

## DIVORCE IN HONG KONG UNDER CHINESE CUSTOMARY LAW

Information has been requested regarding a divorce under Chinese law and custom effected in Hong Kong in 1976. The parties were married there in 1965, also under Chinese customary law. The question now is what would be deemed to constitute such a divorce at that time.

The Chinese law in effect at the time of the cession of Hong Kong by China to Great Britain was given continued recognition with respect to the Chinese inhabitants of Hong Kong on questions dealing with family matters such as marriage, divorce, adoption, and the like. This remained the situation until the passage of the Marriage Reform Ordinance of 1970, which set October 7, 1971 as the appointed day after which marriages under Chinese customary law would no longer be valid under the law of Hong Kong.

Thus after the above date, no marriages could be effected in Hong Kong except under the provisions of the Marriage Ordinance, that is to say, only in a licensed place of worship or in a marriage registry. The Marriage Reform Ordinance, however, expressly provided that customary marriages entered into before October 7, 1971 would still be valid marriages. Parties to such marriages, and the offspring of such marriages, would retain their legal status. The Marriage Reform Ordinance provides in its section 7 as below:

7. (1) For the purposes of this Ordinance, a marriage shall constitute a customary marriage if it was or is celebrated in Hong Kong before the appointed day in accordance with Chinese law and custom.

- (2) A marriage shall be deemed to accord with Chinese law and custom if it was celebrated or is celebrated before the appointed day in Hong Kong in accordance with the traditional Chinese customs accepted at the time of the marriage as appropriate for the celebration of marriage either--
- a. in the part of Hong Kong where the marriage took place; or
  - b. in the place recognized by the family of either party to the marriage as their family place of origin.
- (3) A customary marriage of persons who are subject to Chinese law and custom is hereby declared to be a valid marriage. 1/

The Marriage Reform Ordinance provides for the dissolution of Chinese customary marriages, in its Part V, sections 14 through 22. According to these provisions, a customary marriage which is subsisting on the appointed day, i.e., on October 7, 1971 may, where at least one of the parties to the marriage has a substantial connection with Hong Kong, be dissolved on or after that day in accordance with this part of the Ordinance. In other words, the Marriage Reform Ordinance contains a mode of dissolution of a Chinese customary marriage which the parties may avail themselves of, but which is not the only way of dissolving such a marriage.

Part V of the Marriage Reform Ordinance contains a procedure for dissolution of a customary marriage by the mutual consent of the parties. Section 16 states that the parties to a marriage which may be

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1/ 11 Laws of Hong Kong, ch. 178 (rev. ed. 1971), p. 4-5.

dissolved under this Part of the Ordinance, e.g., Chinese customary marriages, may give notice of their intention to do so in the prescribed form to a designated public officer. The notice, if given, is to be signed by both parties and published or given in the manner as may be prescribed. This notice of intention may be cancelled according to subsection (2) of section 16. If it has not been cancelled, then, not less than one month after notice has been given as above, the parties may appear in person before the designated public officer to whom notice was given. This is for the purpose of satisfying him that each party wishes voluntarily and freely to dissolve the marriage. If the officer is satisfied, according to section 17, subsection 2, that the parties--

- a. have given notice of intention to dissolve their marriage under subsection (1) of section 16 and notice of changed intention under subsection (2) of that section has not been given; and
- b. understand that the effect of dissolution is to put an end to the marriage so as to permit the parties to marry again should either of them so wish; and
- c. freely and voluntarily desire to dissolve the marriage, he shall sign the prescribed form in duplicate and deliver one copy to each of the parties. 2/

Section 18 stipulates that the public officer is to interview each of the parties in the presence of each other and also in the absence

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2/ Id. at 8.

of each other, and no person is to be present at any such interview, unless an interpreter is necessary.

Under section 19, the parties may, within one month of the delivery to them under section 17 of the prescribed forms, sign, in Hong Kong in the presence of each other and in the presence of two other adult persons who are also to sign as attesting witnesses, an agreement or memorandum in writing for the dissolution of the marriage unequivocally with effect from registration. Section 19 of the Ordinance further provides that an agreement or memorandum for the dissolution of a marriage, signed and witnessed as above, shall have the effect, as from registration under section 20, of dissolving the marriage.

Section 20 states that the parties to an agreement or memorandum for the dissolution of a marriage signed in accordance with section 19 are to register it within fourteen days from the date of signature with the public officer before whom they appeared earlier. That officer is to endorse on the document a record of registration under this section. This time period may be extended for special reasons. A register is maintained for the registration of dissolutions of marriage effected under section 19 as above.

A Chinese customary marriage effected in Hong Kong before October 7, 1971 may also be validly dissolved in a manner recognized by Chinese law and custom. The Ta Tsing Lu Li, the code of laws in effect in China at the time of Hong Kong's cession to Great Britain, which is generally taken to represent Chinese law as it existed at the time, per-

mitted unilateral divorce by the husband for any one of seven reasons. The seven grounds for divorce were: having no son, lascivious conduct, failure to serve her parents-in-law, loquacity, larceny, jealousy, and incurable disease. The three defenses against such unilateral divorce were: that it was during a period of mourning, that the husband's family had been poor before the marriage but was now rich, that after being divorced the wife would have no home to which to return. Divorce by mutual consent was also permitted, the Tsing Code saying that if both parties agree to separate owing to incompatibility of temper it may be done.

Parties to a Chinese marriage effected in Hong Kong prior to 1971, wishing to dissolve the marriage in 1976, thus could avail themselves of a divorce by mutual consent, either under the provisions of the Marriage Reform Ordinance or of customary law. The husband also had the unilateral right to divorce the wife on one of the seven traditional grounds, provided the wife in turn could not avail herself of one of the three traditional defenses against such unilateral action on the part of the husband.

If the divorce was by mutual consent of the parties, and if it was effected under Chinese customary law, there is no fixed form whereby such dissolution can be proved. A bill of divorce may be written, a deed may be executed, or a verbal announcement may be made. Thus, so long as there is evidence to prove the mutual consent to divorce, this will be sufficient. If the divorce by mutual consent was effected under the provisions of the Marriage Reform Ordinance, then under the procedures

that have been described earlier in this report, a registered agreement or memorandum of dissolution will be sufficient evidence of such dissolution.

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