

### Series on Mainland/ Hong Kong Cross-Boundary Marriages Article 3 – Division of Matrimonial Assets

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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 3<sup>rd</sup> article, we discuss how the Hong Kong and the Mainland Courts divide matrimonial assets in divorce.

***“My husband and I have been married for 10 years. He was seconded to the Mainland 2 years ago and recently admitted to an affair with a Mainland woman. He is seeking a divorce, but he said he would not pay me a cent. Can my husband just walk out of the marriage without paying me anything?”***

No matter who commences divorce proceedings in Hong Kong, both parties to the marriage have the right to claim financial provision from each other, subject to the prevailing financial circumstances.

The Courts in Hong Kong have a wide discretion in deciding how the family assets should be divided. Under section 7 of the Matrimonial Proceedings and Property Ordinance (Cap.192) (MPPO), the Courts will consider the parties' conduct and all the circumstances of the case, including the following matters:-

- 1) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- 2) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- 3) the standard of living enjoyed by the family before the breakdown of the marriage;
- 4) the age of each party to the marriage and the duration of the marriage;
- 5) any physical or mental disability of either of the parties to the marriage;
- 6) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and
- 7) the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

In the landmark case of *DD v LKW*, the Court of Final Appeal set out a 5-step approach on how to apply the factors under Section 7 MPPO. The first step is to ascertain the size of the matrimonial pot and the parties must provide full and frank disclosure of all their assets and liabilities through the Financial Statement known as “Form E”.

The second step is for the Court to evaluate the needs of each party by assessing their “*financial needs, obligations and responsibilities*”. The Court will also take into account the parties' standard of living, age and any disability.

In the third step, the Court will decide whether to apply the sharing principle in cases where the matrimonial pot is big enough, such that there are surplus assets after meeting the parties' needs.

Thereafter, the Court will decide whether there are good reasons to depart from the sharing principle. Factors which may justify a departure from equal sharing include the source of assets, duration of marriage, contribution and “gross and obvious” conduct.

In the last step, the Court will look at the overall case and decide on the outcome. If the Court decides not to apply the sharing principle, it must provide the reasons.

The Courts in the Mainland approach the issue of asset division differently and [Ms Liu Yang, senior partner of Unitop Law Firm and family specialist in Guangzhou](#), China has the following to say:-

“To facilitate the understanding of the Mainland’s legal position under the matrimonial property regime, we will introduce the legal concepts using the following keywords:

1. “Community property regime” vs. “Separate property regime”

*“Community property regime”*: Where the parties have not agreed in writing how to divide their pre-marital assets and assets acquired during the marriage, all property acquired during the marriage (be it by one party or both parties jointly) will be considered to be jointly owned by the couple.

*“Separate property regime”*: Pursuant to Article 1065 of the Civil Code, where a couple signed a nuptial agreement to set out in writing the division of their pre-marital assets and assets acquired during the marriage, the agreement will be legally binding. The length of marriage and divorce will have no effect on the ownership of the relevant assets.

2. “Proportion of asset division”

Generally speaking, where a couple signed a nuptial agreement to confirm their intention to follow the “separate property regime”, the Courts will give heavy weight and priority to the said agreement in deciding how to divide the family assets.

In the absence of any nuptial agreement, in principle, property acquired by the parties during the marriage (be it by one party or both parties jointly) will be considered to be jointly owned by the couple and shall be equally shared by them. However, where the fault of one party led to the breakdown of the marriage, depending on the facts of the case, the Courts may be more generous towards the no-fault party when dividing the family assets to ensure he/she will be sufficiently provided for. Otherwise, not only would it be difficult to penalize the party at fault and compensate the no-fault party, it would also encourage the party at fault to continue with his/ her wrongful behaviour.

3. “Serious wrongdoing committed during the marriage”

What amounts to “serious wrongdoing committed during the marriage” and how will that affect the distribution of assets in divorce?

Pursuant to Article 1087 of the Civil Code and with reference to the following comment made by the Intermediate People’s Court of Guangzhou:-

*“When applying the principle of compensation and deciding on the ratio of distribution, the Court shall focus on the following factors: 1) extent of the wrongdoing committed, 2) the need to maintain any child(ren) and 3) the value of the assets to be distributed. While it is easy to understand the first two factors, for the third factor, it means that when the value of assets to be distributed are relatively high, there should not be a significant departure from equal sharing. The Court should properly consider each factor and the overall picture in order to come up with a precise judgment.”*

4. “Divorce compensation”

“Divorce compensation” refers to the compensation paid by one spouse, whose fault/wrongdoing led to the breakdown of the marriage, to the no-fault spouse. “Divorce damages” includes compensation for physical damage and psychological damage.

Pursuant to Article 1091 of the Civil Code, the no-fault party is entitled to claim compensation from the spouse at fault if the divorce is caused by one of the following reasons:-

- (I) bigamy;
- (II) cohabitation of a married person with any third party;
- (III) domestic violence;
- (IV) maltreatment or desertion of any family member; or
- (V) any other major wrongdoing.

Given that the degree of damage suffered by the spouse is different in each case, the Courts have great discretion in determining the amount of compensation. For general reference, the amount of damages awarded in practice ranges from around RMB 20,000 to RMB 100,000.

To summarize, as provided in Article 1043 of the Civil Code:-

*'Family shall establish good family values, promote family virtues and place close attention to cultural and ethical advancement in families. Husband and wife shall be faithful to respect and care for each other. Family members shall respect the elderly, take care of children, and maintain equal, harmonious and civilized marriage and family relations.'*

*When handling the division of property, in addition to considering the nature and source of wealth, the Court, whether by way of adjudication or mediation, will also need to take into account good family values, public order and good morals in order to make the most appropriate decision."*

In the next article in the series, we explain the relief available in Hong Kong and the Mainland when a spouse is found to have dissipated/ be planning to dissipate assets to prevent the other spouse from getting his/her fair share of the settlement.

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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