

Series on Mainland/ Hong Kong Cross-Boundary Marriages Article 2 – Nuptial Agreements

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Deacons' Family Practice is at the forefront of handling issues related to cross-boundary marriages. In light of the new Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap.639), we have prepared a series of articles on Mainland/ Hong Kong cross-boundary matrimonial matters and have invited Mainland lawyers to share their views.

In this 2nd article, we will discuss the legal position of nuptial agreements in Hong Kong and the Mainland.

“My fiancée comes from a wealthy family in the Mainland and her parents want us to sign a pre-nuptial agreement before we walk down the aisle. Is a pre-nuptial agreement binding and what should I pay attention to before signing one?”

In Hong Kong, nuptial agreements – both pre-nuptial (before marriage) and post-nuptial (after marriage) - are not automatically binding, as the court retains jurisdiction under the Matrimonial Proceedings and Property Ordinance (Cap.192) to grant ancillary relief in matrimonial proceedings.

In the landmark case of *SPH v SA [2014] 3 HKLRD 497*, the Court of Final Appeal confirmed that Hong Kong should follow the English Supreme Court decision of *Radmacher v Granatino*, which held that pre-nuptial agreements should be given full effect when certain requirements are met.

In *SPH v SA*, the couple signed a pre-nuptial agreement (**Pre-nup**) three months before getting married. Prior to marriage, the parties had already acquired substantial assets including shares in various companies. Both of them also expected to receive sizeable assets from their parents or third parties by way of gift, inheritance or succession.

The Pre-nup therefore provided that the companies which they respectively owned (and debts associated with them) and any such gifts etc. would be excluded from the computation of their assets in the event of marriage breakdown. The wife did not receive independent legal advice before signing the Pre-nup.

The marriage broke down and the parties signed a separation agreement (**Separation Agreement**) in a notary's office in Germany. However, the wife did not receive any financial disclosure or independent legal advice when she signed the Separation Agreement, in which she renounced her right to claim for maintenance.

After returning from Germany, the wife petitioned for divorce in Hong Kong. Two months later, the husband also commenced divorce proceedings in Germany and sought to stay the Hong Kong proceedings. In reviewing the Court of Appeal's decision to refuse the stay, the Court of Final Appeal considered whether *Radmacher v Granatino* represented the law in Hong Kong, as it would be an extremely important factor in deciding whether or not the proceedings ought to be stayed.

The Court of Final Appeal upheld the Court of Appeal's decision and held that a pre-nuptial agreement would carry full weight when the following requirements were met:-

- (1) Each party had entered into the agreement of his or her own free will, without undue influence or pressure. It is recommended that parties should sign the pre-nuptial agreement at least 4 weeks before the registration of their marriage.
- (2) Each party had all the information material to his or her decision to enter into the agreement, and intended that the agreement should be effective to govern the financial consequences of the marriage coming to an end. Parties should receive independent legal advice and provide full and frank financial disclosure.
- (3) It is fair for the agreement to be enforced in the circumstances prevailing. The court will consider it unfair if enforcement of the agreement would leave one party in a predicament of real need, whilst the other party will be sufficiently provided for.

In the subsequent case of *LCYP v JEK [2019] HKCFI 1588*, the Court of First Instance stressed the importance of fairness. The parties in that case signed a pre-nuptial agreement when they were both young, in their 20s, before getting married in New Jersey, USA. At the time of signing, the parties did not have substantial assets. However, during the marriage, the wife gave birth to two children and gave up her career to look after the family, whereas the husband's family business thrived and he accumulated very sizeable assets.

The marriage broke down 16 years later and the wife filed for divorce. During the proceedings, the wife did not challenge the validity of the pre-nuptial agreement, but argued that it would be unfair for the same to be upheld.

The court held that, given the change in circumstances, particularly the vastly different financial landscape at the time of the marriage breakdown, it would be wrong to place great weight on the pre-nuptial agreement. The court recognised that the family's living standard could not have advanced without the wife's sacrifice, and it would be unfair to uphold the pre-nuptial agreement, which would result in the husband keeping the fruits of her sacrifice.

As to post-nuptial agreements, the Court of Appeal in *L v C [2007] 3 HKLRD 819* confirmed that when a couple freely entered into an agreement for the division of matrimonial assets, the court will hold the parties to their bargain in the absence of (1) unfair or unconscionable circumstances surrounding the conclusion of the agreement and (2) material and drastic unforeseen circumstances arising thereafter, such as to cause manifest prejudice to one of the parties.

Regarding the position **in the Mainland**, our Mainland/Hong Kong dual-qualified lawyer, Helen Liao, has the following to say:-

"In the Mainland, a property agreement entered into by a married couple is legally binding.

Specifically under Article 1065 of the Civil Code, a couple can enter into a written agreement to set out the respective ownership of their properties acquired before and during the marriage, and such agreement is legally binding.

Furthermore, certain clauses in a property agreement may be interpreted as effecting a gift from one spouse to the other, thereby allowing the spouse who makes the gift to exercise a right of revocation any time to revoke the agreement. To ensure that a property agreement can be enforced smoothly, the parties should consider including an irrevocability clause in the agreement.

In addition, parties may also obtain determination on whether certain assets (such as bank savings, antique, jewellery, etc.) constitute premarital assets or otherwise from a Notary when ownership of the same is not clear. In the event of disputes, the relevant notarised legal documents (including prenuptial agreements) may be relied upon as evidence in court proceedings.

According to surveys conducted in the Mainland, couples in the Mainland are still reluctant to embrace the notion of signing a nuptial agreement. Having said that, we have observed that there is an increasing number of high-net-worth individuals in the Mainland who choose to protect themselves by entering into nuptial agreements. In view of the importance of nuptial agreements in the protection of personal assets, we strongly recommend readers to engage professional lawyers in preparing the draft agreements and advise them on their legal implications and enforceability." In the next article, we will discuss how the courts in Hong Kong and the Mainland handle property division in divorce cases.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters involving cross-boundary elements. Please reach out to us if you would like to know more.

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