

Research on the Legal Application of Property Division in Foreign-related Divorce

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Abstract. The number of transnational marriages is increasing year by year under the trend of globalization, which makes the new legal issue of foreign-related divorce more and more prominent. While divorce is the end of marital relationship between husband and wife, it is accompanied by a series of legal consequences, such as divorce property division. Divorce property issues in judicial practice is considered more complex, mainly because of its personal and property attributes. Divorce as the dissolution of the marriage relationship, and divorce property division has a close relationship, but because of the marital property has personal attributes, so in judicial practice for the division of divorce property is not simple. And due to the foreign marriage divorce property division of the existence of foreign sex, it is more complex. Therefore, this paper will start from the foreign divorce, divorce property division and other related concepts and principles, combined with relevant typical cases for analysis and discussion. From the foreign divorce, divorce property division and other related legal application of the status quo, through the analysis and discussion of the problems faced by the countermeasures proposed.

Keywords: Divorce Property Division; Foreign Divorce; Matrimonial Property System; Application of Law.

1. Basic Connotation of Foreign Divorce

1.1. The Clarification of the Concept of Foreign Divorce

According to the book *Civil Law (Fifth Edition)* edited by Wang Liming, the concept of divorce is divided into two aspects. On the one hand, it refers to the act of the parties to end the legal constraints on the parties to a marriage in order to eliminate their rights and obligations to each other, so that the husband and wife can return to separate individuals in the legal relationship; on the other hand, it is to declare the end of the spousal rights to the outside world, so as to determine the relationship between the husband and wife and the relevant third party's rights and obligations.

In contrast to the traditional definition of the concept of divorce, foreign marriage refers to divorce with a foreign element. There are two types of foreign-related divorces: foreign-related divorces in the narrow sense and foreign-related divorces in the broad sense. In the narrower sense, foreign divorce refers to the dissolution of a marital relationship in which one or both spouses have a foreign nationality (or are stateless). For example, in multi-jurisdictional countries, more than one of the spouses is a citizen of another jurisdiction at the time of the marriage; in countries where nationality restrictions are provided for in domestic law, more than one of the spouses is a citizen of another jurisdiction at the time of the marriage; and in China, two foreigners are married in the country, and two Chinese are married abroad. The validity of such marriages shall be recognised only on the basis of the relevant treaties or the principle of reciprocity and in accordance with the relevant laws of China. Based on the above two kinds of marriage involving foreign situations, only need to meet one of them, when the couple divorced, the civil law act can be called foreign divorce.

1.2. Foreign Divorce Property Division Regulations

According to the provisions of China's Marriage Law, the general principle of property division in divorce is the equal division of the couple's common property, which was first implemented by the Regulations on the Administration of Marriage Registration issued by the former Ministry of Civil



Affairs of the People's Republic of China, and then formally established by the Supreme People's Court's "Specific Opinions on the People's Courts' Trial and Handling of Divorce Cases in the Division of Properties" (hereinafter referred to as the "Regulations on the Administration of Marriage Registration"), which was issued on 1 August 2001, and has been amended since then. was formally established and has been amended several times since then. The Marriage Law, which came into effect on 1 March 2001, further stipulates this principle, providing that: "Where a man and a woman repudiate their agreement on the division of property within one year of the date of the divorce, and request that the agreement on the division of property be altered or revoked, the people's court shall accept the request. If the people's court, after hearing the case, does not find that there was fraud or duress in the conclusion of the property division agreement, it shall reject the party's litigation request in accordance with the law."

Foreign-related divorce property division refers to divorce property division with foreign-related factors. At present, China's legislation and judicial practice in this regard are blank, and the understanding of this concept in legislation and judicial practice is divided into a narrow and a broad sense. The narrow view that the foreign divorce property division refers to the foreign elements of the division of divorce property, the meaning of which is based on the fact that the foreign divorce, due to disputes between the husband and wife in the maintenance of the material basis of life, the duration of the marriage as a demarcation point, under the premise of distinguishing the nature of the property of the husband and wife, in accordance with the provisions of the law of the division of property disputed between the husband and wife. The narrow view is that the foreign-related element does not exist in the property itself, but is understood in three ways: subject, object and content. Firstly, the subject is foreign, i.e., one or both of the spouses in the division of divorced property have foreign nationality. Secondly, the object is foreign, i.e., the property divided between the divorcing spouses is located in or belongs to a foreign country. Third, the content of foreign, that is, the division of property involved in the divorce of the husband and wife, change and eliminate the fact that the place of occurrence of foreign countries.

In China's judicial interpretation of the definition of "foreign-related", from the literal meaning of the word "foreign-related" should not only have a certain meaning to the parties to the case. From the point of view of the legislative intent, the term "foreign-related" should refer to the existence of a certain legal relationship or legal fact with the parties to the case, as well as related to it or implicated in the case. From the viewpoint of judicial practice, if the party is not its nationality as the legal sense of "foreign-related", but its domicile in foreign countries, habitual residence, etc. as the legal sense of "foreign-related", then at this time ". The determination of "foreign-related" should be in strict accordance with the provisions of the judicial interpretation. Judicial interpretation clearly points out that, because one or both of the parties to the regular place of residence, domicile is not in the same reason, resulting in the People's Republic of China and the actual connection between the case, the people's court may be considered as a civil case involving foreigners. It can be seen, China's judicial interpretation of the "usual place of residence" and "domicile" as a prerequisite for the trial of foreign-related civil cases. In this case, the plaintiff LiangMouHong domicile for yunnan province chuxiong city shuangbai county longchuan town big dragon tree village committee, the defendant LiangMouAn domicile for yunnan province chuxiong city shuangbai county longchuan town big dragon tree village committee.

2. Principles of Division of Property in Foreign Marriages

2.1. The Principle of Autonomy

The principle of autonomy is a basic principle of private international law, which is embodied in all fields of private international law and has an irreplaceable important position. The connotation of the principle of autonomy of meaning is: the parties enjoy complete freedom in their legal status and decide the content and scope of legal relations according to their own will without interference from others; they enjoy complete freedom in their legal status, i.e., they have the right to choose different

legal systems within the scope of the law and to limit such choices; they enjoy complete freedom in their legal status, i.e., they have the right to decide whether to change or terminate the chosen system within the scope of the law; they have the right to decide whether to change or terminate the chosen system within the scope of the law. decide whether to change or terminate the chosen legal system; and enjoy complete freedom in their legal status, i.e. the right to choose a different legal system and to limit such choice within the limits prescribed by law.

The division of property in foreign divorces is a complex and difficult issue in foreign divorces, in essence, how to deal with the attribution of common property and pre-marital personal property between spouses after marriage. Specifically, the principle of autonomy is embodied in: first, the agreed property system takes precedence over the legal property system. This is mainly because the contractual property system than the legal property system can better meet the parties to the marriage relationship during the common property belonging to the agreement.

Secondly, the type of property regime is decided by the parties. This is mainly because different countries and regions have different ways of determining the form of common property between husband and wife, while different countries and regions have different ways of determining the form of common property between husband and wife. Third, the parties may agree to change or terminate the agreement on property. This is mainly because the parties can change or terminate the agreement on agreed property by agreement. Fourthly, for inheritance and gift, fully respect the will of the heir and the donor to determine whether the gift or inheritance is for one or both spouses.

2.2. The Principle of Personal Status of Husband and Wife

In the field of private international law, the husband and wife personal law (domestic rules), also known as "husband and wife personal law" (domestic rules of family relatives), refers to the application of the law applicable to the husband and wife parties, as well as the husband and wife or both parties to the law of the domicile (domestic domestic rules) or the law of the domicile (domestic domestic rules). (It refers to the law applicable to both spouses and the law of the domicile of one or both of the spouses (domestic domestic rules) or the law of the place of habitual residence (domestic rules). It is an important rule of private international law that is widely used in the application of the law of property relations between spouses.

The main legal basis for the "personal law of husband and wife" is the Marriage Law. Article 3 of China's Marriage Law provides that "husband and wife shall be faithful to each other and respect each other; family members shall respect the old, love the young and help each other, and maintain equal, harmonious and civilised marriage and family relations." This provision mainly reflects the fact that "husband and wife" in China's Marriage Law refers to the parties to a legal marriage relationship, including both husband and wife, and also refers only to both husband and wife. However, in social life, the relationship between husband and wife is often more complex and varied than other social relationships. For this reason, the Marriage Law also provides for a number of other legal provisions relating to marriage and the family, such as articles 7, 12, 14, 32 and 46. These provisions also provide alternative rules for the application of the law in judicial practice.

2.3. Principle of Unitary and Split System

For example, Article 46 of the Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relations provides: "The parties may agree to choose the law applicable to the contract. If the parties do not so choose, the law of the regular residence of the party whose performance of the obligations best reflects the characteristics of the contract or other law most closely connected with the contract shall apply." Both approaches are to some extent flawed, since the unitary system tends to favour a single substantive law as the governing law, ignoring the links between different entities, while the split system favours a particular substantive law as the governing law, ignoring the links between the spousal property relationship and other property relationships.

Therefore, the question of whether a unitary system or a division system should be adopted in the area of matrimonial property relations is one that deserves to be explored.

3. Legal Application of Property Division in Foreign Divorces

3.1. Precedent: Determination of the Validity of Marriage

Precedent, also known as incidental issues, refers to a country's courts in dealing with a private international law issue, if another issue must be resolved as a prerequisite, the issue can be referred to as the "main issue" or "main issue", and the other issue needs to be resolved first called "precedent issue" or "incidental issue". The other issue to be resolved first is referred to as the "preliminary issue" or "incidental issue". As far as the distribution of property in a foreign divorce is concerned, a foreign divorce is a prerequisite for the distribution of property, on the basis of which the establishment of the marital relationship between the parties is a prerequisite for a foreign divorce. For example, the case of "Foshunfa Minchu Zi 15170", on 12 February 2007, Liu Mouhong, Wu Moufeng in Macao, witnessed by a notary public, formally married, and signed a community property regime, and on 16 May 2007, registered in mainland China. The dispute over the division of property in the event of divorce between the parties was mainly due to the dispute over the attribution of the property purchased by the parties after the registration of the marriage, as well as the deposit of 500,000 RMB in an international bank in Macao. The plaintiff claimed that the above two properties were acquired after the marriage and were the joint property of the couple, and requested that the trial be conducted in accordance with the laws of Macao. The defendant, however, argued that there was no de facto marital relationship prior to the registration of their marriage. At the time he acquired the property, his marital status was unmarried, therefore, the property in question and the deposit were pre-marital personal property. After hearing the case, the court of first instance rejected the plaintiff Liu Mouhong's above claims. According to Article 7 of Interpretation 1 of the Marriage and Family Section of the Civil Code of the Mainland, the Mainland currently only recognises de facto marriages before 1 February 1994, while de facto marriages after 1 February 1994 shall be notified to re-apply for marriage registration after the promulgation of the Ministry of Civil Affairs' Regulations on the Administration of Marriage Registration. If the marriage has not been registered, it shall be handled in accordance with the provisions of Article 3 of this Interpretation. According to this case, the plaintiff and the defendant were in an unregistered de facto marriage, so after the notarisation and until they returned to the mainland to register their marriage, there was no marital relationship between the two of them. For this reason, the court of first instance, after hearing, made a decision to reject the plaintiff LiuMouHong prosecution requirements.

In this case, from the facts stated by the plaintiff, the marriage contract has been notarised in Macao, and the marriage contract has been registered, there is relevant evidence to prove that the contract can be presumed to be a legal marriage. When the de facto marriage in question is recognised as a legal marriage by Macao, the ruling on this case will also change significantly. Therefore, we can see from this case that due to the foreign-related attributes of the marriage in question, there will be certain legislative conflicts and procedural injustices in its confirmation of validity and other legal relationships. In recent years, China's courts have accepted a large number of foreign-related divorce cases. Property division in foreign-related divorces is one of the categories of difficult issues. First of all, it should be noted that when determining the validity of the marriage, the domicile of the parties cannot be used as a preliminary issue to determine the applicable law. In determining the domicile of the parties, should be based on the principle of personal status of the couple for full consideration. Where the current laws of China have clear provisions on the location of the spouses, full consideration should be given to the legal basis of the place of residence of the parties involved in the case. If the issue of precedence in its own nature to determine the applicable law, due to procedural deficiencies caused by the results of the judgement unfair.

3.2. Identification of Property in Foreign Divorces

At present, China's courts on the "foreign divorce property division" of foreign civil legal relations can be broadly divided into three kinds of identification: namely, the divorce relationship, the husband and wife property relations, property relations. In Case No. 15170 (2011), the judge of the first instance characterised the real estate in the divorce property as a legal relationship in rem. In the case of a dispute over the ownership of a property located in the Macao Special Administrative Region (MSAR), the judge applied the law in accordance with the conflict of laws norms on "immovable property" under Article 36 of the Law on the Application of Laws, thus invoking the law of the MSAR to adjudicate on the issue of the property. The judge of the court of second instance characterised the issue of the division of property in the divorce as a property relationship between the husband and the wife. The Court of First Instance found that the Court of First Instance had applied Article 36 of the Law of Application of the Law to invoke the applicable law, which was an error in the application of the law, and corrected the error by applying Article 24 of the Law of Application of the Law to determine the applicable law.

In the division of property in foreign divorces, since the division of property in foreign divorces is based on the nature of the division of property in divorce, it is inherently personal and property in nature. Simply identified as a divorce relationship or property relations, subject to divorce or property rights conflict of norms adjusted to ignore the unity of the divorce property division of personal and property. Therefore, the author believes that the foreign divorce property division should be one of the content of the foreign spouses should be resolved property relations. In our country, the adjustment of foreign spouses property relations are mainly reflected in the Civil Code, Article 1042 and Article 1077. Among them, Article 1042 stipulates: "Husband and wife may agree that the property acquired during the marriage and the pre-marital property shall be owned by each of them individually, jointly or partially by each of them individually and partially by each of them jointly. The agreement shall be in writing. If there is no agreement or if the agreement is unclear, the provisions of Articles 1062 and 1063 of this Law shall apply."

Article 1077 of the Civil Code provides that "The agreement of the husband and wife on property acquired during the marriage and on premarital property shall be legally binding on both parties." This provision only expands the legal effect of the husband and wife's agreement on property from "contractual debt" to "relationship of debt", and does not change the legal attributes of the husband and wife's property system, nor does it break through the scope of adjustment of the traditional marriage and family law. Therefore, the division of property in foreign divorces should be characterised as a "marital property relationship" from the perspective of safeguarding the legitimate rights and interests of the spouses and respecting the principle of autonomy of the parties. On the one hand, from the point of view of legislative intent, China's Civil Code, Article 1077 is in the marriage and family division of property in foreign divorce provisions. From the perspective of system interpretation, article 1077 of the civil code of our country "husband and wife property relations" part of the "marriage law" on the "husband and wife property system" content of the re-interpretation and re-adjustment, not only reflects the divorce property division of the identity of the law and the property law attributes. It reflects both the identity law and property law attributes of the issue of property division in divorce. On the other hand, although Article 1078 of the Civil Code clearly stipulates the principle of property division upon dissolution of marriage, the property to be divided is divided on the basis of the status of the marriage. Therefore, the applicable law guided by the conflicting norms on the property relations of spouses in the marriage relationship should be applied to hear cases of divorce property division. Therefore, the issue of property division in foreign divorces should be characterised as a "spousal property relationship" issue.

3.3. The Nature of the Division of Property in Foreign Divorce Cases

Divorce property division issues have both identity law and property law attributes. The property to be divided has the possibility of both movable and immovable property, and may also contain both movable and immovable property, which is more complex and has no established standards. In the

current judicial practice in China, the identification of the nature of the case often appear different judges for the same case to make different identification judgement. Therefore, the author suggests to judicial interpretation of the form of provisions, through a number of typical case law published for the judge to provide specific operational guidance. So that the judge in the trial practice, the characterisation of foreign divorce property division issues can be unified, so as to solve the problem of foreign divorce property division in a more equitable manner.

In the process of foreign divorce cases, on the question of whether and what kind of domestic law should be applied to deal with matrimonial disputes, the first thing to be resolved is to determine the jurisdiction of China's courts. Jurisdiction is the premise of the court's judicial trial, only to determine the court has jurisdiction to carry out effective judicial trial. Our laws do not contain clear provisions on the division of property in foreign-related divorces, but only in the Law on the Law Applicable to Foreign-Related Civil Relations, which stipulates in article 41 that: "Agreements relating to identity relations, such as marriage, adoption, custody, etc., shall be governed by the law relating to the identity relations; if there are no such provisions, the law closely related to the identity relations may be applied. "

4. Summary

In order to explore the legal application of foreign-related divorce property division issues, this paper adopts the combination of case analysis and theory, based on the consideration of typical cases and the research on the principles of foreign-related property division, it discusses the status quo of the legal application of foreign-related divorce property division in China, and gives some suggestions for the judicial problems found in practice. In the research and discussion about the necessary issues about property division in foreign-related divorce, this paper will discuss with the legal knowledge about de facto marriage learnt in the course of "Marriage and Family". With regard to the determination of the nature of divorce property in foreign marriages, the author discusses the reasons for the determination of its nature as "marital property" in the light of previous theories and typical cases.

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