

Series on Hong Kong/ Mainland Cross-Boundary Marriages Article 4 – Asset Dissipation

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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 4th article, we discuss how the Hong Kong and Mainland Courts handle the issue of asset dissipation made prior to or during the divorce proceedings.

“I recently filed for divorce and during the financial disclosure process, I discovered that my wife had made substantial bank transfers to her parents who reside in the Mainland. I also found out that she has put her Hong Kong and Mainland properties up for sale. What can I do?”

In Hong Kong, when one discovers that his/her spouse is planning to dissipate assets (e.g. selling properties or transferring money to third parties, such as parents and siblings), then he/she can apply for an injunction under Section 17 of the Matrimonial Proceedings and Property Ordinance (Cap.192).

If the spouse has already sold an asset to a third party, one can still apply to set the transaction aside, such that the net sale proceeds will be included in the matrimonial pot for calculation.

As the applicant, one will need to prove that his/her spouse made the disposition with the intention of defeating his/her claim for financial provision. If the disposition was made within 3 years of the application, such intention is presumed, unless the spouse proves the contrary. However, if the disposition was made more than 3 years before the application, the burden will then be on the applicant to prove that his/her spouse had the said intention.

It is common for parties to seek assistance from experts, such as forensic accountants and even private investigators, to gather the relevant evidence.

Regarding the unilateral sale of Hong Kong properties without one's knowledge or consent, one can register a *lis pendens* with the Land Registry against the relevant properties to put third parties on notice of one's claim as a divorcing spouse.

For similar situations in the Mainland, we caught up with [Ms Tan Fang, family specialist and principal partner of Family & Family Law Firm in Shanghai](#), who has the following to say:-

“In the Mainland, when one discovers that his/her spouse is planning to dissipate assets during the divorce proceedings, he/she can apply for a Property Preservation Order to freeze his/her spouse's bank savings, stocks or funds accounts, or to distraint the properties registered in the spouse's name and prevent the spouse from trading the relevant properties. In the event that assets have already been dissipated, one can request the Court to add back the relevant assets to the couple's community property pot for division. Pursuant to Article 1092 of the Civil Code, the aggrieved party can request the Court to order a smaller or even no share of their community property to his/her spouse.

Depending on the situation, the Court will approach the dissipation in different ways:-

- 1) *If the spouse transferred an asset to a third party in good faith at reasonable market price, the aggrieved party will not be able to make a claim on the transferred asset but only on the sale proceeds;*

- 2) *If the spouse did not transfer the asset to a third party in good faith, the aggrieved party will be entitled to seek recovery of the relevant asset and request that the same be divided as part of the community property pot;*
- 3) *If the spouse transferred a substantial amount of assets to a third party, the aggrieved party can demand his/her spouse to account for the transfer and provide an explanation. If the spouse is unable to provide any reasonable explanation, the aggrieved party can either seek to add back the relevant assets to the community property pot for division, or file a separate claim against the third-party recipient.*

In practice, all matters related to the dissipation of assets, including investigation, discovery, preservation orders application, invalidation of transfer or revocation of gifts, and other relevant legal proceedings are handled by lawyers.

Meanwhile, formal registration is required for the transfer of ownership of immovable properties. For the transfer of properties jointly owned by a married couple, the relevant government body usually requires both parties to be present at the time of registration of the transfer. For a property jointly owned by a couple, but registered only in the sole name of one party, the other party may apply to the relevant government body to register his/her objection to put potential purchasers on notice. Where necessary, an aggrieved spouse may apply to the Court for a declaration that a property registered in the sole name of his/her spouse is in fact community property jointly owned by the parties, and for his/her name to be added to the legal title of the property.”

In the next part of the series, we will look into how disputes involving third party interests in properties are resolved during divorce proceedings in Hong Kong and the Mainland respectively.

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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