title	A Forgotten or Ignored Ordinance? A Critical Appraisal of the Inheritance (Provision for Family and Dependants) Ordinance
Author(s)	Sherrin, C
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A FORGOTTEN OR IGNORED ORDINANCE?
A CRITICAL APPRAISAL OF THE
INHERITANCE (PROVISION FOR FAMILY AND
DEPENDANTS) ORDINANCE



Christopher Sherrin LLM, PhD
*Professor, Department of Professional Legal Education
The University of Hong Kong*

The somewhat portentous title to this article is designed to provoke a critical examination of the core provisions of the Ordinance. It is not possible in the time available to comprehensively review the provisions of the Ordinance but rather the scope will be to concentrate on the first five sections which embody the core elements of the discretionary jurisdiction.¹ I shall also consider the only three reported cases in Hong Kong on the Ordinance, focusing particularly on *In the Estate of Lee Sai Wai*,² a 2002 decision at first instance and in the Court of Appeal.

Introduction

The Ordinance was enacted in 1995 and came into force on 3 November 1995. As such it was part of a series of reforming and amending Ordinances of the same date, to the law of succession, including the Wills (Amendment) Ordinance and the Intestate Estates' (Amendment) Ordinance. Whereas the other 1995 Ordinances were Amending Ordinances to their namesakes, the IPFDO was a wholly new provision that

¹ Thus time does not allow me to fully discuss the important provisions in ss 10 to 15 relating to anti-avoidance and evasion provisions. Nor the ancillary powers of interim awards, variation, effect of divorce, etc.

² [2001] 4 HKC 559; [2002] 4 HKC 517 (with further unreported proceedings in the case, MP 4859/2001) first instance; affirmed by the Court of Appeal CACV 301/2002, the only really substantive decision on the Ordinance and which will be fully discussed.

completely replaced the previous Deceased's Family Maintenance Ordinance (Cap 129).

The long title of the Inheritance (Provision for Family and Dependents) Ordinance (Cap 481, hereafter shortly referred to as the Ordinance), proclaims it to be an ordinance to make provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for certain members of that person's family and dependants of that person, and for connected matters. The seminal legislation on family provision was the English Inheritance (Family Provision) Act 1938. The provisions of the 1938 Act (as amended) was copied into Hong Kong law by the Deceased's Family Maintenance Ordinance, Cap 129, which was enacted in 1971 contemporaneously with the Wills Ordinance (1970), the Intestates' Estates Ordinance and the Probate and Administration Ordinance (both 1971).

The original Deceased's Family Maintenance Ordinance, like the English 1938 Act on which it was based, was a fairly timid intrusion into testamentary freedom; it was limited in scope and was found to be relatively ineffective.³ The deficiencies of the original legislation can be easily identified.⁴ The class of potential applicants with locus standi to apply for provision out of the deceased estate was very limited. The powers of the court were limited to making an award for the maintenance only of the applicant. The court could only make an award out of the deceased's net estate on death; there were no powers to augment that estate to facilitate an award and there were no anti-avoidance provisions. In consequence of these three main deficiencies, both the English 1938 Act and the Hong Kong 1971 Ordinance, were largely ineffective to achieve their objectives of preventing abuse of the freedom of testation and to correct unfairness in the law of intestacy; the jurisdictions were rarely invoked and had little impact on the law of succession. The deficiencies in the law of family provision had been highlighted in England by the Law Commission,⁵ who recommended fundamental and far-reaching changes to the law. These resulted in the wholly new English Inheritance

³ See the Law Reform Commission of Hong Kong; Report on the Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependents.

⁴ Para 13.4.

⁵ Second Report on Family Property: Family Provision on Death (Law Com no 61).

(Provision for Family and Dependants) Act of 1975. When the Hong Kong Law Reform Commission⁶ undertook a similar enquiry in 1989 they had little hesitation in recommending that a new Ordinance be enacted similar in scope and content to the English Act of 1975.⁷ Thus the Hong Kong Ordinance derives very largely from the analogous English 1975 Act of the same name and the Ordinance closely follows the contents and provisions of that Act.⁸

The relationship between the 1971 Ordinance and the 1995 Ordinance

The reported case of *Ye Hong Ying v Chan Lup Ying (No 1)*⁹ considered some interesting points on the relationship between and the transition from the earlier to the later Ordinance. The issues arose because although the deceased died in January 1993, before the coming into effect of the new Ordinance, the action was filed by originating summons on 17 November 1995 after the new Ordinance had come into effect. The deceased's will left the entirety of his estate to his second wife, the defendant, and his first wife, the plaintiff, claimed (as a 'dependant' as defined in the Ordinance) against the estate for reasonable provision for her maintenance under section 4(1) of the Deceased's Family Maintenance Ordinance (Cap 129). The action was commenced by originating summons and the defendant argued that the originating summons should be struck out on substantive and procedural grounds. First, it was argued that the court had no jurisdiction in view of the repeal of the Deceased's Family Maintenance Ordinance on 3 November 1995 when it was replaced by the new Ordinance. The court dismissed this argument holding that since the deceased died before 3 November 1995, the repeal did not affect an order made under it even if made after that date, this being preserved by the transitional provisions in section 33(1) of the Ordinance. Secondly, it was argued that the summons could

⁶ Report on the Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants. See n 3 above.

⁷ Both of these Law Commission Reports are fruitful sources of explanation and comment on the legislation to which reference can usefully be made.

⁸ Although there are some significant differences in the terms of the Act and the Ordinance, many of the authorities on the Act can usefully be referred to under the corresponding provisions of the Ordinance and several such cases are referred to in this lecture – whilst recognising of course that the English cases have no direct authority on the Hong Kong law.

⁹ [1996] 3 HKC 426.

not be filed before probate had been taken out; this was rejected as having no basis under the provisions of the (old) Ordinance particularly in the light of section 11(1) of the (old) Ordinance which enabled the court to make an interim maintenance order. Further, the six-month time limit (section 6) – from the date when representation was first taken out – did not preclude earlier applications before representation was taken out. Although it would certainly be unusual to commence a family provision action before a grant of representation has been taken out there is no reason in general procedural rules why this should not be done.

The procedural grounds centered on whether it was correct to commence the claim by summons rather than by writ; the court holding that the procedure by summons was not inappropriate because the proceedings were not based on an allegation of fraud and the hearing of the summons would provide sufficient opportunity for any inconsistencies to be taken into account.

The case revisited the court as *Ye Hong Ying v Chan Lup Ying (No 2)*.¹⁰ In the first action the court had decided in the plaintiff's favour and ordered the defendant to pay a monthly payment of HK\$6,000 to the plaintiff, under the Deceased's Family Maintenance Ordinance. This was varied by an order to pay a lump sum of HK\$1.2m, under section 8 of the new Ordinance, it being held that where the deceased died before the new Ordinance came into effect, an application could be made under the new Ordinance to vary the order made under the old Ordinance.¹¹ The figure was calculated as one third of the current value of the estate. It was thought that, although the starting point for calculating the amount of the award was the value of the net estate at the death, adjustments should be made on an application for variation to reflect the current value of the estate.

Justice Cheung took the opportunity to point out the differing objectives of the two Ordinances. Under the earlier Ordinance, '... the aim was to ensure the widow can have a reasonable living while under the later Ordinance, the aim is to ensure the widow can have a reasonable share in the estate.'

¹⁰ [1999] 2 HKC 786.

¹¹ Applying *Kung Lok Ping v Ngai Fook Sang and Another* (HCMP) 158/95, unrep.

Characteristics of the Legislation

Judicial Discretion

The legislation provides a remedial jurisdiction to reflect principles of fairness and equity in the inheritance of deceased estates by providing a discretionary jurisdiction which can be invoked to correct manifest unfairness and injustice in cases where the deceased has by his will, or by the effects of intestacy, failed to provide properly for his spouse, children, relatives or dependants.

The law of family provision as set out in the Ordinance is based on the common law system of a judicial discretionary system of provision; there is no notion of 'fixed rights of inheritance' as characterise the civil law inheritance systems. It follows that all claims for family provision under the common law must be by way of application to the court and the invocation of a judicial discretion in the applicant's favour.

The advantages of this are apparent; the provision made, if any, can be specifically tailored to the applicant's needs and deserts in the context of the claims of the other persons with entitlement to the deceased bounty. Thus it embodies flexibility, fairness, appropriateness, preciseness and judgment. The fixed and automatic rights of inheritance under the civil system have corresponding and contrasting disadvantages.

However the disadvantages of the common law judicial discretionary system are obviously those inherent in any system that requires an application to the court; delay, expense, complexity, uncertainty and necessary recourse to lawyers – all of which the civil system avoids.

The jurisdiction is characterised as requiring application to the court to invoke the exercise of a judicial discretion. As such the jurisdiction suffers from the defects of being potentially expensive in legal costs; uncertain in outcome and conducive of delay in resolution. It is no doubt these factors which have deterred many applications under the Ordinance in Hong Kong – although the corresponding legislation in England has been more frequently invoked resulting in many reported cases on the jurisdiction.

Since the law of family provision is dependent on the exercise of a multi-layered judicial discretion the outcome of an application is unpredictable and uncertain and this uncertainty is correspondingly

multi-layered and permeates the whole process of the jurisdiction. The establishment of locus standi is uncertain; proof of the failure to make reasonable financial provision is not clear cut; persuading the court to exercise its discretion depends on complex relative factors and what sort of order the applicant may obtain is unpredictable.

Impact of the Ordinance

It is clear that successful invocations of the jurisdiction to make family provision orders in Hong Kong are rare; successful applications under the Ordinance are very much the exception rather than the rule. Indeed, such statistical evidence as is available, suggests that the jurisdiction is very rarely litigated. Yam J in Chambers in *Re Estate of Lee Sai Wai*¹² stated that: “There are no reported decisions of the courts in Hong Kong on proceedings under the IPFDO, and accordingly no guidance as to where the incidence of costs orders should fall.”¹³

My research has revealed only three reported family provision cases in Hong Kong:

1. *Ye Hong Ying v Chan Lup Ying (No 1)* (1966);¹⁴ *(No 2)* (1999),¹⁵ which has already been considered;
2. *Re Estate of Lee Sai Wai (deceased), Leung Kam Yin, Joyce v Li Oi Lun* (2001 and 2002),¹⁶ the only really substantive decision on the ordinance and which will be fully discussed;
3. *Wang Din Shin v Nina Kung* (2003),¹⁷ which is only very peripherally relevant to the ordinance and need not be further discussed.

¹² HCMP4859/2001, unrep.

¹³ The judge decided that the costs should come from the estate and not from the award, see below.

¹⁴ [1996] 3 HKC 426.

¹⁵ [1999] 2 HKC 786.

¹⁶ [2001] 4 HKC 559; [2002] 4 HKC 517 (with further unreported proceedings in the case, MP 4859/2001) first instance; affirmed by the Court of Appeal CACV 301/2002.

¹⁷ [2003] 463 HKCU 1.

Retrospective and Prospective

It is apparent from the paucity of these reported and unreported cases, that recourse to the Ordinance in the form of applications for family provision is rare. However quite apart from substantive applications it is suggested that the Ordinance does play a significant (though unquantifiable) latent role in Hong Kong probate law in two ways. The main rationale of the legislation is to provide a post-death remedial action which can challenge, upset and rewrite the terms of a will or the distribution under intestacy; a retrospective corrective impact. But the jurisdiction also has a prospective negative impact acting prospectively as a deterrent to testators who are minded to disregard the legal or moral claims of their families or dependants; a prospective deterrent impact. It is not possible to quantify the importance or impact of this deterrent effect but anecdotal evidence with respect to the reciprocal legislation in England, suggests that it is of some significance. Thus solicitors taking instructions from their clients to draft wills which they feel might attract challenge after the death, should be alive to the necessity of advising clients of the jurisdiction and the possible effect of a successful claim against the estate. Where a testator is adamant that he has good reasons for excluding a family member or dependant (who might be considered to have a possible post-death claim) then it may be desirable to include a statement of these reasons in the will. Such a statement is certainly not binding on the court since the test is objective not subjective but the court can have regard to reasons under the general phrase 'any other matter' in section 5(1)(g).¹⁸ Other than that there is little that a testator can do to preempt a possible challenge to his will after his death; he certainly cannot seek to exclude the statutory jurisdiction.

Settlement

There is the important issue of settlement. There is empirical evidence in England that the legislation is often invoked as a bargaining tactic against an estate leading to settlement of the claim in order to avoid cost and delay in the administration of the estate. Certainly it is the experience in England that most family provision claims are settled by

¹⁸ See the cases in n 29 below. Such 'reasons' can be admissible under the Evidence Ordinance; see the Evidence (Amendment) Ordinance No 2 of 1999, s 6 that repealed s 23 of the 1995 Ordinance.

the applicant and the beneficiaries without recourse to a formal judicial hearing. Indeed such is the threat in terms of delay and expense in the administration of the estate by a family provision claim that the beneficiaries and the executors are often persuaded to settle – ‘buy off’ might be a more accurate description in some cases – marginally meritorious claims in order to remove them so that the distribution of the estate can proceed.

Thus Cheung J’s peroration in *Ye Hong Ying v Chan Lup Ying (No 2)*¹⁹ was as follows: ‘It is my wish that the two families should make peace and treat this proceeding as the last litigation between them. Apart from further reducing the value of the estate, I can see no legitimate reason for having a contested probate action. In view of the order I have made, I would strongly urge the parties to reach an overall settlement so that probate can be obtained as soon as possible ...’²⁰

A Forgotten or Ignored Jurisdiction?

Whatever the extent of these negative impacts it is clear that there are very few positive invocations of the jurisdiction by positive application and it is interesting to examine why the jurisdiction under the Ordinance is so little used in Hong Kong. It is suggested that the reason is not so much that the Ordinance is unknown or forgotten but that it is ignored as being too fraught with uncertainty and unpredictability to warrant the time and expense of application resulting in civil proceedings. An analysis of the provisions of the Ordinance will illustrate this point under three perspectives.

A dichotomy of objectives

A fundamental ambiguity inherent in the Ordinance is that it is not a unitary jurisdiction with a single objective; it is a dichotomy of

¹⁹ [1999] 2 HKC 786.

²⁰ Likewise Yam J in the Chambers hearing in *Re Estate of Lee Sai Wai*, HCMP4859/2001: ‘I was concerned to learn during the argument on these matters that probate in the estate has not yet been granted, although it is now more than 2 years since the deceased’s death.....I would view with great concern any further delay in the administration of the estate.’

jurisdictions with each part resting on entirely separate and contrasting objectives. There are in truth two distinct classes of applicant who are dealt with in entirely separate ways; these are applications by husbands and wives on the one hand; and all other eligible categories of applicants on the other. This arises because of the meaning of the crucial phrase 'reasonable financial provision' which is fundamentally different to each category.

The surviving spouse standard

In the case of the former, it means "such financial provision as it would be reasonable in all the circumstances of the case for such a person to receive whether or not that provision is required for his or her maintenance" (section 3(2)(a)). But in the case of all other applicants it means "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance" (section 3(2)(b)).

In *Ye Hong Ying v Chan Lup Ying (No 2)*²¹ Cheung J stated that "under the IPFDO, the aim is to ensure the widow can have a reasonable share of the estate." This was contrasted with the position under the previous DFMO where the aim was to ensure the widow could have a reasonable living. Thus so far as husbands and wives are concerned the jurisdiction is designed to achieve a fair division of the communal assets, in which notions of community of property, or the divorce criteria of one half of the joint assets, can come into play. A widow is not simply limited to a claim for maintenance but is entitled to a fair share in capital terms, of the estate. Accordingly applications by disinherited, or inadequately provided, husbands and wives are far more likely to succeed and to result in much greater provision, regardless of the strength of the relative competing claims.

²¹ [1996] 3 HKC 426. This approach is consistent with and reflective of, the modern attitude to divorce settlements where the objective is not so much to ensure that the husband provides maintenance, as to provide for a fair division of the joint assets with a basic 50/50 criteria; see *White v White* [2000] 3 WLR 1571 and *Cowan v Cowan* [2001] 1 All ER (D) 173; English authorities which do not necessarily apply in Hong Kong.

The best illustration of the surviving spouse standard is provided by *Re Besterman (decd)*²² where the English Court of Appeal decided that in the case of a very large estate where the testator's only obligation was to his widow who was wholly blameless and incapable of supporting herself, reasonable provision required that she should have access to a sufficient lump sum to ensure beyond any reasonable doubt that she was relieved of any (financial) anxiety for the future.

The maintenance standard

In the case of all other applicants (except tsip or male partner) all that the applicant is entitled to is maintenance, and the jurisdiction is concerned only with discharging a maintenance obligation on the part of the deceased. The necessity to prove a maintenance obligation explains why it is difficult for an able bodied adult child to make a successful application for financial provision.²³

It is thought that the general approach to 'maintenance' under the Ordinance will be the same as in other jurisdictions, such as provision for a wife or child on separation. As to the meaning of maintenance in family provision cases reference can be made to Lord Browne-Wilkinson in *Re Dennis*:²⁴ "maintenance connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him".

A further judicial statement is that of Goff J in *Re Coventry*:²⁵ "What is proper maintenance must in all cases depend upon all the facts and circumstances of the particular case being considered at the time, but I think it is clear on the one hand that one must not put too limited a meaning on it; it does not mean just enough to enable a person to get by; on the other hand it does not mean anything which may be regarded as reasonably desirable for his general benefit or welfare."²⁶

²² [1984] 2 All ER 656.

²³ See *Re Coventry* [1980] Ch 461 and *Re Jennings* [1994] Ch 286.

²⁴ [1981] 2 All ER 140.

²⁵ [1980] Ch 461 at p 485, adopting a strict view in relation to an adult son. See also *Re Jenni* [1994] Ch 286, where it was not thought that the discharge of the applicant's mortgage could properly be regarded as maintenance.

²⁶ Cited by Blackburne J in *Robinson v Bird* [2003] All ER (D) 190.

Thus in England applications by adult children will rarely succeed, since they will find it difficult to establish a maintenance obligation on the deceased and even if they can do so, the obligation can be discharged by a modest order simply providing maintenance for so long as that obligation prevails.²⁷ More successful have been claims by cohabitants or unmarried *de facto* spouses where the claim has been essentially for the continuance of the provision of accommodation owned by the deceased; in such cases the maintenance requirement can be met by an order that the applicant should have a right to continue to occupy the premises without any transfer of ownership or proprietary rights to the premises.²⁸

The different standards

This dichotomy of meaning provides for and differentiates between the “surviving spouse standard” and the “maintenance standard” which is relevant to both the questions first, whether the will or intestacy makes reasonable financial provision for the applicant and secondly, if not, what order the court should make in order to make that provision. The surviving spouse standard is much more generous recognising that a husband or wife is entitled to a significant share of the estate assets over and above that which is strictly required for his or her maintenance.

Application of the jurisdiction

A further confusion of objectives arises in the application of the Ordinance to both testate and intestate (total and partial) estates.

Testate estates

In the case of testate estates the jurisdiction is designed to serve as a fetter to unbridled testamentary freedom and to provide a remedy in

²⁷ See *Re Coventry*, above; *Re Jennings*, above; *Williams v Johns* [1988] 2 FLR 475, where a restrictive attitude is apparent. But contrast the following cases where applications by adult children succeeded, mostly because of some exceptionally compelling circumstances; *Re Debenham* (1986) 7 FLR 404; *Re Abrams* [1996] 2 FLR 379; *Re Pearce* [1998] 2 FLR 705; *Re Hancock* [1998] 2 FLR 346; *Espinosa v Bourke* [1999] 1 FLR 747 and *Re Goodchild* [1997] 1 WLR 1216.

²⁸ *Jelley v Iliffe* [1981] Fam 128 and *Bishop v Plumley* [1991] 1 WLR 582.

cases of intentional (or unintentional) unfairness or eccentricity in the testamentary dispositions. Wills are by definition subjective expressions of the testator's wishes but in making awards against a testate estate the court views the matter objectively not subjectively, ie the judge exercises his discretion to achieve a distribution of the estate which he thinks is objectively right or fair, whatever the views, whether expressed in the will or not, of the testator may be.²⁹ It can of course happen that a family provision award can effectuate the frustrated intentions of the testator; where the testator makes a will which fails because of a defect of formalities, the court can simply effectuate those failed intentions by reproducing them in the order. But most successful family provision claims result in a rectification by change in the testator's dispositions, not a confirmation of them. Further this objective evaluation is determined in the light of the circumstances which exist at the date of the hearing – not at the date of the death (section 5(7)) so that changes in the situation of the applicant or of the testamentary beneficiaries whether financial or personal, will be taken into account.

Intestate estates

The impact of family provision on intestacy is entirely different. The rules of distribution on intestacy are supposedly based on objective notions of fairness and reason as applied to the average or median estate and so the intervention of family provision serves to correct in a supplemental way the operation of those rules to exceptional estates. It can certainly be argued that family provision provides a much needed element of flexibility to what is an otherwise fixed and rigid system of entitlement in order to cope with the exceptional rather than the average circumstances.

An obvious example is the ability to use the jurisdiction to make provision for a *de facto* (common law) husband and wife who is not the legally married spouse of the deceased and, in the days when illegitimate

²⁹ *Re Coventry* [1980] Ch 461; *Williams v Johns* [1988] 2 FLR 475 where the testator's expressed reasons were not followed. Likewise in *Re Estate of Lee Sai Wai* [2002] 4 HKC 517, where the implicit wish of the testator that his estate should pass to his family rather than to his widow, was not thought to be compelling; see discussed below.

children had no entitlement on intestacy, for the offspring of such a relationship. The law of intestacy, for reasons more of policy than logic, declines to sanction provision for the *de facto* spouse (and previously for the illegitimate offspring of such a relationship) by a fixed statutory right to inheritance, preferring to provide a remedy where one is needed by the lateral route of family provision. In the same way the law of intestacy makes no provision for a step-child ie the child of the deceased's partner to a marriage which is not the deceased's child, but such a child may be able to apply as a 'child of the family', under the Ordinance.³⁰

So it can be said that in testate situations family provision operates on the will or intentions of the deceased, whereas in intestate situations it operates on the defects of the intestacy statute. But if one pursues the supplementary remedial role of family provision on the law of intestacy a major incongruity is apparent; family provision in the case of every one except spouses is only concerned with maintenance whereas intestacy is concerned with distribution of the estate. Thus if intestacy fails to recognise the common law spouse as entitled to any share of the estate, the best that family provision can do is to make an order for his or her maintenance which is a poor substitute.³¹

Similarly if it is thought that a poorer devoted sister who cared for her richer sibling for many years at considerable disadvantage to herself, is more worthy of inheritance than neglectful nephews and nieces of a deceased sibling, the court has no power under family provision to correct the injustice by giving the whole intestate estate to her. If her one half (or less) of the estate is insufficient for her maintenance the court may be able to supplement that out of the other share(s) but is unlikely to be able to direct the whole capital value to her. It is perhaps

³⁰ See s 3(1)(vii). An illustrative English case is *Re Leach* [1986] Ch 226 where an adult step-daughter brought a successful action against her step-mother's estate, because the step-mother's estate consisted largely of the property of the applicant's father. It was decided that in order to be treated as a child of the marriage it is not necessary that the child should be a minor; an adult child can be so treated. See also *Re Callaghan* [1985] Fam 1.

³¹ In England applications by cohabitants (common-law or *de facto* spouses) have been facilitated by the introduction of a new and distinct category of locus standi for such persons: the Law Reform (Succession) Act s 2, but this legislation has no counterpart in Hong Kong. The first reported case in England on applications by cohabitants under the new para (ba) is *Re Watson* [1999] 1 FLR 878.

because of these inconsistencies of objective that the seminal Family Provision legislation, the English 1938 Act, did not apply to intestacy; that Act was only extended to apply to intestate estates in 1966.

The augmentation of the estate and anti-evasion provisions

An important feature of the Ordinance is provisions designed to make the jurisdiction effective and to curb attempts at evasion and avoidance. Such provisions are essential because orders made under the Ordinance can only be made against the deceased's net estate and so, in order to counteract attempts at rendering applications ineffective by minimising the net estate on death, complicated and difficult to apply anti-avoidance provisions are included. These are aimed at counteracting attempts by the deceased to manipulate the assets during his lifetime for the benefit of the preferred beneficiary but they can be regarded as artificial and arbitrary in effect, expensive in litigation costs to invoke and thus constituting a deterrent to proceedings. These provisions fall into two main categories.

First, there are provisions that augment, in an artificial way, the meaning of 'net estate' for the purposes of the Ordinance. The property of the deceased out of which the judge has power to make an order is not limited to the usual concept of the 'net estate'. In certain situations the net estate can be augmented to include property not usually included in the estate available, for instance, for the payment of debts.³²

Thus property subject to a *donatio mortis causa* or to a nomination can be included as part of the net estate for this purpose. Further, and more significantly, is the provision dealing with joint tenancies.³³ An obvious way of minimising the net estate at death would be to put the property into the joint names of the owner and the beneficiary *inter vivos*; on death the joint interest is an interest ceasing on death, does not, *per se*, form part of the deceased's estate, and passes by survivorship to the surviving beneficiary. The Ordinance contains provisions to frustrate such intentions where property has been deliberately put into joint names in order to minimise the size of the estate on death, by providing a mechanism whereby for the purposes of the Ordinance, joint property

³² Section 10.

³³ Section 11.

can be deemed to be part of the estate. This provision³⁴ states that if an application for financial provision is made under the Ordinance within six months of the date on which representation with respect to the estate of the deceased was first taken out, the court for the purpose of facilitating the making of financial provision for the applicant, 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 the Ordinance as part of the net estate of the deceased. However, laudable though the intent might be, the provision is riven with unanswered practical problems. Any such order will be made many months after the death and thus many months after the survivorship has taken place. The property may or may not be still in the hands of the survivor and, may or may not be in the same form. If the property has been spent (the provision applies to joint Bank Accounts) the order will be nugatory and similarly if the property has been disposed of to a third party it seems doubtful if any order could affect such third party, retrospectively affecting title. There are no express tracing provisions in the sections.

Secondly, there are the 'claw-back' provisions which enable inter vivos transaction to be rendered, in effect, voidable or nullified. The two manifestations of these are in section 12 whereby property which has been given away inter vivos can be made subject to an order which effectively claws back the property into the estate.³⁵ Thus inter vivos gifts can be made subject to orders requiring the donated property to be paid back into the estate thus defeating attempts to benefit the beneficiary by substantial inter vivos gifts with the intention of frustrating possible applications under the Ordinance by seeking to reduce the value of the estate on death.³⁶ It must be noted that such an order can only be made against the donee of the property (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit) and so cannot affect any third party to whom the property

³⁴ Section 11(1).

³⁵ Sections 12-15.

³⁶ Section 12.

has been transferred.³⁷ And in section 13 whereby inter vivos contracts to take effect on death can be nullified.³⁸

But it is a brave litigant who embarks on an invocation of these provisions!

A Multi-Layered Discretion

The operation of the Ordinance is based on the exercise of a judicial discretion which is multi-layered and complex because it not only involves several stages of decision and choice, but also because it requires the court, at each stage, to consider not only the merits of the applicant's case but also to balance the merits of other relative and competing claims against the estate.

The first layer: locus standi to apply

The first stage of any application requires the proof of locus standi, which is not straightforward since it involves, in most cases, the first layer of judicial decision. All applicants must establish that they are either domiciled in Hong Kong, or resident in Hong Kong for the three years immediately preceding death.³⁹ Then the applicant must prove that he or she falls within one of the nine separate categories of persons with

³⁷ Section 12(1). There are complex rules in subsequent subsections providing for the identification of the property or the amount of money which could be the subject of an order against the donee where the property has been disposed of or transferred. But these rules seem fraught with difficulties in their practical application.

³⁸ Section 13 on contracts to leave property by will; see *Schaefer v Schuhmann* [1972] AC 572. If the contract is unexecuted the order will direct the personal representatives not to execute it; if the contract has been executed the order to provide money can only be made against the donee (the person with whom or for the benefit of whom the contract was made) and so cannot affect a third party.

³⁹ Section 3(1). *Domicile* is a difficult, though established concept of private international law. The alternative *Residence* is a novel provision in this area of law which has no counterpart in the English legislation. The phrase is redolent of uncertainty since the meaning of 'ordinarily resident' is not a clearly defined term of art. Further it will be noted that the paragraph does not state that the residence must be 'in or during the 3 years prior to death' but refers to such residence 'at any time in the 3 years immediately preceding his death' which, it is suggested opens the door to argument and dispute. It is submitted that the jurisdiction should be based solely on domicile and that paragraph (b) would have been better omitted.

locus standi to apply. Only two of these categories are defined in factual terms which do not involve any element of judicial decision or judgment, namely, the wife or husband of the deceased (para (i)) and a tsip or male partner of the deceased by a union of concubinage (para (iii)).

The category of an infant child is qualified by requiring the evaluation that the child 'is, by reason of some mental or physical disability, incapable of maintaining himself' (para (v)).

The category of a 'child of the family' by the evaluation that the child 'was treated by the deceased as a child of the family in relation to [the deceased's] marriage' (para (vii)).

All the other specific categories of applicant; a former wife or husband of the deceased (para (ii)); a parent of the deceased (para (iv)); an adult child of the deceased (para (vi)); 'a child of the family' (para (vii)); and a brother or sister of the deceased (para (viii)) requires proof that such person 'was being maintained, either wholly or substantially, by the deceased'.

The last residual category is wholly evaluative: 'any person ...who immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased' (para (ix)). The determination of this requirement in relation to paragraphs (ii), (iv), (v), (vii), (vii) and (ix) is governed by the following guideline: 'a person shall be treated as being maintained by the deceased, either wholly or substantially, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person'.

It will be apparent that this provision is redolent of uncertainty: what amounts to 'substantially'; 'full valuable consideration'; 'money's worth' and 'reasonable needs'?⁴⁰ It can be noted that it is essential that a person

⁴⁰ Notwithstanding the difficulties there have been a number of reported successful applications in England under the corresponding paragraph (e); these include: *Re Wilkinson* [1978] Fam 22 (sister); *Malone v Harrison* [1979] 1 WLR 1353 (mistress); *Jelley v Iliffe* [1981] Fam 128; *Re Beaumont* [1980] Ch 444; *Harrington v Gill* (1983) 4 FLR 265 (common law spouse); *Bishop v Plumley* [1991] 1 WLR 582 (common law wife); *Rees v Newberry* [1998] 1 FLR 1041 (friend). Unsuccessful applications include *Kourkey v Lusher* (1982) 12 Fam Law 86 (mistress) and *Layton v Martin* [1986] 2 FLR 227 (same). A most interesting and unusual case was *Re B. Bouette v Rose* [2000] Ch 662 where a mother successfully claimed against the estate of her deceased minor daughter; the daughter had been born disabled due wholly or partly to medical negligence at her birth, and had been awarded considerable compensation in damages as a result; the mother used this money to support both her and her daughters expenses of living.

claiming locus standi should have survived the deceased. Claims by the personal representatives of predeceased persons will not be entertained. Further it has been decided in England that not only must the applicant be alive at the death but must remain alive up to the date of judgment making the award. So that if an applicant, although surviving the deceased dies before the hearing of the case, the application cannot be continued for the benefit of his estate.⁴¹

The second layer: the testamentary or intestate provision

Once the applicant has established locus standi the court then has to determine whether 'the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant' (section 3(1)). The determination of this question is wholly evaluative being dependent on the meaning of the phrase 'reasonable financial provision' which has been fully discussed below, and is to be determined by a number of stated factors, both general and specific, which are set out in section 5.

The third layer: whether to make an order for reasonable financial provision

When the applicant has satisfied the court on the first two questions then the fundamental discretion of the court arises, namely whether to make an order for reasonable financial provision in the applicant's favour. This is a pure example of judicial discretion, but like most such discretions it is governed by and must be exercised in the context of, a number of stated factors, both general and specific which are set out in section 5. That section states that the court: '...in determining whether and in what manner it shall exercise its powers under [section 4], have regard to the following matters'. There follows a list of general factors of the sort which one would expect relating to the financial resources and needs of the applicant and the other claimants; the size and nature of the estate;

⁴¹ *White v Titchhurst* (1986) 2 FLR 83. The reason being that the application for financial provision is personal to the applicant and is not an action which can survive for the benefit of his or her estate. Similarly an infant child who was adopted after the death but before the hearing was held to be not qualified to apply under the English Act; *Re Collins* [1990] Fam 56.

any physical or mental disabilities of the applicant; ending with an unhelpful 'any other matter' and including, the surely anomalous and anachronistic, 'conduct of the applicant or any other person'.

The specific factors relevant to each type of application are then set out. In relation to spouses, for example, age, duration of, and contribution to marriage, and the interesting so-called divorce standard, ie what the applicant might have expected to receive if the marriage had been terminated by divorce instead of death – a reference which has caused major confusion and judicial disagreement in England.⁴² This and some of the other factors specific to an application by a spouse will be considered in the light of the decision in *Re Estate of Lee Sai Wai*⁴³ below. But helpful though these guidelines are they are no more than that and provide little precise indication as to the likely outcome of a particular application.

The fourth layer: what order to make

If the court, having been satisfied on the first two questions and having decided that it is an appropriate case to exercise its discretion under the third layer, then has to decide on what manner of provision is appropriate and the nature and type of the appropriate order. The former is governed again by the factors set out in section 5 whilst the latter is subject to the list of possible orders which the court can make set out in section 4.⁴⁴ If the court is satisfied on the merits of the application in the light of the relativities, the judge will then proceed to resolve the case by the exercise of the judicial discretion and determine what provision if any, should be made and as to the nature and type of the appropriate order.

The range of possible orders that can be made is sufficiently wide to enable the court to tailor the appropriateness of the order to the

⁴² See the cases in n 51 below. The special factors relevant to the spouse are set out in s 5(2); to parents in s 5(3); to children in s 5(4); to brothers and sisters in s 5(5) and to other applicants in s 5(6). In all cases the facts and circumstances to be taken into account are those at the date of the hearing, not at the date of the death; s 5(7).

⁴³ Above.

⁴⁴ In summary: (a) periodical payments; (b) lump sum; (c) transfer of property; (d) settlement of property; and (e) acquisition of property. The court can also make consequential orders; subsections (3) and (4).

circumstances of the estate and the affected parties, whether by settlement of property, periodic payments or lump sum orders. Which of these orders, or combination of orders the court chooses to make, is again a matter of discretion by the court, not a matter of right by the applicant.

The relativity of claims

The consideration and exercise of the second, third and fourth layers of the judicial discretion involves making a value judgment on the relative merits of the competing claims against the estate. The court has to consider not only the merits of the applicant's case, but also, in all cases, the claims of the designated testate or intestate beneficiaries – because any exercise of the discretion to make an award inevitably involves 'taking from Peter to pay Paul'. Where there is more than one applicant claiming against the estate the court must in addition balance the relative merits of each those applicants, as well as the claims of the testate or intestate beneficiaries.

Thus all family provision cases involve assessment of relativities. It is perfectly possible for an applicant to have a 'good' case but receive nothing because others have stronger claims, such as where a child, who has been left unprovided for in the will, claims against an elderly widow; in such a case a 'strong' case by the child may well fail against the stronger case of the widow. Conversely a weak case may succeed where, for example, the estate is left to charity or passes to remote 'windfall' beneficiaries under intestacy, when the burden of influencing the court's discretion will be much easier to discharge.

Another important factor affecting the outcome of an application will be the size and nature of the estate since a large free estate will be more able to satisfy diverse claims upon it than a small or fixed estate. For this reason reports of previous cases decided under the Ordinance can be at best no more than a guide or indication as to the outcome of any other case because each case will have a completely different combination of facts, circumstances, factors, and competing claims. A successful claim by a widow may result in an award of one half of the estate in one case, but of only one quarter in another; an adult child may succeed in one set of circumstances but have no chance of success in another.

An Illustrative Case:

In The Estate Of Lee Sai Wai (decd)

The exercise of the judicial discretion can be illustrated by an examination of the only substantive case on the Ordinance, *In the Estate of Lee Sai Wai (decd), Leung Kam Yin Joyce v Li Oi Lun*⁴⁵ the case concerned an application by a widow for reasonable financial provision out of her husband's estate. The parties married in 1990 in Canada, when the husband was aged 40 and the applicant was aged 28. There were no children of the marriage and in fact, after the marriage the couple didn't live together much since the wife remained in Canada and the husband returned to Hong Kong. The husband died in April 2000 and by his will, made in March 1999, he left his entire estate to his two brothers and his sister equally. He made no provision for his wife and gave no reason for not doing so. His estate comprised a flat in Kornhill owned solely by himself, purchased before the marriage, debt-free and valued at \$2.9m and cash and securities valued at \$2.15m. After funeral expenses and legal costs the estate was, by the time of the trial, worth about \$4.385m. The defendant was the sister of the deceased, one of the beneficiaries under the will.

A preliminary issue to be resolved was a claim by the defendant that the house was held by the deceased as constructive trustee for himself and his brothers and sisters in proportion to their respective contributions. This was accepted by Deputy Judge Saunders, deciding that the beneficial interest was owned as to two thirds for the deceased and as to one third for the siblings. Further the judge accepted a similar argument as to \$120,000 of the cash, holding that of this \$90,000 belonged to the siblings. That left the total beneficial value of the estate as \$3,415,000.

The first layer of discretion

Applying the analysis above to the case the first layer of decision or discretion was easily decided. The applicant was the wife of the deceased, this is a purely definitional category and the applicant had locus standi as such, to apply under the Ordinance: section 3(1)(i) and section 2.

⁴⁵ [2001] 4 HKC; [2002] 4 HKC 517, first instance; affirmed by the Court of Appeal, CACV 301/2002.

The second layer of discretion

This likewise was easily answered. The estate was worth over \$4 million; the will left nothing to the wife; the wife was in need, she needed accommodation and income, and the wife was in poor health; accordingly the will had failed to make reasonable financial provision for the applicant.

The third layer of discretion

This required substantive consideration and resolution. To some extent this question is the corollary of the second since a finding that the will failed to make reasonable financial provision suggests that the court should do so. But not necessarily, since it could be that the beneficiaries under the will could demonstrate greater need than the applicant could. However in this case the conclusion in favour of the applicant was, it is submitted, inevitable, since it was a case of a widow who had demonstrated real need, competing against her husband's brothers and sister, who had not proved any need on their part.

The following factors were identified by the judge as relevant in governing the exercise of his discretion.

The testator's wishes: under the general heading 'any other matter' in paragraph (g), the (English) court has had regard, as a relevant matter, to the deceased's testamentary intentions or promises even where these have not found expression in the will.⁴⁶ But such wishes or intentions have not overridden the primary objective approach and⁴⁷ have not led the court awarding financial provision for the applicant which went beyond what was reasonably required for his or her maintenance. In the instant case there were no reasons expressed in the will but there was evidence that the testator had been advised as to the possible effect of the Ordinance. Further that the testator had handed the will to his sister saying that he had left his whole estate to her and their brothers 'because the estate belonged to the family'. Judge Saunders whilst accepting that the testator's reasons could be relevant in some cases,

⁴⁶ See *Rees v Newbery and the Institute of Cancer Research* [1998] 1 FLR 1041; *Re Goodchild (decd)* [1997] 2 All ER 63; *Espinosa v Bourke* [1999] 1 FLR 747 and *Robinson v Bird* [2003] All ER (D) 190.

⁴⁷ See Blackburne J in *Robinson v Bird*, above.

thought that reasons could have little impact in a case where there had been a blatant failure to provide for a widow.⁴⁸

The financial resources and needs of the applicant (section 5(1)(a)): it is clear that the judge found that there had been less than full disclosure by the wife as to the nature and extent of her assets, but surprisingly, the judge did 'not hold the concealment against her in assessing the evidence'. Although it was not entirely clear what the assets and resources of the applicant were, the judge was satisfied that she had some capital resources and could not be treated as an applicant with nothing at all. But she was aged 40 and in poor health, there was reference to a limited disability resulting in limited earning capacity. She was not made welcome in the family home and was forced to rent her own accommodation. In the circumstances the judge was satisfied that she had demonstrated a real need. This indicated that she would need some capital in order to invest and live on the income or possibly to buy some accommodation and work part time.

The financial resources and needs of the beneficiaries (section 5(1)(c)): they were all comfortably off and could not establish any real need.

The size and nature of the estate (section 5(1)(e)): the estate was substantial, the net value being \$3,415,000 of which 43 per cent was in readily realisable cash or securities.

The wife's disability (section 5(1)(f)): the wife would remain under some limited disability which would make it difficult for her to find work. The beneficiaries were in good health.

Age and duration of the marriage (section 5(1)(a)): the wife was aged 40 and had no children to whom she could look to for support in her old age. The marriage had lasted for nine years.

The wife's contribution to the welfare of the family (section 5(2)(b)): not a significant factor.

The divorce standard (section 5(2)): on the basis of a clean break the wife could have expected to have received 40 per cent of the available sum on divorce.⁴⁹

⁴⁸ Citing *Re Inns*, *Inns v Wallace* [1947] Ch 576 and *Re Krubert (decd)* [1997] Ch 97.

⁴⁹ *Re Besterman (decd)* [1984] 1 Ch 458; *White v White* [2000] 3 WLR 1571 and *Cowan v Cowan* [2001] 1 All ER (D) 173, cited, but Judge Saunders was careful to reserve the question whether these cases represented the law in Hong Kong – see the comment in the Court of Appeal, *ibid.*, para 13. As indicated earlier there were no guiding Hong Kong authorities.

The closeness of the marital relationship (section 5(6)): Judge Saunders was satisfied that the relationship was sufficiently close not to detract from the amount of the award.

The judge did not indicate what particular weight he placed on each of these factors nor whether one was more persuasive than the others. But having considered them all, and balanced the respective claims of the applicant and the beneficiaries in the light of them, the judge decided that the balance of his discretion fell onto the side of the applicant and that he should exercise his discretion by making an order for reasonable financial provision out of the estate for the applicant.

The fourth layer of discretion

And so the judge came to the crucial question 'how much'? In making the award the judge had regard to all the factors noted above. He found that the wife had demonstrated 'a real need' and was mindful that when making provision for a widow the court is not restricted to maintenance.

Some guidance can be obtained on the sort of award that might be appropriate for a widow from previous cases on the corresponding English legislation – although Judge Saunders did not refer to such cases in his judgment.

Re Besterman (decd):⁵⁰ a decision of the English Court of Appeal. The widow was competing only against charities for a very large estate of GBP 1.5 million. The widow was awarded a total of GBP 378,000 being approximately one quarter of the available assets, but note that in view of the size of the estate this was sufficient to provide the widow with a sum which rendered her free of any financial worries in the future.

Re Bunning (decd):⁵¹ a first instance English authority. The widow was competing against charities for a medium sized estate of GBP 237,000 (net GBP 206,000) but the widow had been given GBP 100,000 *inter vivos*. The widow was awarded a total of GBP 60,000 which (added to the GBP 100,000 she already had) was approximately one half of the total joint assets.

⁵⁰ [1984] 2 All ER 656.

⁵¹ [1984] 3 All ER 1.

Moody v Stevenson:⁵² a decision of the English Court of Appeal. The widower was competing against his deceased's wife's daughter by a previous marriage, who was the sole beneficiary under the will of a small estate of GBP 40,000 consisting mostly of the matrimonial home. Order made was a settlement of the matrimonial home on term giving the widower the right to occupy the matrimonial home for as long as he was willing and able to do so.

Re Krubert (decd):⁵³ English Court of Appeal. The widow was competing against the deceased's brother and sister for a medium sized estate of GBP110,000, plus a house (of unspecified value) in which the widow had only been given a life interest. The widow was awarded the whole of the assets except for the house in which she took a life interest.⁵⁴

So on the example of those cases (although recognising that these were cases on the English and not the Hong Kong legislation) what should the provision be in the case under discussion?

Judge Saunders thought that this was not a case, in the light of the fact that the widow and the siblings could not live amicably together in the home, where it would be appropriate to make an order for the transfer of the home to the applicant.⁵⁵ Rather the needs of the applicant could best be satisfied by a lump sum award, which would recognise the standard of provision appropriate for a widow. In determining the amount of the award the judge re-considered the divorce standard, which might suggest an award of 40 per cent of the estate, but bore in mind the obvious fact that provision of divorce is not analogous to provision on death for the simple reason that in the former the needs of both parties to the marriage have to be considered whereas in the latter only one.

⁵² [1992] 2 All ER 524.

⁵³ [1997] Ch 97.

⁵⁴ Note that in *Moody v Stevenson* the court was influenced by the divorce standard, ie what the spouse would have been awarded on divorce, whereas this factor was neutral in *Bunning* and minimised in *Besterman*. In *Krubert* the court expressly stated that the *Besterman* approach was to be preferred and undue regard should not be paid to the divorce standard because 'on a divorce two parties had to be provided for; on death there was only one'. The award in *Re Krubert* can be regarded as being in excess of what would have been awarded on divorce.

⁵⁵ In other circumstances this might well have been an appropriate order in view of the fact that the widow had no home of her own and was living in rented accommodation.

Applying that consideration the judge made an order for a lump sum award of \$1,750,000, which was half of the estate. Few would object to that award since it is in line with the sort of awards appropriate to provision for a widow. The Judge awarded the costs of the action to the applicant, which thus fell on the estate, reducing further the net entitlement of the testamentary beneficiaries.

The Court of Appeal Decision

The defendant appealed Judge Saunders' decision both on the trust point and the award made. The finding on the trust point depended largely on the evidence of contribution and the Court could find nothing objectionable in the way that the first instance judge had decided it.

An appeal against a judicial exercise of a discretion is always difficult because appeal courts are notoriously reluctant to interfere with a trial judge's discretion. Only if the appellant could show that the judge had erred in principle or had plainly disregarded a factor which the Ordinance stated should be taken into account or had conversely taken a factor into account which he was not justified to do, would the Court of Appeal likely interfere with the decision. In considering the judge's exercise for his discretion it was argued that he had paid insufficient weight to one factor rather than another. The Vice-President Rogers disagreed, finding no error in principle or with reference to the evidence or the factors which had or had not been taken into account and concluded: "In those circumstances I do not consider that it is open to this court to interfere with the exercise of discretion by the trial judge which he is given under the Ordinance."

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