



Child Support: Changes in Financial Capacity or Needs

Produced in partnership with Alfred Ip of Hugill & Ip



As we discussed in our previous article “Child Support: What Do You Need to Know?” child maintenance orders are often periodic payments made over a number of years. Throughout that period of time, the party responsible for making maintenance payments may have a change in financial capacity – for better or for worse. Losing a job will most likely have a dramatic impact on your ability to effect child support payments, and the prospect can be terrifying. On the contrary, the needs of children are continuously changing as they grow, and an order for child maintenance remains in effect even if your financial situation has changed, as it is necessary to ensure that the child’s material needs are fulfilled.

Both parties to the maintenance order (i.e. the payee and the payor) have the right to make an application to vary the order. Pursuant to [section 11 of the Matrimonial Proceedings and Property Ordinance](#) (Cap. 192) (“MPPO”), the Court has the power to “vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended”. But section 11(7) of the MPPO provides that in exercising the powers conferred by section 11 to vary, discharge, etc. any orders for financial provision, the Court will take into consideration “all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates.”

However, not all kinds of orders can be varied. Lump sum orders and property adjustment orders **cannot** be varied as they are intended to create finality in litigation as “once and for all” orders. The following orders can be varied:

- ◆ interim maintenance (maintenance paid before the [divorce is finalised]);
- ◆ periodical payments;
- ◆ instalments by which a lump sum is payable (take note that the final amount cannot be changed);
- ◆ an order for the sale of property

Reduced financial capacity

In a fast-paced economy like Hong Kong where the job market is extremely flexible, it is not uncommon to be part of a retrenchment even when such event was totally unforeseen just a few months before. Nobody wishes to lose their job, but it is crucial to ensure that all financial obligations are still in order when one does. As aforementioned, the Court “takes into consideration all circumstances of the case” – including the earning capacity of both parties and other financial resources of the parties (e.g. whether the payor has any savings or redundancy payments out of which maintenance can be paid temporarily) – there is no guarantee as to whether an application for variation of a maintenance order will be granted if you lose your job.

The Court of Final Appeal dismissed an application for leave to vary an order for maintenance in [WNWG v PBF \[2012\] HKCFA 86](#). The applicant Husband and respondent Wife had agreed in a Mediation Agreement (dated 2006) upon divorce for the Husband to pay child maintenance to the Wife of \$27,500 for each of the three children of the marriage (totalling \$82,500 per month), and acknowledged in the Mediation Agreement that

“the monthly child maintenance amounts are calculated taking into account [the Husband’s] full time employment and current salary package [as a partner in an international law firm] ... In the event of any significant change to [the Husband’s] salary package, the Parties agree to review the monthly child maintenance provisions”.

The Husband ceased to work for the international law firm in 2009 and applied to vary the order, seeking the Wife’s contribution toward maintenance. HH Judge C K Chan varied the original order, reducing monthly payments to \$40,000 total. The Wife successfully appealed the decision to the Court of Appeal, which restored the original order. Judgement given by the Court of Appeal – which was upheld by The Court of Final Appeal – was of the view that the Judge failed to give sufficient weight to the original order and [proclaimed] that the Husband had a “*vastly superior earning capacity compared with the Wife, and the original maintenance for the children was an expense he could easily afford*”. It was also noted that nothing in the Mediation Agreement indicated that maintenance of their children would be reduced upon the Husband’s ceasing to work for the law firm.

The Honourable Lam J in the [WNWG v PBF Court of Appeal decision](#) made reference to judgement by Cheung JA in [AEM v VFM \[2008\] HKCA 7](#) towards the proper approach to be adopted by the Court in considering an application for variation, and the weight to be attached to the original order (emphasis added):

“6. Almost invariably, an application to vary an earlier periodical payment order will be brought on the basis that there has been some changes in the circumstances since the original order was made, for example, continuing inflation; the increased costs in supporting a growing child and that one party may be more adversely affected than another by the increase in the costs of living: Garner v Garner.

8. At the same time the basis and intended effect of the original order are relevant factors to which the court on variation should pay regard and there should not be a radical departure from the approach taken by the parties themselves when they had entered into an agreement embodied in a consent order: Boylan v Boylan”

Although *WNWG v PBF* exemplifies a refusal to vary a child maintenance order, the Court will consider the circumstances of each case individually. For example, it is possible for the Court to vary the order for child maintenance if the payor has been made redundant and can only find employment with a lower salary, and is therefore unable to pay at the previously agreed rate.

Dependent on the specific circumstances of your case, it is also possible to apply for upward variation of child maintenance as the custodial parent if you lose your job or experience a decrease earnings. Similarly, in the unfortunate situation where your child has the need for an extraordinary medical expense, such as an emergency surgery, it is also possible to apply to vary the maintenance order for a lump sum payment to assist with the associated fees.

It may also be the case that at the time of divorce, one party will seek a nominal maintenance order (e.g. payment of HK\$1.00 per annum – which in practice is never made) to retain the rights to apply for the same in the future. Therefore, parties agreeing to make nominal maintenance orders should be aware that the order is subject to the possibility of subsequent variation should the other party apply for such in the future.

Increased financial capacity

To the contrary, an increased financial capacity can also serve as a “trigger” to bring an application to vary the child maintenance order. If the payor has received a pay rise, the payee can apply for an upward variation of child maintenance from the other parent. In certain situations, the original maintenance order may stipulate for the sum of maintenance to be increased annually or in line with an established inflation measuring index, which reduces the need for parties to make regular applications to Court, thus saving time and money for both sides.

Conclusion

Where there is a change of circumstances, the Court may look at a case *de novo*. While the existence of a previous order should be a relevant consideration, the Court may look at the situation afresh and may vary the order based on the parties’ existing financial circumstances – taking into consideration their current income, expenses, earning capacity, and other financial resources of the parties amongst other considerations – to achieve the fairest outcome while maintaining the financial needs of the children of the family. In the event of a dramatic change in circumstance where it will affect your ability to effect child maintenance payments, it is best practice to contact a lawyer and discuss your options to apply for variation to the order as soon as possible as arrears may incur interest in the long run.

This article is for information purposes only. Its contents do not constitute legal advice and readers should not regard this article as a substitute for detailed advice in individual instances.



AUTHOR

Alfred Ip

Partner, Hugill & Ip

A qualified solicitor in Hong Kong since 2000, Alfred's speciality is dispute resolution, an area in which he is ranked by Chambers & Partners Asia Pacific as a 'Leading Individual'. Until recently he was partner in the Dispute Resolutions team and head of Private Client at a leading Hong Kong law firm.

Alfred is skilled in helping individuals and their families manage personal and wealth-related matters, including trust and probate (both contentious and non-contentious), family office, and mental capacity issues.

He is vastly experienced in all areas of probate and can help clients with estate planning, ranging from the proper drafting of a will to constructing complicated trusts, airtight from any potential perils.

Alfred is appointed by court as an administrator in estate disputes, and advises professional administrators on legal aspects of estate administration, both in Hong Kong and internationally.

In contentious cases, he acts for clients in probate actions, ranging from propounding the Will to having an executor removed. For clients requiring help in estate administration problems such as declaratory relief or disclosure of account, Alfred will apply to Court for the necessary directions and orders.

Alfred's professional skills are enhanced by his membership of the Society of Trust and Estate Practitioners ("TEP"), and of the Chartered Institute of Arbitrators. He is a CEDR accredited Mediator and a Notary Public.

In 2012, he won the Law Society of Hong Kong's Gold Award for services to the community for his pro bono initiative, "FreeWill", and he has received several pro bono service awards since.

In addition to his Private Client practice, Alfred has 20 years of experience in commercial litigation and dispute resolution. Moreover, he helps clients with issues regarding family law.

In March 2017, Alfred was appointed to sit as a Deputy District Judge.

Alfred is Director of Pink Alliance.

This document is available on Lexis Advance® Hong Kong Practical Guidance.

Lexis Advance® Hong Kong Practical Guidance provides up-to-date practice notes, precedents and know-how from specialist solicitors and barristers so you can work efficiently and provide advice with confidence. Lexis Advance® Hong Kong Practical Guidance contains exclusively written content by trusted experts in the field. Hugill & Ip is one of our many expert contributors from a range of Hong Kong legal leaders.

Discover Lexis Advance® Hong Kong Practical Guidance today by registering for a demonstration at www.lexisnexis.com.hk/lahk-pg