

Series on Hong Kong /Mainland Cross-Boundary Marriages – Article 5 – Third party interests in family proceedings

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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 5th article, we will discuss how the Hong Kong and the Mainland Courts will handle disputes of ownership of property in divorce proceedings between the couple and a third party.

“My husband and I are going through divorce and he is now claiming an interest in a property which I am holding on trust for my parents. My parents funded the purchase of the property and I did not make any financial contribution. My husband is arguing that my parents purchased the property as a gift for me.”

In Hong Kong, when disputes over the ownership of properties arise in divorce proceedings, parties can apply to the Court to have it first adjudicated as a “preliminary issue” before proceeding with their underlying claim for financial relief. The relevant third party - usually the parent, sibling or relative of a spouse - may intervene or be joined as a party to the proceedings.

In *LLC v LMWA*¹, the Court of Appeal identified 2 types of cases. In cases where a third party is the legal owner or one of the legal owners of a disputed property, he/she should be joined as a party to the proceedings because the Court may make an order requiring him/her to transfer the property or subject the property to encumbrance.

For cases where a spouse claims that the third party has a beneficial interest in a property legally held under the spouse's name, that third party should be notified of the claim and is at liberty to decide whether to join in the proceedings or not. If the third party decides not to join, he/she will be bound by the judgment.

When determining whether the beneficial ownership of a disputed property should deviate from the legal ownership, the Court will consider factors such as:-

- The purpose of the purchase;
- The reason the property was purchased in the name(s) of the legal owner(s);
- The financing arrangements of the purchase, for example, who paid for the down payment, estate agency fee and legal costs, in whose name was the mortgage obtained, and who serviced and/or redeemed the mortgage; and
- Pre- and post-purchase conduct.

Having said so, whilst the Court may give directions for a trial of preliminary issues should the need arise, it does not mean that the parties must go ahead with the trial because it “*can be disastrously expensive, substantially increase the financial burden on the parties and unduly prolong the resolution of the ultimate issue which is the fair distribution of matrimonial asset.*”² Instead, all interested parties, including the third party should proactively explore whether they can resolve their dispute by way of there are alternative dispute resolution methods such as mediation.

¹ [2019] HKCA 347, paragraph 25

² [2019] HKCA 347, paragraph 38

For similar disputes in the Mainland, **Ms WANG Hao, family and private client specialist and senior partner of Rayyin & Partners P.R.C. Lawyers**, has the following to share:-

“In mainland China, when there is dispute on property ownership in divorce proceedings, it is necessary to consider various factors such as the registration status of the property, the nature of the investment, and the timing of the purchase (i.e. whether it was purchased before or after the marriage). Under the premise that the legal system of matrimonial property in mainland China is a communal system of matrimonial property, property acquired by one of the spouses after marriage is in principle the communal property of the spouses. However, property acquired by one of the spouses through inheritance or gift, and which is determined in a will or gift contract to belong to only one of the spouses, is the personal property of one of the spouses. When handling such disputes, The People’s Courts in the Mainland usually conduct mediation with the parties first, and if mediation fails or the parties have no intention to mediate, the Court will then adjudicate on the matter.

In practice, when a divorce involving properties “purchased” by parents for their children, it is first necessary to determine the nature of the investment made by the parents. The Mainland Courts will first determine whether the funds contributed by the parents were in the nature of a loan or a gift. If the funding is considered to be a loan, it shall be handled in accordance with the relevant provisions of the civil law on loan. If the funding is considered to be a gift and the property is registered in the name of either one or both spouses, but one party claims that the property was purchased by his or her parents, then it is critical to look at the timing of purchase. According to the Interpretation (I) of the Supreme People’s Court on the Application of the “Marriage and Family” Book of the Civil Code of the People’s Republic of China:

- 1. If a spouse’s parents purchased a property for him/her before marriage, the investment shall be treated as a personal gift to their children, except in situations where the parents have made it clear to both parties that the property was purchased as a gift for them.*
- 2. If a spouse’s parents purchased a property for him/her after marriage, then it shall be determined in accordance with their own agreement; however, if there is no agreement amongst them or the agreement is unclear, then the property shall be regarded as a marital asset jointly owned by the spouses unless the parents are able to produce sufficient evidence to show that the purchase was made solely for the benefit of their child.*

However in many cases, parents and their children seldom enter into any formal gift contract given their close relationship and the unique Chinese traditional family culture. Accordingly, whether the parents have made a gift to their children is often a point of contention during divorce. Usually in cases where one party’s parents provide full funding and register the property in the name of their child, the Mainland Court will consider that as a gift from the parents to their child. Given the complicated nature of such disputes, parties should specify the nature of their parents’ investment and property ownership by way of an agreement at the time of purchase or shortly after to minimize the occurrence of such disputes in the future.”

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.

Want to know more?

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