Separation & Divorce – Custody, Ancillary Relief and Financial Matters

Introduction
Separation and divorce is no doubt distressful. Failure to understand the relevant law and procedure may add to the suffering. The relevant Hong Kong law and procedure on separation and divorce are outlined below to give a quick guide through the maze in this area. When you or your friends need any help, we have a good team ready to give advice and assistance.

Separation
Although separation can be easily achieved by simply living apart, never underestimate the use of a separation agreement which is designed to formalize parties' rights and obligations during separation. Properly negotiated and drafted, a separation agreement (covering matters like spousal and children maintenance; care, control and access of children; debts, financial obligation arrangements; place of abode of parties; management of properties etc.) paves the way for more efficient divorce proceedings. It also reduces ambiguities concerning the rights and obligations of parties during separation.

Other than separation by agreement, separation can also be achieved by way of court orders if the other party misbehaves (such as being violent, physically and sexually abusive towards his/her spouse and their children; addicted to drug and alcohol; imposing sex when infected with venereal diseases etc.) A court ordered separation has the advantage of obtaining maintenance by order of the court provided that such maintenance is reasonable.

Divorce
Condition for a divorce proceeding to take place in Hong Kong
1. Either party to the marriage needs to be domiciled in Hong Kong or was habitually resident in Hong Kong for 3 years or had a substantial connection with Hong Kong.
2. Save where there are great hardship suffered and depravity of the other party, parties to a marriage cannot seek a divorce until after at least one year of marriage.
Ground for Divorce

There is only one ground of divorce, i.e., the marriage has irretrievably broken down but the court will accept the following circumstances as proof of such a breakdown:

1. Adultery - One party to the marriage has been adulterous;
2. Desertion - One party has deserted the other party for one year against the wishes of the latter;
3. Separation with Consent - Parties have separated for at least one year and both have consented to a divorce;
4. Separation without Consent - Parties have separated for two years and one wishes to divorce the other; and
5. Unreasonable Behaviour - One party has behaved in such a way that it is unreasonable for the other party to live together with the former.

The prevalent thinking that one MUST have separated for one year before divorce is a popular but incorrect notion.

Custody

The practice of arranging custody by private agreement is encouraged up to a certain extent. Based on the law that the welfare of the child is the first and paramount consideration, the court has the power to overrule any privately agreed custody arrangement although the conduct and wishes of the parents may be considered. Careful arrangement on the custody, care, control and access of children prior to separation and divorce may, to some extent, pre-empt disapproval of the court when such issues come to be considered in cases of divorce.

Factors that May Affect the Award of Custody

1. Physical, emotional and educational needs of the child;
2. The child’s own wishes;
3. Preservation of a familiar and stable environment for the child; and
4. Any other material factors.

Ancillary Relief

Such relief usually concerns properties and financial provision. There is no simple rule of thumb, instead, a balancing of the following principles is adopted to achieve equities for parties and their children:
1. The income, earning capacity and financial resources of parties;
2. The financial needs, obligations and responsibilities of parties;
3. The standard of living enjoyed by parties before the divorce;
4. The age of parties to the marriage and the duration of the marriage;
5. Any physical or mental disability of parties;
6. The contributions made by the parties to the welfare of the family; and
7. Any benefits, by reason of the divorce, that parties will lose.

Properties
The court may order a transfer, settlement and variation of proprietary interests in the matrimonial home or other properties of parties based on the balancing of the above principles and property law principles.

1. The general rule is that property purchased by one person presumptively belongs to the purchaser to the exclusion of the other. In the case where money is paid for by the husband but the property is conveyed to the name of the wife, there is a presumption of gift to the wife. But in the converse case where the wife paid for the property and registered it in the name of the husband, there is no such presumption.
2. Where both spouses work and contribute to the matrimonial home directly or indirectly, the court will allocate shares in the property according to the contributions of parties in caring for the family.
3. Where a wife has no proprietary interests in the matrimonial home at all, the court may still allow her to occupy the home if it finds that to be equitable. A spouse claiming interests in properties upon divorce can protect his/her rights by registering the court action at the Lands Office so that a prospective buyer will then have warning.

Financial Provision
Parties may seek the following kinds of monetary provision:
1. Maintenance pending suit (to provide for needs in the period starting from the commencement of proceedings to its conclusion)
2. Periodical payments (can be secured or unsecured)
3. Lump sum payments
The court has power to restrain one party from disposing or transferring property out of Hong Kong where such acts are calculated to defeat the other party's claim to financial provisions.

**Legal Procedures**

To commence divorce proceedings in the Family Court of Hong Kong, the applicant should file an application to the court together with a statement concerning the arrangement of children as the case may be. Such documents should inform the court about (1) the proof in support of divorce (2) the arrangement over custody and (3) maintenance. The other party may raise concerns relating to the above said three areas in his/her reply. If there is agreement between parties in the three areas, from the time of the filing of the application for divorce to issuance of decree nisi (temporary divorce order), the waiting time is about 3-4 months. Final divorce order can be obtained from court in about 1 to 2 months thereafter.

In summary, for non contentious cases, the time normally needed from commencement of the proceedings to the issuance of a final divorce order is about six months.

**Introduction of FDR in Hong Kong on 29th December 2003**

In order to manage divorce and separation cases more efficiently, a pilot scheme of Family Dispute Resolution (FDR) was introduced on 29th December 2003 by the court. Under the scheme, parties of divorce or separation proceedings filed after 29th December 2003 must attend mediatory meetings presided over by judges to resolve conflicts on financial matters. If no settlement is reached, the case will be adjourned to trial.

In addition, with the widening of Special Procedure List, under which undefended petition and joint application will be set down once parties agree to divorce. This quickens the pace of the litigations considerably.