

HONG KONG BAR ASSOCIATION'S RESPONSE

ON THE PROPOSED PRACTICE DIRECTION FOR TRANSFER OF PROCEEDINGS FROM THE FAMILY COURT TO THE COURT OF FIRST INSTANCE

1. The underlying objective of the proposed Practice Direction for Transfer of Proceedings from the Family Court to the CFI ("the PD") appears to be tighter case management. The Hong Kong Bar Association ("The Bar") supports the objective of the PD.
2. The retention of control by the Family Court/CFI as to whether the case should be transferred up, or re-transferred down, whatever the parties' respective positions may be, is appropriate and consistent with case management principles in other civil proceedings.
3. Some of the subsidiary issues have been considered before. Please see the attached paper (without its appendices), produced by Legal Practitioners for the Family Court Users Committee, prepared last year when the PDs on transfer were first mooted. (**Annexure**)
4. The Bar supports the division of the First Directions Bundle into Part A and Part B as the latter is likely to be a relatively small bundle and, unlike Part A, can be replaced from time to time (cf the First Appointment bundle).

Part A

Reason for Transfer

5. The Bar suggests that, unless the "reason for transfer" is set out in a Judgment or Order, the "reason for transfer" be located in Part B (not Part A) because this is not part of the pleadings but is more akin to the documents dealing with case management, case summaries and issues, all of which are located in Part B.

Petition, Form A, Form Es, Questionnaires, Answers Pending Summons, Orders

6. The Bar proposes that the Children's Form J be included in Part A as well.
7. The Bar proposes that all (not just pending) summonses are included in Part A because as all orders will be included, it makes good sense to include the summonses upon which the orders have been made. This may explain the resulting costs orders, if any.

8. With the inclusion of *all* summonses, Part A can be compiled as a chronological bundle of pleadings, commencing from the start of the proceedings, and submitted upon transfer, without the wasted costs of re-copying/re-pagination of the documents.
9. The Bar proposes that the remaining documents, namely
 - a. Affidavits;
 - b. Exhibits/attachments to affidavits, Form Es and Answers; and
 - c. Social Welfare Reports, expert reports, etc

be hived off from the start of the case to separate chronological bundles (say Bundles C, D and E respectively). This avoids the duplication of costs and the waste of paper in generating a multiplicity of mini-bundles for interlocutory hearings and/or a change of cross-referencing upon transfer.

10. If necessary, irrelevant documents can be removed from the respective bundles.

Part B

Chronology, Case Summary, Statement of Progress, Time Estimate

11. The Bar notes the difficulty in submitting agreed documents at every stage of the proceedings, including the First Directions hearing. Trying to agree each of the above documents would be time consuming and may result in disproportionate costs.
12. Therefore the option of the parties, failing agreement, submitting separate documents in respect of a chronology (item 1), a case summary (item 2), an updating statement as to progress of the case (item 4), a time estimate (item 6), is welcome.

Scott Schedule of Issues

13. However, the requirement of an *agreed* list of issues in a Scott Schedule (item 3) for the First Directions hearing is *not* welcome.
14. Just as for the Chronologies etc, the Bar proposes that, unless the Court has specifically directed that agreed lists be filed, there should be the option that, failing agreement, the parties be at liberty to file separate lists.

Proposed Directions

15. The requirement to file (separate) lists of proposed directions for future conduct of the case (item 5), is helpful as it focuses the parties and the Court and provides a draft for the Court and the parties to amend as the hearing proceeds, thus avoiding arguments as to what orders were in fact made.

List of Witnesses

16. The Bar agrees that a list of witnesses (item 7) is useful but the Bar queries whether it would be necessary in *all* cases to set out a description of "*the major areas that their evidence will cover*", however brief.
17. The Bar proposes that the description be optional.

Schedules of Costs – Form H

18. The Bar agrees that including the respective schedules of costs (item 8) ie Form H in Section B would be a useful addition. Currently Form Hs are not lodged in the bundles anywhere and insufficient use is made of them.
19. The Bar would like to propose that Part B should contain *all* Form Hs, filed at *all* previous interlocutory hearings as this allows the Court to track the comparative amounts spent on costs, at each milestone stage and to case manage the litigation if costs are going out of control. It also gives counsel the opportunity to do the same and advise clients on disproportionate costs and the desirability of an early settlement.
20. Incidentally, Form H does not have to be filed and served until 4:30 pm the day before the hearing and therefore this would necessarily be a late addition to Part B.

Dated: 10th September 2013

Hong Kong Bar Association

**THE PRACTITIONERS' NOTE
ON BUNDLES IN FAMILY PROCEEDINGS**

1. This Practitioners' Note addresses the issue of the composition and nature of Bundles at all stages of a Family proceeding. It has been prepared by an Ad Hoc Sub-Committee of the Family Court Users Committee (the Sub-Committee) in consultation with:
 - a. The Bar's Special Committee on Family Law;
 - b. The Family Law Committee of the Law Society; and
 - c. The Hong Kong Family Law Association,and thus represents the views of the Practitioners.

Current Practice

2. Currently, there is no fixed practice as regards bundles but most specialist Family practitioners prepare "running bundles", paginating all filed documents chronologically in lever arch files and updating the files from time to time. Other practitioners rely on the court file of documents for interlocutory hearings, with new bundles prepared for trial. Some practitioners prepare "mini-bundles" or "core-bundles" which are paginated and used solely for the hearing in question. The bundle and its pagination is not referred to or used again for subsequent hearings or the trial.
3. Separate paginated files are kept for open and without prejudice correspondence respectively.
4. Additionally, documents are prepared for the First Appointment and FDR hearings respectively. The parties' respective list of directions and orders sought, a concise statement of the apparent issues and a brief chronology must be filed and served by exchange, not later than 14 days

before the First Appointment hearing¹.

5. Not later than 7 days before the FDR, the applicant “shall apprise” the Court of all offers and proposals and responses in an indexed and paginated FDR bundle which is returned to the party concerned at the end of the FDR.²
6. Practice Directions as to the bundle upon transfer to the Court of First Instance are now being considered.

Principles and Considerations

7. Practitioners acknowledge that the overriding principle in the preparation of bundles is to ensure that relevant material is identified and efficient use is made of time in Family proceedings so that delay is avoided:

“The purpose of all this is to ensure that the judge can embark upon the necessary pre-reading in a structured and focused way, making the best and most efficient use of limited time, so that when the case is actually called on in court everyone can proceed immediately to the heart of the matter, without the need for any substantial opening and with everyone focusing upon the previously identified issues. The objective is to shorten the length of hearings and thereby to increase the ‘throughput’ of the family courts – with the ultimate objective of bringing down waiting times and reducing delay.”³

8. The Sub-Committee considers that in doing so, *inter alia* the following considerations should also be borne in mind:
 - a. proportionality in time and costs;
 - b. the avoidance of a proliferation of bundles and, wherever possible,

¹ Practice Direction 15.11, para 4

² Practice Direction 15.11, para 8(e)

³ Re X and Y (Bundles) [2008] EWHC 2058 (Fam) (Transcript) per Munby J, at para 5

- the re-use of bundles; and
- c. consistency in pagination.

The English Practice

9. Guidance to English practitioners was given by Dame Butler-Sloss:

“A bundle for the use of the court at the hearing shall be provided by the party in the position of applicant at the hearing or by any other party who agrees to do so. It shall contain copies of all documents relevant to the hearing in chronological order, paginated and indexed and divided into separate sections, as follows: (a) applications and orders; (b) statements and affidavits; (c) expert reports and other reports including those of a guardian ad litem, and (d) other documents, divided into further sections as may be appropriate.”⁴

10. The above guidance has been adopted in the English Practice Direction 27A, dealing *inter alia* with family proceedings in the Royal Courts of Justice in cases lasting more than one hour and other than urgent applications. PD 27A requires that the bundle be lodged not less than 2 working days before the hearing:⁵

“The bundle shall contain copies of all documents relevant to the hearing, in chronological order from the front of the bundle, paginated and indexed, and divided into separate sections (each section being separately paginated) as follows:

- (a) preliminary documents (see para 4.2) and any other case management documents required by any other practice direction;*
- (b) applications and orders;*
- (c) statements and affidavits (which must be dated in the top right corner of the front page);*
- (d) care plans (where appropriate);*

⁴ Practice Direction (family proceedings: court bundles) [2000] 2 All ER 287, per Dame Butler-Sloss, at para 2.1

⁵ See PD 27A, para 6.3

- (e) *experts' reports and other reports (including those of a guardian, children's guardian or litigation friend); and*
(f) *other documents, divided into further sections as may be appropriate.*"⁶

11. The following English practice directions apply to "preliminary documents":

a. Preliminary documents should include

- i. a statement of the background to the hearing,
- ii. a statement of the issues,
- iii. a position statement by each party,
- iv. a summary of the orders or directions sought,
- v. a chronology,
- vi. skeleton arguments, and
- vii. a list of essential reading,⁷

with cross-referencing in the above documents to the relevant pages of the bundle;⁸

b. the preliminary documents should be agreed by all parties, and where the parties disagree, their differing contentions shall be set out at the appropriate places in the document;⁹

c. The preliminary documents should be lodged with the Court no later than 11 am on the day before the hearing.¹⁰

12. The Sub-Committee compares the preliminary documents under the English PD 27A to those required under the Hong Kong Practice Directions in respect of First Appointments¹¹ but notes that whereas the English practice requires a joint document which is either an agreed document or one which sets out the extent of the disagreement, the HK Practice Direction 15.11, paragraph 4 requires the parties to file separate

⁶ See PD 27A, para 4.1

⁷ See PD 27A, para 4.2

⁸ See PD 27A, para 4.4

⁹ See PD 27A, para 4.5

¹⁰ See PD 27A, para 6.4

¹¹ HK Practice Direction 15.11, para _

documents.

13. The issue of the composition and nature of the documents to be placed before the Court, being
 - a. Part I: documents, such as the Pleadings, Applications, Orders, Form Es, Questionnaires and Answers, Affidavits, Reports etc. (“the bundle”); and
 - b. Part II: those akin to “preliminary documents”, required for the First Appointment or other hearing in question,is considered separately below.

The Practitioners' Approach to Bundles

14. Having consulted with the Practitioners' committees (the Bar, the Law Society and the HKFLA), the consensus was strongly, in fact overwhelmingly, in favour of continuing with “running bundles”, commencing at the earliest stage of the proceedings and updated from time to time, up to and including the trial.
15. Practitioners recommended that a specific index for the hearing, must be supplied to the Court in good time so that judicial time is not wasted in reading the entire file. This will ensure that focus is directed to the documents relevant for the hearing. A list of all relevant documents to be used at the hearing, (where possible, with relevant page and paragraph numbers) should be exchanged between themselves and submitted to the Judge at a reasonable time prior to every application or hearing, say 7 days, and prior to the deadline for submission of skeletons, say 3 days beforehand. Penalties where this is not done can be imposed.
16. Some of the reasons practitioners have urged in favour of running

bundles are summarized:

- a. the provision to the Court of specific indices for the hearing in question is effectively the same as the duplication of core bundles but without the wasted time, effort, costs and confusion caused by endless copying and duplication, particularly where a case may involve multiple interlocutory applications and separate/different core bundles are compiled for each application;
- b. the waste of paper which “mini-bundles” or “core-bundles” generate is thus avoided;
- c. the time and costs in photocopying new relevant bundles for each interlocutory hearing and the trial is saved: anyone doubting this would only need to look at solicitor/own client bills of costs in relation to the preparation of core bundles. A judge with a family law practice prior to appointment to the bench will appreciate this;
- d. the difficulty in explaining and justifying to the litigant why costs have to be incurred by photocopying and duplicating documents over and over again is avoided;
- e. the pagination used in running bundles (as distinct from mini-bundles) remains constant, thereby reducing the chance of confusion in skeleton arguments or subsequent statements/affidavits;
- f. cross-referencing to existing paginated documents (instead of exhibiting the document again) will reduce the bulk of the bundle;
- g. the Court retains access to the chronological emergence of the

documents, if such is considered relevant by the Court in any given hearing;

- h. the risk of omitting documents considered relevant by the Court is avoided; and
- i. time and effort is saved in that the bundle can be marked up and re-used.

17. The Sub-Committee recognises that in some cases, e.g. modest claims by legally aided persons, the applicant may wish to avoid the costs of preparing a running bundle. In such cases, directions to dispense with the running bundle can be sought from the Case Management Judge at the First Appointment.

18. Further, the Sub-Committee accepts that it is essential for the proper use of running bundles that the preparation and use of such bundles be addressed responsibly and pragmatically. In this age of complicated litigation, it is inevitable that in substantial cases, voluminous quantities of paper will build up quite rapidly and bundles can soon become unwieldy unless care and discipline are exercised by all. With this in mind, the Practitioners propose some refinements to the running bundles:

- a. The running bundle shall contain copies of all documents, filed in chronological order from the front of the bundle, paginated and divided into separate sections (each section being separately paginated) as follows:

- i. Bundle A: Pleadings, Applications and Orders;
- ii. Bundle B: Form Es, Questionnaires, Answers, Statements and Affidavits (without their exhibits);
- iii. Bundle C: Exhibits to Form Es, Answers, and Affidavits,

- separated by folders;
 - iv. Bundle D: Reports including Reports of Experts, Social Investigation Reports, Reports of the Guardian ad litem;
 - v. Bundle E: Other documents, including a separately paginated folder (Tab 1) for Costs Estimates (Form H), filed chronologically;
 - vi. Separate Correspondence Bundles.
- b. a Master Index and a running bundle shall be prepared for the Court by the applicant, (or any party who agrees to do it) and updated from time to time;
 - c. the parties shall agree on the Master Index and pagination, each preparing and updating his own running bundle therefrom; and
 - d. an updated soft copy of the Master Index shall be provided to the other party so that by relying on the soft copy, either party can, in a timely and relatively cost-saving way, prepare an edited index for the Court, specifically relevant to the hearing concerned.
19. A sample Master Index is attached (**Appendix 1**) with an Explanatory Note thereto (**Appendix 2**).

The Practitioner's Approach to "Preliminary Documents"

20. Having considered the alternative, the Practitioners prefer to retain the Hong Kong practice directions of the parties filing separate "preliminary documents" at interlocutory hearings such as the First Appointment (eg chronologies, statements of issues etc) to that of filing agreed documents:
- a. separate documents can be prepared relatively quickly;
 - b. without having to wait for the other party;
 - c. without the costs that are run up if practitioners are required to

reach agreement: anecdotal evidence was provided for the high cost of preparing agreed documents;

- d. often agreement may not be possible;
- e. even if a joint document were to be considered helpful, the realistic option is a document setting out the parties agreements and/or differences rather than an agreed document.

- 21. The Practitioners therefore propose that the practice of filing separate documents continue unless the Case Management Judge orders otherwise.
- 22. Sample documents where this has been ordered are attached:
 - a. Joint Statement of Issues (**Appendix 3**);
 - b. Joint Chronology (**Appendix 4**).

Conclusion

- 23. The key to cost-saving and efficiency in the proper use of running bundles is discipline by practitioners and vigilance by judges, perhaps to be enforced by imposition of regulatory practice directions or specific judicial guidelines.
- 24. The fact that the overwhelming majority of experienced and specialist family law practitioners favour running bundles over core bundles is indicative of the practicality of the former. The situation with inexperienced practitioners is likely to make matters more acute due both to their inability to identify all relevant material for inclusion in core bundles and their propensity to step outside the boundaries of core bundles when this occurs.
- 25. At the end of the day, the choice is between one complete and composite set of running bundles for all hearings from start to finish of a

case, versus multiple sets of competing bundles, many inevitably repetitive in whole or in part, almost all of which will be thrown away at the end of the case after having cost the litigants huge sums of costs and decimated several forests in the process.

Dated this 27th day of September 2012

Ad hoc Sub-Committee of the Family Court Users Committee

The Bar's Special Committee on
Family Law

The Family Law Committee of the
Law Society

The Hong Kong Family Law Association