

## International family law—Hong Kong

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**Family analysis:** In the first of a series of News Analysis considering family law provisions in other jurisdictions, Caroline McNally, executive partner at Gall, Hong Kong, outlines the key principles in Hong Kong in relation to jurisdiction, divorce, financial provision, private children and non-court dispute resolution as well as recent and forthcoming law reform.

### How is jurisdiction established in Hong Kong? What is the approach to domicile and habitual residence?

#### Jurisdiction

Pursuant to [section 3](#) of the Matrimonial Causes Ordinance (Cap 179), the Hong Kong courts have jurisdiction in proceedings for divorce if:

- either of the parties to the marriage was domiciled in Hong Kong at the date of the divorce petition or application, or
- either of the parties to the marriage was habitually resident in Hong Kong throughout the period of three years immediately preceding the date of the divorce petition or application, or
- either of the parties to the marriage had a substantial connection with Hong Kong at the date of the divorce petition or application

#### Domicile

To be domiciled in a country generally means that the parties, or one of them, consider that country to be their permanent home. The [Domicile Ordinance \(Cap 596\)](#) provides 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:

- they are present there, and
- they intend 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 they hold a Hong Kong permanent identity card or passport.

#### Habitual residence

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

The parties, or one of them, 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 continuously in Hong Kong for three years prior to the date of the divorce petition, there is usually no difficulty in establishing habitual residence.

#### Substantial connection

The court will look at:

- whether either party has a connection to Hong Kong, and

- whether that connection is substantial

Connection means physical presence in Hong Kong and a substantial connection is one which is not of a transitory nature. The courts do not encourage 'fly in' and 'fly out' divorces. The connection must be of sufficient significance or worth to justify the courts of Hong Kong assuming jurisdiction.

What factors are relevant and how much weight should be given to each factor depends on the actual circumstances of the case. As it is a fact-sensitive exercise, there is no comprehensive list setting out all the relevant factors or a formula.

Some of the factors which the court may look at include:

- whether the parties' matrimonial life was conducted in Hong Kong
- whether the parties' matrimonial home is in Hong Kong
- whether Hong Kong is regarded as their home (even if their lifestyle may indicate that they do not take root in one place for too long a time)
- whether the parties engaged in business or work in Hong Kong, and
- if there are children of the family, whether they are studying in Hong Kong

### **Are marital agreements enforceable in Hong Kong? If not, will they be taken into account by the courts?**

At present, marital or nuptial agreements in Hong Kong are not binding on the courts in Hong Kong. The terms of a nuptial agreement cannot oust the jurisdiction of the courts. The courts are required to follow the discretionary exercise and must consider the factors set out in [section 7](#) of the Matrimonial Proceedings and Property Ordinance (Cap 192) and case authorities when making financial orders in matrimonial proceedings.

The law relating to nuptial agreements has developed following the decision of the Supreme Court of England and Wales in *Radmacher v Granatino* [\[2010\] UKSC 42](#), [\[2010\] 2 FLR 1900](#). This decision was endorsed by the Hong Kong Court of Final Appeal in *SPH v SA* [\[2014\] 3 HKLRD 497](#). The Court of Final Appeal held at (para [39]) that:

'...the principles enunciated in *Radmacher v Granatino* should also be regarded as the law in Hong Kong. In common with the UK Supreme Court, we see no reason for distinguishing between ante-nuptial agreements and separation agreements.'

There have been significant developments in this area of law in Hong Kong since *Radmacher v Granatino*. The key points of the current law are as follows:

- when considering the role of a nuptial agreement in a financial claim on divorce, the starting point is the relevant legislation, which is the Matrimonial Proceedings and Property Ordinance—[section 7](#) of that Ordinance obliges a judge to consider all the relevant circumstances of the case when deciding how to divide the parties' finances on a divorce
- no agreement between the parties can override the legislation or prevent the judge from deciding on the appropriate division of assets on a divorce—this means a nuptial agreement cannot stop a spouse from applying to the court for financial provision from the other spouse and any 'waiver' of the right to apply to the court for financial provision in an agreement will not be effective
- the significance of a nuptial agreement is as a relevant circumstance of the case, to be weighed by the judge and a nuptial agreement will have a substantial impact on the judge's decision in many cases—the Supreme Court of England and Wales said in *Radmacher v Granatino* that the court should give effect to a nuptial agreement that is freely entered into by each

party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement

## **What are the grounds for divorce? Are same-sex marriage or civil partnership available in Hong Kong?**

Pursuant to [section 11](#) of the Matrimonial Causes Ordinance, the sole ground for divorce is that the marriage has broken down irretrievably.

Pursuant to [section 11A](#) of the Matrimonial Causes Ordinance, the court shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts:

- that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent
- that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent
- that the parties to the marriage have lived apart for a continuous period of at least one year immediately preceding the presentation of the petition and the respondent consents to a decree being granted
- that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition
- that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition

Divorce proceedings can also be commenced by way of a joint application. Pursuant to [section 11B](#) of the Matrimonial Causes Ordinance, a joint application for divorce in Hong Kong needs to satisfy the court of either or both of the following facts:

- that the parties to the marriage have lived apart for a continuous period of at least one year immediately preceding the making of the divorce application, and
- that not less than one year prior to the making of the divorce application, a written notice was signed by both parties and given to the court showing their intention dissolve their marriage and the notice was not subsequently withdrawn

[Section 4](#) of the Marriage Reform Ordinance (Cap 178) defines marriage as 'the voluntary union for life of one man with one woman to the exclusion of all others....'. As such, same-sex marriages and civil partnerships are not recognised under the laws of Hong Kong and parties to a same-sex marriage or civil partnership are unable to dissolve their marriage or partnership in Hong Kong.

## **What are the key considerations as to financial provision between spouses?**

In undertaking its discretionary exercise, the court must take into account the following factors, as set out in [section 7\(1\)](#) of the Matrimonial Proceedings and Property Ordinance:

- 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
- the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future

- the standard of living enjoyed by the family before the breakdown of the marriage
- the age of each party to the marriage and the duration of the marriage
- any physical or mental disability of either of the parties to the marriage
- 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
- in the case of proceedings for divorce or nullity of marriage, 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

### **What are the key considerations in relation to private children disputes?**

The court will make orders in respect of custody, care and control and access. Custody refers to the decision-making by the parents on major issues regarding their child, such as their education, place of residence, religious activities and medical needs. Care and control refers to the day-to-day care of the child ie the parent having care and control of the child is responsible for their daily needs. Access refers to visitation rights of the parent who does not have care and control of the child.

A child's best interests is the paramount consideration of the court when making any order in respect of the child. Pursuant to [section 3\(1\)\(a\)](#) of the Guardianship of Minors Ordinance (Cap 13), in relation to the custody or upbringing of a child, the court must have regard to:

- the views of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so, and
- any material information including any report of the director of social welfare available to the court at the hearing

The court will consider the following factors when determining child custody:

- the preservation of the status quo
- the ages of the parents and child
- the personality, capability and character of the parents
- the financial resources of the parents
- the physical and mental health of the parents and child
- the accommodation available to the child
- the child's own wishes and views, if any
- the benefit of keeping the siblings together with one parent
- the religion and culture of the family, and
- professional reports such as medical, school, or social welfare officer's reports

The above list of considerations is not exhaustive.

### **What rights do cohabitants have in Hong Kong?**

Unmarried cohabitants in Hong Kong do not have the same legal status as that of married couples and do not enjoy the benefits enjoyed by married couples, including tax, pension, medical and public housing benefits.

## Parental rights

Where a child is born out of wedlock, the mother of the child is given all the rights and authority in regard to the child's custody and upbringing, while the father is not given automatic parental rights. If the father wishes to obtain parental rights, he is required to make an application for an order pursuant to [section 3\(1\)\(c\)](#) of the Guardianship of Minors Ordinance.

## Estate

In accordance with [section 4](#) of the Intestate' Estate Ordinance (Cap 73), if a cohabitant dies without a will, their cohabitant cannot share in their estate. The [Inheritance \(Provision for Family and Dependants Ordinance\) \(Cap 481\)](#) allows a cohabiting partner to apply for financial provision from the estate of their deceased partner.

## Violence

The [Domestic and Cohabitation Relationships Violence Ordinance \(Cap 189\)](#) makes provision for victims of violence in a cohabitant relationship to seek legal remedies and apply for injunctions.

## Are any non-judicial methods (non-court dispute resolution) obligatory or widely used?

The courts have a duty as part of active case management to encourage settlement of disputes by alternative dispute resolution (ADR) as early as possible. Mediation is widely used as a means of resolving family disputes in Hong Kong. It has become increasingly common for the parties to be directed by the court to engage in mediation before taking further steps in court proceedings. However, it is not obligatory.

The court is obliged under [Practice Direction 15.11](#) to consider whether a financial dispute resolution (FDR) hearing or children dispute resolution (CDR) hearing should be conducted. In most cases, the court will direct that the parties attend an FDR and/or CDR before setting down the case for trial. At an FDR or CDR hearing, the judge will act as a conciliator to assist the parties in resolving or narrowing down their disputes, by giving their indication on what would be the likely outcome at trial if settlement cannot be reached.

In recent years, the courts have promoted the option of mediator-assisted FDR/CDR as a means of dispute resolution. This is a process in which the mediator works closely with the judge at the FDR/CDR to assist the parties in reaching a settlement. It is anticipated that a guidance note or practice direction concerning the logistics of the mediator-assisted FDR/CDR process (eg on confidentiality of communications between the mediator and the judge) will be issued in due course.

Other available ADR options include private FDRs and private financial adjudication (PFA).

A private FDR is held in a private setting rather than a court room and conducted by a conciliator jointly appointed by the parties. The conciliator is usually a retired judge or an experienced family practitioner.

Under PFA, the parties are required to follow [Practice Direction SL9](#) in terms of:

- the scope of the disputes that can be adjudicated
- the appointment of the adjudicator, and
- the procedure of the PFA

Shortly after a decision is handed down by the adjudicator, the parties are required to draw up a consent summons in terms of the decision for the court's approval, and they are barred from making any application to appeal that decision.

## Are there any notable forthcoming developments in relation to family law in Hong Kong or key areas of reform?

### **Child custody and access: whether to implement the ‘joint parental responsibility model’ by legislative means**

In December 2011, the Labour and Welfare Bureau launched a public consultation exercise on the recommendations put forward by the Law Reform Commission in its report on child custody and access dated 7 March 2005. The main thrust of the report relates to the introduction into Hong Kong’s family law of a new parental responsibility model, emphasising the continuing responsibilities of both parents towards their children rather than their individual parental rights.

In September 2022, the Labour and Welfare Bureau [stated](#) that it agrees in principle that the parental responsibility model should be pursued. However, it is mindful of how it is to be implemented in practice, and it is seeking to work with stakeholders on the legislative proposals and implementation arrangements.

### **Enactment of the Mainland Judgements in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap 639) and corresponding Rules (Cap 639A) (the Ordinance)**

The [Ordinance](#), which came into operation on 15 February 2022, provides for the reciprocal recognition and enforcement in Hong Kong of judgments in matrimonial and family cases given in the Mainland and vice versa. Given the increasing number of cross-border marriages between Hong Kong and the Mainland, the [Ordinance](#) seeks to simplify the enforcement process and save time and costs of relitigating the same dispute.

The [Ordinance](#) provides for three types of applications that can be made in Hong Kong:

- registration in Hong Kong of specified orders made in the Mainland—the three main types of order that can be registered are:
  - care-related orders such as orders in relation to children’s custody, guardianship and access
  - status-related orders such as orders granting divorce or parentage, and
  - maintenance-related orders such as orders in relation to spousal or children maintenance and division of property
- recognition of Mainland divorce certificates in Hong Kong, and
- applications for certified copy of Hong Kong judgments and orders given in family cases (including judgments and orders relating to divorce, financial provision, transfer of property, orders relating to children)