

# Legal 500

## Country Comparative Guides 2024

### Hong Kong

### Family Law

### Contributor

Hugill & Ip



**Caroline McNally**

Partner | [caroline.mcnally@hugillandip.com](mailto:caroline.mcnally@hugillandip.com)

This country-specific Q&A provides an overview of family laws and regulations applicable in Hong Kong.

For a full list of jurisdictional Q&As visit [legal500.com/guides](https://legal500.com/guides)

# Hong Kong: Family Law

## 1. What are the jurisdictional requirements for divorce and property division?

Under Section 3 of the Matrimonial Causes Ordinance ("MCO"), the court has jurisdiction in divorce proceedings if:

- a. Either of the parties to the marriage is domiciled in Hong Kong at the date of the petition;
- b. Either of the parties to the marriage has been habitually resident in Hong Kong for three years immediately before the date of petition; or
- c. Either of the parties to the marriage has a substantial connection with Hong Kong at the date of the petition.

If either party can satisfy one of the above requirements, divorce proceedings can be initiated in Hong Kong by way of either a petition for divorce or a joint application for divorce. There is no requirement for the parties to be married in Hong Kong.

Domicile is a well-recognised concept in general law. It is where a person has or is deemed to have by law his or her permanent home. Under the Domicile Ordinance (Cap. 596), every person has a domicile and one domicile only.

Habitual residence is a question of fact. A party can use this ground if they have lived in Hong Kong for three years immediately prior to the date of the petition. Temporary trips overseas for professional or personal reasons do not have any impact on the meaning of habitual residence.

Substantial connection is also a question of fact. Whether a substantial connection exists will depend on all the circumstances of each case including but not limited to: the length of time the parties have lived in Hong Kong prior to the initiation of divorce proceedings; whether the parties are employed in Hong Kong; and whether they have acquired assets in Hong Kong. The frequency and the purpose of stay in Hong Kong are crucial factors that the court will consider. The fact that one or both parties might hold the right of abode in Hong Kong or that they have bank accounts in Hong Kong or properties in Hong Kong does not automatically mean that the connection is substantial.

## 2. In what circumstances (if at all) would your jurisdiction stay divorce proceedings in favour of proceedings in another country?

The court may stay divorce proceedings in favour of proceedings in another country if the other country is deemed to be the more appropriate jurisdiction.

The principles governing an application for a stay of proceedings for *forum non conveniens* set out in the English case of *Spiliada Maritime Corp v Consulex Ltd (The Spiliada)* [1987] AC 460 have been adopted in Hong Kong. The leading case in Hong Kong is the Court of Final Appeal case of *SPH v SA* [2014] HKFLR 286.

The question to be decided is whether there is another forum which is the appropriate forum for the proceedings to take place. The Hong Kong courts follow a three-stage test in determining the question of forum.

### Stage 1 - forum

The burden always rests on the party disputing jurisdiction to prove that:

- i. Hong Kong is not the natural or appropriate forum with the most real and substantial connection; and
- ii. There is another available forum which is clearly or distinctly more appropriate than Hong Kong.

It is not enough for a party to show that there is another equally competent jurisdiction to hear the matter.

### Stage 2 – juridical advantage

If the factors under stage 1 can be proved i.e. the court decides that there is another forum which is clearly and distinctly more appropriate, it will ordinarily grant a stay of the Hong Kong divorce proceedings, unless it can be shown that the petitioner would be deprived of a legitimate, personal or juridical advantage if the proceedings were to be tried in a forum other than Hong Kong. If the petitioner can establish this, the court will move to the final stage.

### Stage 3 – balancing exercise

If the court has found that there is another more appropriate forum (stage 1) but one party would be deprived of an advantage if the proceedings there not to

remain in Hong Kong (stage 2), the court will balance the advantages of the alternative forum with the disadvantages that the other party may suffer.

### 3. Is applicable law relevant in your jurisdiction – when would this apply?

The Hong Kong courts apply the laws of Hong Kong. However, the Hong Kong court may require expert evidence of the law in another jurisdiction if, for example, the parties have married under a marital regime or entered into a nuptial agreement in another jurisdiction.

### 4. What are the grounds for divorce and are they fault-based?

Under Section 11 Matrimonial Causes Ordinance ("MCO"), the only ground for divorce in Hong Kong is that the marriage has broken down irretrievably. To prove this, at least one of the following fault or non-fault based facts under Section 11A of MCO must be satisfied:

- a. The respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- b. The respondent has behaved such a way that the petitioner cannot reasonably be expected to live with the respondent;
- c. The parties to the marriage have lived apart continuously for at least a period of one year immediately preceding the filing of the petition and the respondent consents to the divorce being granted;
- d. The parties to the marriage have lived apart continuously for at least a period of two years immediately preceding the filing of the petition (in this case, the respondent does not need to consent to the divorce being granted); and
- e. The respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the filing of the petition.

In case of a joint application for divorce, the sole fact is that the parties to the marriage have lived apart continuously for a period of at least one year immediately before making the application.

### 5. What are the requirements for serving the application for divorce on the Respondent?

A sealed copy of the petition must be served personally or by post on the respondent and any other party to the

proceedings.

The petitioner cannot affect service of the petition on the respondent in person by him/herself.

If it has not been possible for the petitioner to serve the respondent (personally or by post), the petitioner can apply to the court for substituted service which includes advertising the petition in a newspaper or serving the respondent by post to an address where it is known he/she resides or visits, or care of a third-party. The petitioner must swear an affidavit giving details of the attempts that have been made to serve the respondent by the usual means.

If the respondent does not live in Hong Kong, the petitioner can serve the divorce petition out of Hong Kong without leave/permission from the court. In this case, the respondent will have longer to file his/her acknowledgment of service.

### 6. When is a foreign marriage, and when is a foreign divorce, recognised?

A foreign/overseas marriage between a man and a woman is recognized in Hong Kong provided that it is a valid marriage in that jurisdiction. It is not necessary to register a foreign/overseas marriage in Hong Kong.

Part IX MCO sets out the grounds and requirements for recognition of foreign divorces in Hong Kong. Under Section 56 MCO, a foreign divorce will be recognized in Hong Kong if at the date on which the divorce proceedings in the foreign country are commenced, either party was (a) habitually resident in that place or (b) was a national of that place.

There are some exceptions to the recognition of a foreign divorce in Hong Kong. These are set out under Section 61 MCO. A foreign divorce will not be recognized if according to the law of Hong Kong there was no subsisting marriage between the parties. Other exceptions include where the divorce was obtained by one spouse (i) without the other spouse having notice of the divorce proceedings; or (ii) without the other spouse having been given an opportunity to take part in the proceedings. A foreign divorce will also not be recognized in Hong Kong if recognition would be manifestly contrary to public policy.

### 7. Are same sex marriages permitted in your jurisdiction and/or is there another scheme? Do

## you recognise same sex marriages that have taken place in another jurisdiction?

At present, Hong Kong has not legalized same sex marriages and same sex marriages that have taken place in another jurisdiction are also not recognised in Hong Kong.

Under the current legislation, only a marriage between a man and a woman is recognized in Hong Kong. Under the Marriage Ordinance (Cap. 181) marriage shall be a Christian marriage or the civil equivalent of a Christian marriage. Under Section 40, it states that marriage *"implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others"*.

As same sex marriages are not recognized, same sex couples are not able to obtain a divorce in Hong Kong. However, same sex marriages may be regarded as valid marriages in Hong Kong for certain purposes such as inheritance (*Ng Hon Lam Edgar v Secretary for Justice* [2020] 4 HKLRD 908), immigration visas (*QT v Director of Immigration* [2018] HKCFA 28), tax assessment (*Leung Chun Kwong v Secretary for the Civil Service* (2019) 22 HKCFAR 127) and parental rights (*NF v R* [2023] HKCFI 2233).

In 2023, the Hong Kong Court of Final Appeal handed down a judgement in *Sham Tsz Kit v Secretary for Justice* [2023] HKCFA 28 which made a significant step forward for same sex couples in Hong Kong. The Court of Final Appeal declared that the Government has a positive obligation under the Hong Kong constitution to establish an alternative framework for legal recognition of same-sex partnerships in Hong Kong, that provides for appropriate rights and obligations. Following this ruling, the HKSAR Government until 5 September 2025 to take steps to comply and establish a new alternative legal framework.

## 8. What are the substantive financial orders (e.g. capital, property and maintenance) the court can make and how are claims determined?

Under the Matrimonial Proceedings and Property Ordinance (Cap. 192) ("MPPO") sections 4,5,6 and 6A, the orders that can be made are as follows:-

1. An order for maintenance pending suit and interim maintenance;
2. A periodical payments order
3. A secured periodical payments order
4. A lump sum provision order

5. A settlement of property order
6. A transfer of property order
7. A variation of settlement order
8. An avoidance of disposition order
9. An order for the sale of property

Under section 5(2) MPPO, the court can make similar financial orders for the benefit of the child of the family.

In exercising its discretion when determining a claim, the court will consider the factors set out in section 7 MPPO whilst also having regard to all of the circumstances of the case. The section 7 factors are set out below as follows:

- a. The income, earning capacity (i.e. the ability to earn an income), property and other financial resources which each of the parties to the marriage have or are likely to have in the foreseeable future;
- b. The financial needs, obligations and responsibilities which each of the parties to the marriage have or are likely to have in the foreseeable future;
- c. The standard of living enjoyed by the family before the breakdown of the marriage;
- d. The age of each party to the marriage and the duration of the marriage;
- e. Any physical or mental disability of either of the parties to the marriage;
- f. The contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and
- g. In the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The leading case in Hong Kong regarding the division of matrimonial assets/determination of financial claims on divorce is *LKW v DD* [2010] 6 HKC 528. In this case, the Court of Final Appeal recognised the difficulties presented to Judges in applying the section 7 MPPO factors and provided 4 principles and 5 steps as guidance.

The 4 principles are as follows:

1. The objective of fairness i.e. the result must be fair and just
2. The rejection of discrimination i.e. the husband and wife hold an equal status irrespective of their roles
3. The yardstick of equality – the starting point should be equal division of the assets which should only be departed from if there is a good reason to do so.

4. The rejection of minute retrospective investigations into conduct and arguments in relation to contribution.

The 5 steps are as follows:-

1. Identifying the assets
2. Assessing the parties' financial needs
3. Deciding to apply the sharing principle
4. Considering whether there are good reasons for departing from equal division
5. Deciding the outcome

In cases where parties only have enough assets to meet their financial and housing needs, the court will not go through step 3 and step 4 in the 5-step approach. The outcome would be decided based on how much each party needs.

## 9. What orders can be made in relation to pensions and what are the guiding principles?

The Hong Kong court does not have the ability to make any orders with regards to the sharing of pensions.

Instead, the loss of future pension benefits will be considered when the Court undertakes its statutory exercise under section 7 MPPO and wherever possible, a party should be compensated accordingly. The pension will be included in the matrimonial assets but will be retained by the spouse who owns it. The court will therefore offset the value of the pension or retirement benefits with the other matrimonial assets to provide a fair outcome. For example, if a husband retains his retirement funds from his employment, he may need give the wife a larger share of the other assets to achieve a fair outcome.

## 10. Can the court make interim provision (including for legal costs) during the proceedings?

Pursuant to section 3 MPPO, the court has jurisdiction to make orders for interim provision (maintenance pending suit) including for legal costs. Applications for interim provision for the benefit of children are brought under section 5 MPPO.

An application for interim provision can only be made once the petition has been filed. Any order for maintenance pending suit will cease to have effect on decree absolute.

When considering an application for interim provision the

court takes a "broad-brush" approach usually without oral evidence. This is on the basis that the court can adjust any over or under payment at the time of the substantive order for ancillary relief. The court will look at the needs of the applicant with reference to the standard of living of the marriage and the ability of the other party to pay.

In respect of provision for legal costs, the court will consider whether the applicant can demonstrate that he or she cannot reasonably procure legal advice and representation by any other means and whether there are assets that can be reasonably deployed for such purpose.

## 11. Can financial claims be made after a foreign divorce?

The courts have the power to make orders in relation to financial claims after a marriage has been dissolved in a foreign jurisdiction. The provisions/grounds for making such an application are set out in Part IIA of the MPPO. The leading case in Hong Kong for applications under Part IIA of the MPPO is *C v H* (Foreign Decree; Part IIA) [2012] HKFLR 199.

The applicant must first obtain leave from the court to make the application. The court will not grant leave unless there are substantial grounds for making an order for financial relief. Leave can be granted even if there is an order for financial provision from another competent authority outside Hong Kong.

The applicant must have jurisdiction to bring an application in Hong Kong. The jurisdictional requirements are the same as jurisdiction in divorce proceedings (i.e. either of the parties must be domiciled in Hong Kong at the date of the application, habitually resident in Hong Kong for three years preceding the date of the application or must have a substantial connection to Hong Kong at the date of the application).

When making any order, the court will consider all the circumstances of the case, having particular regard to the factors set out in Section 29AF(2) MPPO, which includes the connection a party has with Hong Kong. Under Section 29AG(1), the court has the power to make any one or more of the orders that could be made under Section 4, 5, 6 and 6A MPPO.

## 12. What is the process for recognising and enforcing foreign financial orders (including orders relating to pensions situated in your



## jurisdiction)?

### *Enforcement of maintenance orders*

The law and procedure in relation to the reciprocal enforcement of maintenance is governed by the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap 188) which contains a schedule of reciprocating countries.

To enforce an overseas maintenance order in Hong Kong, the order must first be registered. Once registered, the order can be enforced in Hong Kong as if it had been made by the District Court of Hong Kong and as if the District Court had had the jurisdiction to make it.

### *Enforcement of orders other than maintenance orders*

Orders other than maintenance made by courts in other jurisdictions may be enforceable in Hong Kong under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 139). A judgement creditor under a foreign judgement can apply to the Court of First Instance in Hong Kong to have the judgment registered so long as the judgment has not been wholly satisfied or could not be enforced in the court of the country that made the original order. The application must be made within 6 years after the date of the last judgement given in those proceedings.

Once the foreign order is registered in Hong Kong, the applicant can take out an enforcement application against the other party's assets in Hong Kong as if the order had been made by the Hong Kong court.

The procedure is governed by Order 71 Rule 2 of the Rules of the High Court Cap 4A. The application to register the order can be made *ex parte* unless the Court directs an originating summons to be issued. The application must be supported by affidavit. The contents of the affidavit must comply with Order 71 Rule 3.

### *Recognition and enforcement of judgments and orders between Mainland China and Hong Kong*

The reciprocal recognition and enforcement of judgments and orders between Mainland China and Hong Kong is governed by the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap 639). The Ordinance came into force on 15 February 2022. Pursuant to the Ordinance, Mainland Court Orders in family proceedings made after 15 February 2022 can be registered in Hong Kong. The Ordinance facilitates the enforcement of family judgements or orders handed down by the Courts in the Mainland and Hong Kong respectively.

To enforce a Mainland financial order in Hong Kong, an applicant will have to apply to register the order in question. Only specific orders made by the Mainland Courts can be registered. These are set out in Schedule 2 of the Ordinance. They include maintenance orders and orders in relation to the division of properties between the parties to a marriage such as transfer/delivery of property order, lump sum order, vesting of property order and a declaration that a property belongs to a party to the marriage.

Once the order is registered, enforcement proceedings can be commenced in Hong Kong and the order will be treated as though it had been made by the Hong Kong court.

## 13. Are matrimonial property regimes recognised and if so, in what circumstances?

Foreign matrimonial property regimes are not recognised in Hong Kong. However, when making orders for financial provision the court will consider the factors set out in section 7 MPPPO whilst also having regard to all of the circumstances of the case which could include that the parties married under a foreign matrimonial property regime.

In *SPH v SA* [2014] HKFLR 286 the pre-nuptial agreement purported to apply Germany's matrimonial property regime with some modification. The Court of Final Appeal recognized that in European civil law jurisdictions such as Germany, matrimonial property regimes and financial provision upon divorce are governed differently than in common law jurisdictions and purposely left open for future cases the question of whether any qualification or adjustment of a nuptial agreement with a foreign element would be needed.

## 14. How are pre and post nuptial agreements treated? Is it different if the prenuptial or post nuptial agreement was concluded in your jurisdiction (as opposed to another jurisdiction)?

The law relating to nuptial agreements has developed following the decision of the Supreme Court of England and Wales in *Radmacher v Granatino* in October 2010. This decision was endorsed by the Hong Kong Court of Final Appeal in *SPH v SA*. The Court of Final Appeal held as follows:

*"The principles enunciated in Radmacher v Granatino [2011] AC 534 represents the law in Hong Kong and there is no reason to distinguish between ante-nuptial*

*agreements and separation agreements. Therefore, an agreement could carry full weight only if each party had entered into it of his or her own free will, without undue influence or pressure, having all the information material to his or her decision and intending that it should be effective to govern the financial consequences of the marriage coming to an end".*

The key points of the current law are as follows:

- When considering the role of a nuptial agreement in a financial claim on divorce, the starting point is the relevant legislation, which is the Matrimonial Proceedings and Property Ordinance. Section 7 of that Ordinance obliges a judge to consider all the relevant circumstances of the case when deciding how to divide the parties' finances on a divorce.
- No agreement between the parties can override the legislation or prevent the judge from deciding on the appropriate division of assets on a divorce. This means a nuptial agreement cannot stop a spouse applying to the Court for financial provision from the other spouse. Any "waiver" of the right to apply to the Court for financial provision in an agreement will not be effective.
- The significance of a nuptial agreement is as a relevant circumstance of the case, to be weighed by the judge. A nuptial agreement will have a substantial impact on the judge's decision in many cases. The Supreme Court of England and Wales said in *Radmacher v Granatino* that the Court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

This is the stance taken by the Hong Kong Court of First Instance in the case of *LCYP v JEK* [2019] HKCFI 1588, where the Court held that an unvitiated nuptial agreement (i.e. a nuptial agreement which was reached without any vitiating factors such as lack of full disclosure or duress) is one of the circumstances to be considered in arriving at a fair distribution of assets.

The overriding consideration is fairness and the Court will hold parties to the nuptial agreement unless it would be unfair to do so.

## 15. How is maintenance for a child dealt with in your jurisdiction?

In the context of divorce, maintenance for a child is mainly regulated by Matrimonial Proceedings and

Property Ordinance (Cap. 192).

There are some special features under MPPO on child maintenance :-

1. MPPO defines "child of the family" as a child of both parties and any other child who has been treated by both parties as a child of the family. Thus, the obligation to maintain would extend to children who are not biologically related to the payer. However, when the court assess the liability of a payer towards a child of the family who is not of the child of the payer, extra considerations have to be made including whether the payer is aware that the child was not his or her own when providing for the financial support (section 7(3) of MPPO).
2. Duration of child maintenance is regulated by section 10 of MPPO. In short, the obligation to provide for a child of the family ceases when the child turns 18 or completes full time education, whichever is later. Although it is not explicitly mentioned in the statute, it is typically accepted that full time education refers to a first degree. Thus, if a child decided to leave college and start a full-time job, the obligation for maintenance shall cease at that point, even though he or she has yet to complete his degree.
3. Child maintenance is always subject to variation (section 11 of MPPO). The same legal principle on variation to maintenance for a spouse applies. In short, if there is material change in circumstances for example material change in the child's needs and/or material change in one party's financial position, the court is prepared to hear the matter afresh.

When deciding on liability and quantum of child maintenance, different legal principles apply depending on whether it is "interim child maintenance" or "final child maintenance".

Interim maintenance refers to maintenance orders made covering the period of from filing of petition until the grant of divorce decree. Final maintenance refers to order made after divorce decree.

For interim maintenance, the court will take a "broad-brush" approach without hearing evidence from the parties in the witness box. The court is not tasked to do minute investigation but mainly aims to preserve the parties' financial status quo pending determination of the parties' ancillary relief claim. When it comes to interim maintenance, the court is limited to making orders on periodical payments, secured periodical payments and/or a lump sum payment (section 5(2) of MPPO).

For final orders, the parties would need to provide the

court with far more documentary evidence and the court would have the opportunity to properly hear the evidence from the parties. The court will be more ready to make findings on what is the reasonable expenses of the child going forward and also the ability of the parties to bear these expenses. Any over or under payment made at the interim stage can be adjusted by way of capital division between the parties in the final order.

### **16. With the exception of maintenance, does the court have power to make any orders for financial provision e.g. housing and/or capital sums for a child? If so, in what circumstances?**

While the court has wide discretion when it comes to children related matters, the types of financial orders which the Court can make are limited.

Under section 5(2)(c) of MPPO, the court can make an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified.

Under section 6(1) of MPPO, the court has the power to make the following:-

- a. an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
- b. an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- c. an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;

In determining the outcome, the court must consider the factors stated in section 7 of the MPPO. Unlike claims between spouses where the court encourages a clean break, due to the changing nature of children's needs and the ability to vary children maintenance, in practice, the court almost always prefers periodical payment as children maintenance orders.

### **17. Are unmarried couple relationships recognised (eg. as a civil partnership?)**

Unmarried couple relationships are not formally recognized as civil partnerships or similar legal arrangements. The law primarily recognizes marriage between a man and a woman.

Unmarried couples are still offered some protection in law in terms of domestic violence, as they can apply for an injunction order against their domestically abusive partner as long as they are or were cohabiting.

### **18. What financial claims, if any, do unmarried couples have when they separate and how are such claims determined i.e. what are the guiding principles?**

Unmarried do not have any financial claims against the other when they separate.

If there is a child involved, the person with care and control of the child would be able to seek child maintenance and a carer's allowance under the Guardianship of Minors Ordinance (Cap 13).

While some private arrangements (like cohabitation agreements) can be made between partners, they do not carry the same legal weight as marriage or civil partnerships. In particular, it is doubtful as to whether the courts have the power to enforce such agreements in the absence of valuable consideration or any trust arrangements in respect of properties.

If trust arrangements are in place, a party can make a civil claim. For example, if one person holds certain properties on trust for their unmarried partner and they later separate, the former may refuse to return the property to the latter. In such cases, the civil courts can provide support in addressing these issues. The usual principles in relation to trusts and equity will apply.

### **19. What is the status of separated parents in relation to their children? Does it make a difference if the parents were never married?**

Married parents have equal rights of custody. Where parents are unmarried only the mother has rights of custody under section 3(1)(c) of the Guardianship of Minors Ordinance (Cap 13) ("GMO").

An unmarried father can make an application under section 3(1)(d) and the court may, where it is satisfied



that the applicant is the father, order that the applicant shall have some or all of the rights and authority that the law would allow him as father if the minor were legitimate.

For married parents, section 19(1) of the Matrimonial Proceedings and Property Ordinance (Cap 192) enables the court to make an order as it thinks fit for the custody and education of any child under 18 in any proceedings for divorce, nullity of marriage or judicial separation.

For unmarried parents, section 10 of the GMO enables the court to make orders as to custody and rights of access.

## 20. What are the jurisdictional requirements for child arrangements/child custody?

A child is defined as a person who has not yet attained the age of 18 under section 3 of the Interpretation and General Clauses Ordinance (Cap 1), given "full age" means the age of 18.

For married parents, the court has jurisdiction to deal with children proceedings where either party to the marriage was domiciled in Hong Kong at the date of the petition or application, was habitually resident in Hong Kong throughout the period of three years prior to the date of the petition or application; or has a substantial connection with Hong Kong.

For unmarried parents, the GMO does not have limits on the court's jurisdiction and section 26 states that it can exercise jurisdiction regardless of whether any party is domiciled in Hong Kong. The court will be guided by *forum non conveniens* and will bear in mind that the interest of the child is of paramount importance.

## 21. What types of orders can the court make in relation to child custody/a child's living arrangements and what are the guiding principles? What steps are followed to hear the voice of the child?

The court can make orders in respect of decision making and how much time a child spends in the care of each parent.

"Custody" means the right to make important decisions for a child, such as in relation to education, health and religion. If sole custody is ordered to one parent, the parent without custody can make an application to the Court to be heard on custodial issues.

In respect of the care arrangements for the child, "care and control" and "access" may be ordered by the court. "Care and control" concerns the day-to-day decisions for the child, and "access" is the contact the child has with the other parent, including staying access and holiday time. There may be an order for "shared care and control" or "sole care and control" and "access".

In the leading case *PD v KWW (Child: Joint Custody, care and control)* [2010] HKFLR 184, Hartmann JA stated when the court awards care and control to one parent and rights of access to the other parent, the court is effectively awarding a form of shared care and control. This is because when a child has "access" with a parent, particularly staying access, that parent assumes care and control of the child when the child is in their physical custody.

The court will consider the best interests of the child as the first and paramount consideration. The Court will take into account the views of the child having regard to his or her age and understanding.

There is no list of guiding principles in the legislation but factors the court considers include the child's physical, emotional and educational needs, the likely effect on him or her of a change in circumstances, his or her age, maturity, sex, social and cultural background, any harm which he or she suffered or is at risk of suffering, the capability of his or her parents to meet his or her needs, the nature of his or her relationship with each parent, and the attitude to the child and the responsibility of parenthood demonstrated by each parent. This is commonly referred to as the "welfare checklist". However, in *H v N* [2012] HKLRD 498 the court warned that this is not a compulsory list and is not meant to be exhaustive.

A social welfare report may be ordered to assist the court as its "eyes and ears" however there is no presumption that any recommendation will be followed.

A judge may also meet the child and there is a guidance note to assist judges in considering whether they should do so, and the procedure they should follow.

A child may also be separately represented by the Official Solicitor and guidance has been set out in Practice Direction SL6 in 2021 in respect of this.

## 22. What are the rules relating to the relocation of a child within and outside your jurisdiction and what are the guiding principles?

A parent cannot permanently relocate internationally

without the other parent's consent or a court order. The court will consider the best interest of the child as the first and paramount consideration, and as with other applications relating to children, it will consider the matters in the "welfare checklist". In doing so the court will consider the proposals made by the parent wishing to relocate and whether there is a genuine motivation for relocation. The court will consider the effect on the parent who wishes to relocate, as well as the parent who is left behind as part of its consideration. The impact on the child resulting from a refusal of leave and the denial of contact with the other parent are also important considerations.

### **23. What is the process for recognising and enforcing foreign orders for contact/custody of children? Does your court operate a system of mirror orders?**

Care-related orders made by a court in the People's Republic of China concerning custody, guardianship, access, and domestic violence protection can be enforced once registered with the District Court under section 7 of the Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap 639).

Other foreign orders are not automatically recognized, as Hong Kong is not a signatory to 1996 Hague Convention on Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. To obtain a mirror order, parent(s) must file an originating summons under the GMO, accompanied by an affidavit that includes the foreign order.

### **24. What is the status of surrogacy arrangements and are surrogates permitted to be paid?**

Surrogacy arrangements are permitted and regulated in Hong Kong under the Human Reproductive Technology Ordinance (Cap. 561). However, commercial surrogacies i.e. where there is monetary compensation for the surrogate mother are prohibited by law and they carry the risk of criminal penalties.

On 25 September 2024 Her Honour Judge Queeny Au-Yeung handed down an important decision in *CS, CTW v SW* [2024] CFI 2326 concerning a surrogacy arrangement which illustrated the undesirable consequences of entering into a commercial surrogacy arrangement in one country (Cambodia) but with the surrogate birth in another country (Thailand). The laws of both of those

countries and Hong Kong had been breached and the commissioning parents only realized the need to obtain a parental order upon their application for divorce.

The court granted the parenting orders but the case serves as a serious warning to commissioning parents who want to run the argument that they were ignorant of the law when entering into the surrogacy arrangement. In such cases the commissioning parent will need to satisfy the court on the following questions:-

(1) Why did they not enter into a surrogacy arrangement in Hong Kong? What due diligence have they done to ascertain the Hong Kong law on surrogacy and satisfy themselves that it was lawful to enter into a surrogacy arrangement?

(2) Why did they enter into a surrogacy arrangement out of Hong Kong? What due diligence have they done to ascertain the law on surrogacy of the foreign jurisdiction(s) and satisfy themselves that it was lawful to enter into a surrogacy arrangement there? It is unlikely to be satisfactory for the commissioning parents to rely on a surrogacy agency to give such advice on the law. This is especially so when there are 2 jurisdictions involved as in the present case.

(3) Who, in law, are the parents of the child born out of surrogacy? The law governing commercial surrogacy and that governing parentage are 2 different matters.

(4) What steps have been taken to remove the parental rights of that/those parents? If no such steps have been taken, why not?

### **25. What forms of non-court dispute resolution (including mediation) are available in your jurisdiction?**

Non-court dispute resolution methods include mediation, collaborative practice, private financial adjudication and early neutral evaluation.

Mediation is an established private and court assisted practice in Hong Kong. Parties involved in disputes in the court over children and finances are required to go through a Children's Dispute Resolution procedure and Financial Dispute Resolution procedure. These can also be held with the assistance of a mediator. These procedures promote early settlement with the aid of Court.

The parties can also privately appoint a mediator who facilitates their negotiations. It is also possible for the

voice of the child to be heard with child-inclusive mediation.

At present, private adjudication can only be for financial disputes. Private financial adjudication is consensual, and the parties agree to be bound by the decision of the private adjudicator which will subsequently be made an order of the Court. So far in Hong Kong there has only been 1 Private financial adjudication but it hoped that it

will gain popularity as a constructive alternative to a court process which is often slow and unpredictable.

A new NCDR process has recently become available which is early neutral evaluation whereby a former judge will consider the case and give an indication, on paper of likely outcomes, with a view to assisting the parties move forward more constructively with their settlement negotiations.

---

## Contributors

**Caroline McNally**  
Partner

[caroline.mcnally@hugillandip.com](mailto:caroline.mcnally@hugillandip.com)

