Family law news: Big decisions in Hong Kong

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Rita Ku
PARTNER | HONG KONG

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In the last few months, there have been significant developments in Hong Kong's courts' approach to family law cases.

DD v LKW

In October 2010, the Court of Final Appeal in Hong Kong made its final decision in the case of *DD v LKW* (heard with *WLK v TMC*), which was discussed by Marcus Dearle in our Family Newsletter of July. The question for the Court of Final Appeal in these jointly heard cases was: '… whether it is necessary to adopt the principle of "reasonable requirements" laid down in the case of *C v C* [1009] 2 HKLR 183; and, if it is not necessary to do so, whether the courts should adopt the "equal sharing" principle laid down in a line of English cases, starting from the case of *White v White* [2001] 1 AC 1996'. The Court of Final Appeal endorsed the Court of Appeal's decision in this case and confirmed that the Court of Appeal's approach in invoking the principles laid down in the English cases of *White v White* and *Miller/McFarlane* was correct.

ML v YJ

Following the landmark decision in *DD v LKW*, the Court of Final Appeal heard the case of *ML v YJ*, in which Withers' Hong Kong office represented the Husband, and gave its Judgment in December 2010.

This case involved two nationals of the People's Republic of China ('PRC'). The wife was born in Hunan Province in 1964 and the husband was born in Shenzhen in 1963. They married in Shenzhen in April 1992 and had two sons, the first in 1992 and the second in 1999. The family moved from Shenzhen to Hong Kong in the mid-1990s and, from that time, maintained two matrimonial homes: one in Shenzhen and the other in Hong Kong. The marriage broke down in early 2006 and the wife lodged her Petition in Hong Kong in May 2006. In October 2006, some five months later, the husband commenced proceedings in Shenzhen, seeking orders for the dissolution of the marriage, division of property and custody of the children. He argued that, as both parties were PRC nationals, a Hong Kong decree might not be recognised in the Mainland. The decree nisi was pronounced in Hong Kong on 13 November 2006 but the wife did not make her application for the decree nisi to be made absolute until 25 February 2008. In the parallel proceedings in Shenzhen, the court dissolved the marriage on 14 November 2007 and the husband was ordered to pay the wife RMB 8.8 million (circa £840,000). The wife had 30 days from 14 November to lodge an appeal but she did not do so and the decree therefore took effect on 14 December 2007.

On 3 December 2007, the husband applied to the Hong Kong Court for an order (amongst other things) to strike out the wife's ancillary relief claim and for a declaration that the decree nisi should not be made absolute. At trial on 5 March 2008, the husband's application was heard as a preliminary issue and was dismissed. On 23 May 2008, the Judge ordered the decree nisi be made absolute and, on 6 November 2008, the husband was ordered to pay the wife HK$378 million (circa £30.4 million) of the total assets (excluding those dealt with by the Shenzhen Court) of HK$840 million (circa £68.4 million). The husband appealed.

The Court of Appeal reversed the High Court's decision and declared that the marriage was validly dissolved by the Shenzhen divorce. It also held that the High Court's ancilliary relief orders should not take effect. The wife appealed.

In the Court of Final Appeal, the wife asked the Court to dismiss the Court of Appeal's decision and not to give recognition to the Shenzhen divorce. On that basis, the parties would remain married under Hong Kong law and the Court in Hong Kong would retain its jurisdiction in relation to the parties' ancilliary relief claims. In the alternative, the wife invited the Court to backdate the Decree Absolute so that it pre-dated the Shenzhen divorce, even if the Court held that the Shenzhen Order should be recognised. Her application failed by a 3:2 majority. Dissenting, Mr Justice Chan and Mr Justice Bokhary held that the Shenzhen divorce should not be recognised, as they believed that the husband had made his application in Shenzhen simply to derail the Hong Kong proceedings. They take the view that for the Court to recognise a Shenzhen divorce in those circumstances would be manifestly contrary to public policy.

The three assenting Judges refused to exercise the public policy discretion and upheld the majority decision of the Court of Appeal on the following points: (i) the wife had willingly participated in the Shenzhen proceedings with legal representation and must therefore have known what effect a Shenzhen divorce would have had on the proceedings in Hong Kong; (ii) she failed to take adequate proactive steps to protect her position in Hong Kong; (iii) she failed to make an application for decree absolute in Hong Kong, when it was open to her to do so six weeks after 13 November 2006; and (iv) she had a right to appeal the decree in the Shenzhen proceedings but had failed to exercise that right.

The outcome of the Court of Final Appeal's decision is noteworthy in two key respects: *ML v YJ* is the first matrimonial case in Hong Kong that has dealt with the issue of international comity, particularly in relation to the recognition of a Judgment in Mainland China and, as a consequence, it

has put the Legislative Council under tremendous pressure to expedite legislation equivalent to Part III of the Matrimonial and Family Proceedings Act 1984. Secondly, if the Shenzhen order had not been recognised by the Court in Hong Kong, the wife's award, which amounted to an equal division of the 'pot' of HK$840 million, would have been the highest award ever made in Hong Kong proceedings. We await the Court's next big money decision with interest.

Authors

Rita Ku

PARTNER | HONG KONG

Family

+852 3711 1670

rita.ku@withersworldwide.com