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Hong Kong or UK: Where to Divorce?

Hong Kong has one of the highest percentage of expatriate populations in the world. Expatriates come to Hong Kong to explore opportunities. Unfortunately, Hong Kong also has the reputation as the 'graveyard of marriages'.

The question then becomes where should they file for divorce? Can they get a divorce in Hong Kong or do they have to return home? This article will set out the eligibility for filing for divorce in Hong Kong and examine the similarities and differences between the regime of the Hong Kong and the Courts of England and Wales.

Eligibility to petition for divorce in Hong Kong

If you are an expatriate in Hong Kong, you are eligible to file for divorce in Hong Kong if you satisfy one of the following pre-requisites.

Pursuant to section 3 of the Matrimonial Causes Ordinance (Cap. 179), the Hong Kong Courts shall have jurisdiction in proceedings for divorce if either of the parties to the marriage:

- 1) Was domiciled in Hong Kong at the date of the petition or application;
- 2) Was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of the petition or application; or
- 3) Had a substantial connection with Hong Kong at the date of the petition or application.

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Domicile

To be domiciled in a country generally means that the parties, or one of the parties, consider that country to be their permanent home. The Domicile Ordinance (Cap. 596) provided that no individual has, at the same time and for the same purpose, more than one domicile. An adult could acquire a new domicile in a country if (a) he is present there and (b) he intends to make a home there for an indefinite period.

An individual will not be considered as domiciled in Hong Kong only on the basis that he holds a Hong Kong Permanent ID card or passport.

Habitual residence for 3 years

Habitual residence refers to a place of settled dwelling which constitutes a person's ordinary residence. "Habitually" means where a person voluntarily lives and is settled for the time being.

The parties are required to have been habitually resident in Hong Kong throughout the period of three years immediately prior to the petition for divorce. If an individual has been living and working in Hong Kong for 3 years prior to the date of the divorce petition, there is usually no difficulty determining whether this criterion can be met.

Substantial connection

The Court will look at whether either party has a connection to Hong Kong and whether that connection is substantial.

- 1) Whether the parties have centered their lives in Hong Kong (i.e. whether their children go to school in Hong Kong, whether they have a bank account in Hong Kong, etc); and
- 2) If the parties live and work in Hong Kong, other than on a temporary basis.

The Court will not find that the parties have substantial connection to Hong Kong if it is apparent, or if it can be shown that they came to Hong Kong for the purpose of commencing divorce proceedings.

The fact that a person was married in Hong Kong, or owns property here, or was resident here in the past, will almost certainly be insufficient grounds to establish jurisdiction in the Hong Kong Family Court.

Financial relief

Divorcing couples might find themselves eligible to file for divorce in both England and Wales and in Hong Kong. It is therefore helpful to look at how the respective Courts deal with the financial relief in divorce proceedings. Although there are many similarities, there are also significant differences.

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Division of matrimonial assets

There is no mathematical formula for the division of matrimonial assets in either jurisdiction. In deciding whether to exercise its powers to make any of the orders set out below, the Court will take into account the conduct of the parties and all the circumstances of the case, including the following matters which are set out in section 7 of the Matrimonial Proceedings and Property Ordinance (Cap. 192). These factors mirror the factors which are set out in section 25 of the Matrimonial Causes Act 1973:

- The income, earning capacity, property and other financial resources that each spouse has or is likely to have in the foreseeable future;
- The financial needs, obligations and responsibilities that each spouse has or is likely to have in the foreseeable future;
- The standard of living enjoyed by the parties during the marriage;
- The age of each spouse and the duration of the marriage;
- Any physical or mental disability of either of the parties;
- The parties' respective contributions to the welfare of the family; and
- The value of any benefit (such as a pension) that one party may lose upon divorce.

The approach taken by the House of Lords in *White v White* [2001] 1 AC 596 was approved in Hong Kong in 2010 in the case of *LKW v DD* [2010] HKFLR 016.

The principles of *LKW v DD* are as follows:

- The Court's primary objective is to arrive at a distribution of assets which is fair as between the parties;
- There is no place for discrimination between a husband and a wife and their respective roles when considering the concept of fairness;
- With a view to eliminating insidious discrimination and promoting fairness, judges should check their tentative view on distribution against a 'yardstick of equal division' which should only be departed from for good, articulated reasons; and
- The Court should not countenance any attempt to engage in costly and often futile retrospective investigations of the failed marriage.

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In applying the above principles, the Court will take the following steps:

(I) Identification of the assets

The parties have an important duty to ensure that the Court has sufficient information regarding their financial resources. They must make full, frank and clear disclosure in a sworn Financial Statement Form E. A party who fails to do so runs the risk of the Court drawing adverse inferences and robustly attributing assets to him or her, or making adverse costs orders.

(II) Assessing the parties' financial needs

The process involves assessing the financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future. Factors such as standard of living will be relevant.

(III) Deciding to apply the sharing principle

On the basis that surplus assets remain after the parties' needs have been catered for, the next step in the exercise is for the Court to apply the sharing principle to the parties' total assets. Applying the sharing principle, the Court will take the view that the assets should be divided equally between the parties unless there is a good reason for departing from an equal division.

(IV) Considering whether there are good reasons for departing from equal division

Any such departure means increasing or reducing one party's half share. The following matters may be reasons for a departure from equality:

- Where the assets are in the category of non-matrimonial assets by virtue of them being independently acquired, for example, prior to the marriage, inherited during the marriage or business assets;
- Where the marriage is of short duration;
- Where conduct by one of the parties is such that it would be inequitable for the Court to disregard it; and
- In rare and exceptional cases, there may be a 'special' or 'stellar' contribution to the marriage by one of the spouses.

(V) Deciding the outcome

The decision is fact-specific and discretionary but where there is a departure from equality, the Court should explain its basis since the articulation of reasons provides a useful check on the fairness of the outcome.

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Financial provision for spouses and children

In Hong Kong, the Court has the power to make orders for financial provision for a spouse, including:

- An order for periodical payments;
- An order for secured periodical payments;
- An order for a lump sum;
- An order for the transfer or settlement of a property;
- An order for the variation of a settlement; and
- An order for the sale of a property.

In respect of financial support for the children, there is a difference between how this is dealt with in Hong Kong and in the UK.

In Hong Kong, in deciding the financial provision for children, the Courts will take into account the following:

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

In England and Wales, if the parties are not able to work out among themselves on how the children's costs will be met, the financial support for children will be dealt with through the Child Maintenance Service ("CMS"). The CMS also provides an online calculator for the parties to determine the financial support required to meet the child's needs.

Pension sharing

Pension or Mandatory Provident Fund (MPF) is often a substantial matrimonial asset. This is the area on which the Courts diverge in respect of its powers.

In England and Wales, the Court has jurisdiction under the Welfare Reform and Pensions Act 1999 to make orders on pension sharing. The party with none or limited pension provision can secure a percentage of the other party's pension and put it in their own name.

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Hong Kong does not have any legislation on pension sharing and the Courts does not have jurisdiction to make pension sharing orders. Pension/MPF will be included in the matrimonial assets but they must be retained by the spouse who owns it. The Court must therefore offset the value of the pension with the other matrimonial assets to provide a fair outcome.

Assets in different jurisdictions

It is quite common for expatriates to own property in Hong Kong, their home countries and possibly other jurisdictions.

Irrespective of whether the divorce proceedings are commenced, both parties have the duty to provide full and frank financial disclosure of their worldwide financial resources. The Courts in both jurisdictions will deal with assets that the parties hold regardless of the location of the asset or income.

Enforcement considerations

If a party obtained a financial remedies order in England and Wales, it can be enforced in Hong Kong either under common law or statute.

Under common law, a UK judgment is enforceable if the following is satisfied:

- The foreign judgment must be in *personam*;
- The foreign judgment must be for a definite sum of money;
- The foreign judgment must be a final judgment; and
- The defendant must have been resident in, or submitted to the foreign jurisdiction.

Methods of enforcement fall into the following categories:

- Those directed against the person;
- Those directed against the property of the person; and
- Those directed against the person's income.

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The main types of enforcement orders include:

- Writ of *feri facias*;
- Writ of sequestration;
- Attachment of income;
- Garnishee order;
- Charging order;
- Appointment of a receiver; and
- Committal.

A maintenance order made in England and Wales can be enforced in Hong Kong under the Maintenance Orders (Reciprocal Enforcements) Ordinance (Cap 188).

Procedure

The procedure is broadly similar in both jurisdictions. When divorce proceedings are filed, the Court will list a First Appointment in around 10 weeks. 28 days before the First Appointment, the parties are required to file their Form E financial statements. The process in Hong Kong might be slightly longer as there will usually be at least 2 First Appointments, and possibly more in cases where non-disclosure is alleged, before proceeding to the next stage, i.e. the Financial Dispute Resolution (FDR) hearing.

There are other options for the parties to try to “speed up” the process. Mediation and private FDR are available for the parties to try to reach an agreement among themselves, which is highly encouraged by the Courts. If the parties are able to reach an agreement, a Consent Summons containing the terms of the agreement can be filed for the Court’s approval.

Other considerations

Restriction against real property

Where the matrimonial assets include real property in Hong Kong, it might be advantageous for a party to petition for divorce in Hong Kong provided that he or she is eligible to do so.

It is possible to place a restriction on a Hong Kong property by registering a Notice of an Application for Ancillary Relief (Form A) with the Lands Registry when there are proceedings in the Hong Kong Family Court. The owner will not be able to dispose the property free of encumbrance as the Land Registers are public documents which are available to potential buyers and estate agents.

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It is not been possible to place a restriction against a Hong Kong property when divorce proceedings are issues in another jurisdiction.

Attendance at the hearing

Parties to divorce proceedings are required to personally attend the FDR hearing and the trial. If a party decided to return to the UK after having filed for divorce in Hong Kong or vice versa, he or she will incur extra travel costs in order to personally attend the Court hearings.

Conclusion

As seen from the above, there are many factors to take into account when deciding where to file for divorce. When a party is eligible to file for divorce in two or more jurisdictions, they must give serious consideration as to the best location for the proceedings having regard to the nature and location of the assets and other practical considerations.

Contacts



Caroline McNally
Executive Partner
Tel +852 3405 7629
carolinemcnally@gallhk.com



Loretta Ho
Associate
Tel +852 3405 7626
lorettaho@gallhk.com

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