



香港信託人公會
Hong Kong Trustees' Association

HONG KONG TRUSTEES' ASSOCIATION

SEMINAR ON

The treatment of trusts in matrimonial litigation

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The Treatment of Trusts in Matrimonial Litigation

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Haldanes
SOLICITORS AND NOTARIES

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Deepak Nagpal K.C.
(England & Wales)

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Part 1

Divorce 101

Outline of Presentation

- 01* Statistics
- 02* Jurisdiction
- 03* Children
- 04* Finances

Statistics

Year	Marriages	Divorce	
		Divorce applications	Divorce decrees
2011	58,369	22,543	19,597
2012	60,459	23,255	21,125
2013	55,274	22,960	22,271
2014	56,454	21,980	20,019
2015	51,609	21,467	20,075
2016	50,008	21,954	17,196
2017	51,817	23,302	19,394
2018	49,331	22,998	20,321
2019	44,247	22,074	21,157
2020	27,863	17,302	16,020
2021	26,769	17,774	16,692
2022	29,983	16,513	13,026
2023	47,518	22,074	17,919

(Source: Census and Statistics Department)

Jurisdiction

- Place of registration of marriages is not a jurisdictional consideration;
- Either party is domiciled in Hong Kong at the date of the petition;
- Either party has habitually resided in Hong Kong throughout the period of 3 years prior to Petition; or
- One party has a substantial connection with Hong Kong.

Ground for Divorce

- The marriage has broken down irretrievably.
- Proof:
 - Adultery
 - Unreasonable behaviour
 - Separation for one year by mutual consent
 - Separation for two years – no consent required
 - Abandonment of petitioner for at least one consecutive year
- Joint Application:
 - Separation for one year by mutual consent

Children

- Custody
- Care and Control
- Access
- The best interests of the child are the first and paramount consideration

Finances

- Fundamental Principles
 - Needs
 - Sharing
 - *Compensation*

The 5 Steps

(*LKW v DD* (2010) 13 HK HKCFAR 582)

- Step 1: Identification of the assets
- Step 2: Assessing the parties' financial needs
- Step 3: Deciding to apply the sharing principle
- Step 4: Considering any good reasons for departing from equal division
- Step 5: Deciding the outcome

- Duty of full and frank disclosure
- Form Es, Questionnaires, Answers

Filed by Petitioner or Respondent (delete as appropriate)

FORM E

FINANCIAL

STATEMENT

Between

Petitioner / 1st Applicant

Solicitor's ref.

and

Respondent / 2nd Applicant

Solicitor's ref.

In the District Court / High Court*

Case No

Always quote this

Petitioner / 1st Applicant / Respondent / 2nd Applicant*

Please fill in this form fully and accurately. Where any box is not applicable write "N/A". You have a duty to the court to give a full, frank and clear disclosure of all your financial and other relevant circumstances. A failure to give full and accurate disclosure may result in any order the court makes being set aside and an order for costs being made against you.

If you are found to have been deliberately untruthful, criminal proceedings for perjury may be taken against you.

If there is not enough room on the form for any particular piece of information, you may continue on an attached sheet or paper.

Attach documents to the form where they are specifically sought and you may attach other documents where it is necessary to explain or clarify any of the information that you give.

This statement must be sworn or affirmed before a solicitor or a Commissioner for Oaths before it is filed with the Court or sent to the other party.

Important: You are recommended to obtain independent legal advice before completing this form.

*delete as appropriate

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Factors considered by Court

(s.7 of Matrimonial Proceedings and Property Ordinance)

- length of marriage
- income/ earning capacity
- needs of the parties
- financial resources
- standard of living enjoyed by the family
- the parties' age, physical and mental disability

N.B. Non-exhaustive list – all the circumstances

Matrimonial Home

Matrimonial Home

- In *LKW v DD*,
“The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. ... in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.”

Dispute over beneficial ownership of assets

- Property purchased by a spouse's parents but put in the spouse's name
- Property purchased by a spouse but put in a third party's name

Trusts

- Identify the type of trust
 - The nature of the spouse's entitlement
- The Spectrum

Fixed

Interest in Possession

Discretionary



Claim 1

- **Absolute entitlement to property**
- **Absolute entitlement to income**

Section 7(1)(a)

the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future

Claim 2

- Charman question/The likelihood test
- Trust assets – now or in the foreseeable future

Claim 3

- **Nuptial settlement**
- **Variation of nuptial settlement**

Joinder of Trustees?

- Existence of trust
- Resources
- Variation of nuptial settlement
- Disclosure

The Trial

- Resources
 - Answer the Charman question
- Trust estate is non-matrimonial
- Trust estate is matrimonial
- Hybrid cases

Resources Claim

- Backfill cases
- Fresh money cases

VNS Claim

- Nuptial
 - Nuptialisation
 - Denuptialisation
- Property in the settlement
- Form of the variation
- Compensation for affected third parties
- Enforceability

Part 3

Nuptial Agreements

Nuptial Agreements

- Pre-nuptial agreement
 - To be entered by a couple before marriage
 - To regulate the terms concerning children / financial arrangements in the event of divorce
- Post-nuptial agreement
 - To be entered into during the marriage
 - Husband and wife are still together and intended to remain together
 - Husband and wife are on the point of separating or have already separated but do not intend to divorce.

(collectively “**PNA**”)

Benefits of a PNA

Benefits of a PNA

- To avoiding future litigation
- To minimise associated costs, conflicts and uncertainty
- To ringfence assets especially those gifted, inherited or pre-acquired
- To protect a party's family's trust, wealth, business against a claim from a spouse.

Enforceability of PNA

- Not binding on HK Courts
- Section 7 factors
- Criteria of a 'weighty' PNA
 - Voluntary, own free will
 - Without any undue influence or pressure
 - All relevant information – financial disclosure
 - Fully appreciate the implications – Competent, independent legal advice
 - Signed no less than 28 days prior to the marriage – cooling-off

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