

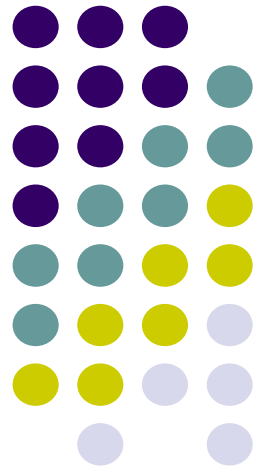
# Handling Cross Border Divorce and Legal Rights of Family Members

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# Hong Kong Chinese and International City



As far as Divorce is concerned:

- Other nationals divorce here
  - Children issues including removal back to home country
  - Financial issues
- Hong Kong domicile and residents and mainlanders
  - Focus for today



- The choice of jurisdiction to commence divorce proceedings
- Custody of children of the family
- Property

# Divorce

- Jurisdiction of Family Court in divorce
- s.3 Matrimonial Causes Ordinance (Cap. 179) – Jurisdiction in divorce



The Court shall have jurisdiction in proceedings for divorce under this Ordinance if –

) Either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application; or

) Either of the parties to the marriage was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of the petition or application; or

) Either of the parties to the marriage had a substantial connection with Hong Kong at the date of the petition or application.





) Domicile in Hong Kong

) Habitually resident for 3 years

) Substantial Connection      B v A (HCMC 6 of 2007)

B v A (HCMC 6 of 2007), Hon Hartmann J:-

## Domicile

“At the time of the issue of proceedings, either party considered Hong Kong to be his or her permanent home; that is, his or her place of domicile.”



## Habitually resident



“At the time of the issue of proceedings, either party had been usually living in Hong Kong for the previous 3 years; that is, had been habitually resident here for that period of time.”



## Substantial connection

“At the time of the issue of proceedings, even if neither party considered Hong Kong to be his or her permanent home or had been usually living here for the preceding 3 years, nevertheless one or other of them had a substantial connection with Hong Kong.”



# What is Substantial connection



- 1st question – did the party have a substantial connection with Hong Kong?
- 2nd question – was that connection of sufficient substance; that is, of sufficient significance or worth, to justify the courts of Hong Kong assuming jurisdiction in respect of matters going to, and consequential upon, the dissolution of that party's marriage?



- Do not accept that a person who has come to live in Hong Kong for a limited period of time is, by that fact alone, incapable of establishing a substantial connection with Hong Kong.
- Particular facts of each case must be taken into account. The question is – what are the circumstances relevant to the limited period of residence and just how limited is it intended to be?

# S. v S. [2006] 3 HKLRD 251



Hon Hartmann J. -

“...the substantial connection which is contemplated in the Ordinance is one which gives jurisdiction to the Hong Kong’s courts in respect of matrimonial causes; that is, to matters going to the dissolution of marriage – still a profound matter in the eyes of the law – and to matters which flow from that, for example, matters of custody and property distribution.”

# Forum



C v C (FCDJ 7834/1997)

Whether Hong Kong was the ‘forum  
conveniens’?

Evidence before the Court:

- Parties were married in China on 8th October 1971
- Parties came to live in Hong Kong in 1980, i.e. 17 years ago

- parties have made Hong Kong their home

- Parties acquired their wealth in Hong Kong and their wealth was largely based in Hong Kong

- Parties have brought their children up in Hong Kong

- Their matrimonial home was in Hong Kong



Deputy Judge Carlson:-

Having regard to the evidence before me I have no doubt that Hong Kong is the natural forum...

...The Mainland of China is of course their place of origin and their motherland...their closest connection over the last 17 years is with...Hong Kong.

# Children

- Relevance of parent having Hong Kong residence rights?



# L v H (FCMC 2161 of 2006)

- Petitioner Husband (H) is a Hong Kong resident
- Respondent Wife (W) resides in Mainland China
- Parties married in Hong Kong
- The children of the family reside in Hong Kong
- W would visit Hong Kong regularly on a two-way entry permit for a period of 3 months each time







- W has no residence rights in Hong Kong as at the date of hearing
- W told the Court that it is now very easy to apply for the two-way permit, and that after marriage, she would come regularly for 3 months each time and in between, she would return to Mainland China for 2 to 3 days to renew her visa.

Her Honour Judge Chu:-

W shall have custody, care and control of the children

# S v Z (FCMC 14535/2005)



- The mother is from Mainland China
- The father is American – a Hong Kong resident since 2002
- Dispute over the arrangements for the two adolescent boys
- Mother seeks no order at all, or in the alternative joint custody and joint care and control
- Father seeks sole custody with defined access to the mother



## ● The Father's case:

- works full time – occasional travel
- harassing behaviour of the Mother
- concerned about the Mother's ability to parent
- joint custody not feasible as the parties are unable to communicate at any level

## The Mother's case:

- a full time mother and housewife
- she should be allowed to resume the role of the boy's primary care giver



Her Honour Judge Melloy:-

Sole custody granted to the Father, with shared care and control to both the Father and the Mother

# Finances



## Section 7 Matrimonial Proceedings and Property Ordinance (Cap. 192)

It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say-

- (a) 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;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) 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;
- (g) 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.



- ) Without prejudice to subsection (3), it shall be the duty of the court in deciding whether to exercise its powers under section 5, 6 or 6A in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say-
- (a) the financial needs of the child;
  - (b) the income, earning capacity (if any), property and other financial resources of the child;
  - (c) any physical or mental disability of the child;
  - (d) the standard of living enjoyed by the family before the breakdown of the marriage;
  - (e) the manner in which he was being and in which the parties to the marriage expected him to be educated;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.



## Family assets:-

- in the parties' sole name
- in the joint names with the other party
- In the joint names with others
- Beneficial interests
- Trust interests



- maintenance pending suit
  - a periodical payments order
  - a secured periodical payments order
  - a lump sum order
  - a property adjustment order
- 
- for the parties
  - for the children



# Enforcement of Judgments



- Cross-border marriages



- Enforcement of foreign judgments in Hong Kong  
Section 3(2) Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) and  
Judgments (Facilities for Enforcement) Ordinance  
(Cap. 9)
- Mirror order



- Assets in the Mainland China?
- Mainland Judgments (Reciprocal Enforcement) Bill
  - Civil or commercial matters only



**FDR –**

**Family Dispute Resolution?  
Financial Dispute Resolution?**

# Hague Convention



- The Convention on the Civil Aspects of International Child Abduction 1980 was signed at The Hague on 25 October 1980 (“the Convention”) – incorporated by the Child Abduction and Custody Ordinance (Cap. 512)

## Article 1 of the Convention:-

The objects of the present Convention are –

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Contracting States to the Convention are stated in Child Abduction and Custody (Parties to Convention) Order (Cap. 512 sub. leg. A)

the Mainland is not a contracting state to the Convention



# Issue: what if a parent abducted the child of the family to the Mainland?



## AC v PC (HCMP 1238 of 2004)

- the father removed the children of the family from Australia, their country of habitual residence, on 16 August 1999
- In early September 1999, the father took the children to his father's home town Zhongshan, Guangdong Province in the Mainland. The children remained in the Mainland and commenced schooling



- In March 2000, the Australian Central Authority made an application to the Hong Kong Central Authority for the children's return. Hong Kong Immigration authorities were alerted and placed the children on a 'watch list'.
- In about December 2002, due to the outbreak of an epidemic in the Guangdong Province, the father smuggled the children to Hong Kong from the Mainland in a vessel which sailed into the fishing port of Aberdeen, Hong Kong





- In April 2004, the father sought to obtain permanent resident status for the elder child. The presence of the children in Hong Kong came to light.
- Although Hong Kong is a member of the Convention, China has not itself ratified the Convention.

## Concerns in Hong Kong

Children kept on Mainland but parent continues to live and work in Hong Kong



*Thank you*