

# Family law news: Developments in Hong Kong Ancillary Relief claims

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The recently published *2010 Merrill Lynch Global Wealth Management/Capgemini World Wealth Report* shows that in the last year there were three million high net worth individuals in Asia. It is with this background that divorce disputes are inevitably going to continue to be a major focus in Hong Kong, where financially stronger parties, under the law as it currently stands, now face losing up to half their wealth by court order – including assets held in trust – as a result of the landmark Court of Appeal judgment of *DD v LKW* in 2008.

*DD v LKW* is going to the Hong Kong Court of Final Appeal in October and the decision will be scrutinised with considerable interest. The question on many family lawyers' minds in Hong Kong, however, is whether the Court of Final Appeal will 'do something different' and start to break away from the influence of the English court in its decision-making process.

The Impact of *DD v LKW* [2008] HKCA 74 – 'the Hong Kong White v White'

*DD v LKW* is undoubtedly one of the most significant family law cases in Hong Kong in recent years. The parties were married for seven years. The divorce was finalised on 26 January 2004. At first instance the Judge held the husband ('H') had assets of HK\$4,650,000 (£393,000) and that the wife ('W') was entitled to one third. On W's appeal to the Court of Appeal, she was awarded half. The Hong Kong Court of Appeal threw out the 'reasonable requirements' principle and adopted the 'new approach' of equality of division, following the English decisions of *White v White* (2000) and *Miller v McFarlane* (2006). The case underlined the strong connection between the courts of Hong Kong and England & Wales. Cheung JA reminded us in *DD v LKW* that English decisions are '*not binding on Hong Kong courts but highly persuasive authorities ... the Hong Kong legislation on matrimonial property is still based on the almost identical United Kingdom legislation*'.

In a refrain which will be familiar to English family lawyers who have had 10 years to interpret the impact of *White* with a plethora of case law, Cheung JA also said: 'I would firmly embrace the approach in *White* and *Miller* on the division of family assets on divorce. On marriage the parties commit to sharing their lives. It is a partnership of equals. The husband may work while the wife may stay at home to take care of the family. The contributions are nonetheless equal ... On divorce the principle and spirit underlining the union should be reflected on the basis of fairness and this necessarily means there is no room for discrimination between husband and wife. The starting point is equality in division unless there is a good reason to depart from it.'

The adoption of '*fairness*', equality of division, and the dismissal of discrimination against the '*homemaker*' has had a major impact in Hong Kong on the level of financial awards imposed by court order in big money cases. The judgment turned the Special Administrative Region overnight into one of the most generous divorce jurisdictions in the world. H has now gone to the Court of Final Appeal.

There is now more of a spotlight in Hong Kong on trust assets with the courts insisting on seeing the total 'pot' for division, when hitherto they might not have needed to do so. Indeed, there are a number of high net worth divorce cases going through the courts now in Hong Kong where the main assets of the family are held in trust and those trusts are being attacked by the financially weaker spouse.

The approaches that might be taken by the Hong Kong family courts in relation to trusts are again broadly analogous to those that are available in the English courts, either because the trusts may be treated as a financial resource of the parties or as a variable nuptial settlement. The impact of *DD v LKW* and the prospect that in some cases half of the family's wealth, including assets held in trust, may end up in the hands of the financially weaker party, has inevitably drawn the attention of legal advisers, trustees and fund managers to the question of legitimate and responsible asset preservation.

Family lawyers in Hong Kong, as in England, are increasingly playing a damage limitation, wealth planning role and are advising at a very early and crucial stage when trusts are set up, often giving advice in tandem with advice on pre and/or post-nuptial agreements. The emphasis is on minimising the scope for future acrimonious litigation.

Also to be stressed is the fact that trusts remain useful vehicles for asset preservation, provided they are carefully set up and managed properly. And so there is increasingly a focus, too, on dynastic trust planning where those who wish to preserve a proportion of their wealth and genuinely to pass it down from generation to generation, may be minded to set up a trust of which, very importantly, they are not a beneficiary. The letter of wishes is carefully drafted to stress the importance of passing down wealth through the generations. A trust set up in this way, years before the breakdown of the marriage, may well provide some valuable protection in Hong Kong (as well as in England) against divorce orders.

We will cover the outcome of the Court of Final Appeal decision in this case and details of the case of *M/ v YJ* in future briefings.

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