

De facto partners – How to protect yourself if you are not married

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There is no distinction between Hong Kong residents and expats in their treatment by the law courts in Hong Kong. There is also no such thing as a 'common law' spouse. Currently there are laws protecting a party to a de facto relationship in terms of domestic violence, but no financial protection, other than where there are children, and then it is for the benefit of the children, not the parent. Partners who are not married do not currently have any say in each other's medical decisions.

As an expat, a divorce or separation of the parties in a relationship may have an impact on their immigration status but this is so whether they are married or not. Consider applying for permanent residency, (to which the applicant will be entitled if he has lived in Hong Kong continuously for more than 7 years) or obtaining a work visa to remain independently.

A party to a de facto relationship will have no right in the court to seek maintenance from the other party or to get any entitlement by way of capital sum or a transfer of property for his or herself. This can come as a big shock, particularly if the relationship has been a long one. The party must fall back on the remedies arising out of the general laws of contract or property. Contribution to the purchase price or loan repayments on a property may give rise to a beneficial interest and/or a right to live in the property, as may a common intention by the parties in that regard, even if the property is registered in the other party's name.

An unmarried mother will only be allowed a 'carer allowance' to support her child-rearing, a sum for her basic needs if caring for her children reduces her ability to work. This is usually considerably less than maintenance for a married mother. In respect of children, the family courts will always consider individually the welfare of every child which it encounters and parents have a duty to maintain them, whether the parents are married or not. Similar provisions for child maintenance are available to children of unmarried parents, such as monthly maintenance, provision of a lump sum and the transfer of property.

For children without married parents, the only parent who automatically has custodial rights is the mother. The father of a child born out of wedlock has to make an application to the court to have the same rights. Once the unmarried father makes his application, there is no distinction in treatment of the children and both parents can apply for custody, care and control and access to their children. The Hong Kong court has inherent jurisdiction over every child in the jurisdiction and therefore the children of unmarried parents cannot be removed against the will of the natural parent.

It is clearly better, legally, to be married in Hong Kong than not, but if the parties do not, or cannot marry, then they should consider drawing up a cohabitation agreement setting out all of the terms which they would like a court to take into account, should the relationship break down. These have the force of contract but are not particularly helpful when it comes to rights concerning children, although the 'best interest' principle will always guide the courts in respect of children.

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