

LCQ1: Protecting rights and interests of spouses after marital breakdown

Following is a question by the Hon Nixie Lam and a reply by the Secretary for Home and Youth Affairs, Miss Alice Mak, in the Legislative Council today (February 19):

Question:

It has been reported that while quite a number of prospective couples have drawn up prenuptial agreements through lawyers to make advance arrangements for the distribution of property and protection of their rights and interests in the event of divorce, prenuptial agreements are not legally binding under the existing legislation. In this connection, will the Government inform this Council:

(1) whether it will consider enacting legislation to ascertain the legal effect of prenuptial agreements; if so, of the details; if not, the relevant legal considerations;

(2) whether it will, by drawing reference from the Civil Code of the People's Republic of China, categorise a person's property into prenuptial and postnuptial property, without converting prenuptial property into joint property between spouses as a result of marriage; if so, of the details; if not, the reasons for that; and

(3) as it is learnt that while quite a number of members of the public protect their interests in property in matrimonial causes through the trust services provided by banks and trust companies, some banks require their clients to have a minimum of US\$1 million in liquid assets or US\$3 million in non-liquid assets, and some trust companies' minimum asset requirements for their clients are also very high, whether the Government will consider taking measures to provide members of the public whose assets have not met the relevant thresholds with a similar asset protection mechanism, so as to further enhance Hong Kong's status as an international asset management centre?

Reply:

President,

When applying for a divorce, both parties to the marriage would normally apply to the court for the settlement of financial matters, such as the division of property and application for maintenance. According to existing legislation, the Matrimonial Proceedings and Property Ordinance (Cap 192) (the Ordinance) empowers the court to order either party to the marriage to make to the other financial provision, or to make order for transfer of property, etc., when granting decree of divorce, decree of nullity of marriage or decree of judicial separation, or at any time thereafter.

In consultation with the Financial Services and Treasury Bureau and the Department of Justice, my reply, on behalf of the Government, to the question raised by the Hon Nixie Lam is as follows:

(1) According to section 7(1) of the Ordinance, the court shall have regard to the conduct of the parties to the marriage and all the circumstances of the case when dealing with matters in relation to financial provisions, transfer and sale of property, etc. The circumstances of the case include 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; the age of each party to the marriage and the duration of the marriage; as well as the contributions made by each of the parties to the welfare of the family. As the circumstances of the parties to the marriage and family in each case vary, each application shall be handled according to the actual situation. Under the current law, the court has broad discretionary powers to enable it to properly deal with different situations and make fair arrangements for the division of property.

Although Hong Kong currently does not have relevant legal provisions made for prenuptial agreements, the court will, based on the circumstances of the case and the conduct of both parties, consider adopting some or all of the contents of the prenuptial agreement. With reference to local cases, the Court of Final Appeal also pointed out in its judgment that although a prenuptial agreement could not override the powers of the court to grant ancillary relief, it carries considerable weight in relation to the exercise of the court's discretion when granting such relief. If prenuptial agreement is made between a couple prior to their marriage as to the manner in which their financial affairs should be settled upon divorce, the court should give weight to such agreement where it was fair to do so. Conversely, mandatory enforcement of a prenuptial agreement may, due to the unique circumstances of individual cases, such as something unforeseen at the time of the agreement occurred after the marriage, result in an unfair division of property and harm the interests of one party. It can thus be seen that the current regime effectively ensures that the court can, after fully considering the contents of the prenuptial agreement and all other factors related to the division of property, make an arrangement for division of property which is the fairest for both parties to the marriage to safeguard their interests.

(2) For the second part of the question, the division and definition of matrimonial property and non-matrimonial property depend on the specific circumstances of each case. As I have just mentioned, the court will consider a basket of factors in determining the division of property when the parties to the marriage divorce. According to Section 7(1)(f) of the Ordinance and with reference to local cases, the contributions made by each party to the welfare of the family and the source of the assets are factors that the court would take into account when dealing with the division of property. In fact, in accordance with the principle of fairness, the court must also take into account the financial needs of both parties and/or their children, as well as the standard of living they enjoyed before the divorce. Therefore, due to the uniqueness of each case, the court may not be able to deal with pre-marital

property in a uniform approach. The division of property upon divorce involves various complex legal principles and issues, which must be considered comprehensively and carefully. We believe that the current arrangement is effective and will keep in view the relevant situation.

(3) Regarding trust companies, the Government is committed to promoting the industry to offer diversified products, with a view to better satisfying the market needs and facilitating the long-term healthy development of the sector. There is no uniform standard on the asset threshold for setting up a trust. Trust companies in the market formulate different asset thresholds based on their business models, types of trust solution, clients' need and their levels of risk exposure. Trust companies offer diversified products and professional services to clients with different asset scales, providing them with greater flexibility and more choices when conducting asset allocation.

The Hong Kong Monetary Authority (HKMA) regulates the trust business of banks, so as to enhance clients' confidence in entrusting assets to banks in Hong Kong. At present, the HKMA does not impose any regulatory requirements on the minimum asset thresholds for the provision of trust services to clients. Banks may decide the conditions applicable to the provision of trust services to their clients, taking into account their own specific circumstances, such as target clientele, operational costs, resource allocation and market demand, among other factors. Banks will review and adjust their trust business, with reference to market developments and their own business considerations. The HKMA will continue to keep in view market developments, and enhance the regulations on the trust business of banks as appropriate.