

Is earning capacity an asset to which the sharing principle applies in Hong Kong?

09 JULY 2020

Samantha Gershon

PARTNER | HONG KONG

CATEGORY:
[ARTICLE](#)



如需要閱讀中文網頁, 請[點擊此處](#)。
如需要阅读中文网页, 请点击[此处](#)。

[Click here](#) to read more insights on how we can weather the coronavirus outbreak with you.

You have been separated from your spouse for two years and live apart. Despite being emphatic that you would resolve your divorce proceedings as amicably as possible for the sake of the children, it has not gone quite as planned! With the Courts being closed due to COVID-19 your recent court hearing has been postponed. Now you are sure that a final resolution either by settlement or court order is still many months off. What about your hard earned salary during this time period. You are adamant that your spouse should not benefit from your "blood, sweat and tears". Your spouse disagrees. It was through their support, love and affection (yes it was there once) that enabled you to reach the pinnacle of your career. You would not have been so successful without your spouse. So there should be the sharing of everything that you built up during the marriage and of your salary.

Both views seem reasonable and perfectly understandable. So, who is right? What is the position in Hong Kong? Is the spouse's earning capacity a matrimonial asset to which the other spouse is entitled to share as with other assets? It has been argued that earning capacity is built up during the marriage and is the product of marital endeavor. Arguably, in every case including where the parties' resources of capital and/or income exceed their needs, the applicant spouse potentially has an entitlement to share in future income. Why should one spouse need to use their capital when the other does not because of their earnings?

Firstly, it is accepted that there is a difference between the spouse's earning capacity and any post-separation bonus that the spouse may receive. Let us consider post-separation bonuses to begin with. If the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation it is felt that it is too close to the marriage to justify it being classed as a non-matrimonial asset. It is also accepted that during the period of separation a non-earning party carries on making their non-financial contribution. It is difficult to put a value on this. There is no set time period but the courts feel that a post-separation bonus is not normally classed as non-matrimonial unless it relates to a period which begins at least 12 months after the separation.

Where at all possible, the courts try and achieve a clean break financial settlement between the parties. This creates certainty and provides closure to the parties. Neither party wishes to go back to court years later arguing about their rent going up or that they can no longer afford to make the monthly payments to an ex-spouse. They may now have a new family to look after. The new spouse may resent having to struggle each month because a percentage of their new spouse's income is going to their ex-spouse. It is therefore accepted that even though one party might have better prospects than the other in the future, once the marriage is over, it is still better for there to be no further claims upon each other. It is possible for one party to be awarded a large capital sum so that there are no further claims on the earning party for these very reasons.

It is impossible to determine what each of the parties would have been earning if there had been no marriage and to then provide compensation for the disadvantage or advantage to each of them. How could a court determine how a spouse's career would have developed without the marriage having existed or to what extent it was enhanced by the marriage. In the same way, how would a court be able to determine the extent to which an earning capacity was the product of marital endeavour.

When considering a financial award, the court has to determine both the level at which and the manner in which the other spouse's needs should be met. There is a difference between the cases where the capital assets are more than sufficient to meet the parties' financial needs and a case where the parties' capital is insufficient to effect an immediate clean break. Matrimonial assets are the property of the parties generated during the marriage other than those received by other means such as by way of inheritance. Recent English case law which Hong Kong is most likely to

follow, has held that earning capacity is not capable of being a matrimonial asset to which the sharing principle applies and so the other spouse cannot have an entitlement to share it. It is felt that this has to be so as otherwise it would undermine the court's ability to effect a clean break. Sharing would also mean it would apply to every case in which one party had earnings which were greater than the other's regardless of need. That cannot be right. It would also mean that the court would have to assess the extent to which the earning capacity had accrued during the marriage. Where would the court start and with reference to which factors. This would be far too difficult for the court to determine.

If the parties have sufficient matrimonial assets to share to satisfy their needs then there should be a clean break settlement. If there are insufficient assets and one party is earning more than the other, the higher earner may need to provide monthly financial support to that spouse. What if a spouse chose to move to lower paid employment or not to work at all? The other spouse's share should then be determined by reference to their earning potential, unless it was reasonable for the spouse to have acted as she/he had because the other spouse had a "post-marital" obligation to work. How much and for how long can be delved into at another time.

[Click here](#) to read more insights on how we can weather the coronavirus outbreak with you.

Authors

Samantha Gershon

PARTNER | HONG KONG

Divorce and family

 +852 3711 1606

 samantha.gershon@withersworldwide.com