

Money, Matrimony and Autonomy: The Way Forward for Pre-nuptial Agreements in Hong Kong

Introduction

On the first day of 2014, a local actor singer made the headline of a gossip magazine. He was reported to be marrying his Hong Kong girlfriend on mainland China¹, where his family wealth could be protected by a marital property regime, thus not subject to substantial sharing in the event of divorce. Nine days later, the high-profile divorce case of *TCWF v LKKS*² received a Court of Appeal judgment and made headlines. None of these stories involved pre-nuptial agreements, but they share a common theme relevant to this essay: how money decisions and personal choices are realistically embedded in marriage.

Pre-nuptial agreement (PNA)³ or ante-nuptial agreement refers to a contract made by a couple before marriage, which seeks to regulate their financial affairs during the relationship or to determine division of property in the event of divorce or separation⁴. This essay focuses on the second scenario. Together with post-nuptial agreements and separation agreements, they constitute what is known as marital property agreements.

As explained below, PNAs are not recognized in full force in Hong Kong. It is perhaps unfathomable that in this city where the spirit of the contract is safeguarded by the courts and cherished by many, that an agreement freely entered into by two individuals may not be enforced. Is our law on contract not consistent once marriage is in the picture?

¹ '3 Weekly Magazine', Issue No. 743, 1 January 2014.

² CACV166/2012.

³ 'PNA' refers only to pre-nuptial agreements in the following. Post-nuptial agreement is beyond the scope of this essay.

⁴ Law Commission for England and Wales, 'Marital Property Agreements' (Law Com No 198), p.viii.

To put matters in a macro perspective, in 2012 there were 60,459 marriages and 21,125 divorces in Hong Kong⁵. In 19,452 marriages in that year, one or both parties had married before⁶. Furthermore, 21,268 marriages registered in Hong Kong had a bride or bridegroom from mainland China in 2012, up by 3.8% from the year before⁷. The upward trend in these figures shows how complex marriage is getting in our time, and that is bound to have an implication on marital finance arrangements. Indeed, a local practitioner has noted that a lot of clients seeking the use of PNAs in Hong Kong are from mainland China⁸. It is time we take stock of this area in earnest.

This essay explores the current unenforceability of PNAs in Hong Kong and draws reference from other common law jurisdictions and mainland China in supporting the argument that PNAs should be recognized through legislative means to inject more certainty in our law relating to divorce and ancillary relief. This essay also recommends qualifications and limitations that should be inherent in enforceable PNAs.

The current status of PNAs in Hong Kong

Divorce, ancillary relief and PNAs

By way of background, Family Law in Hong Kong follows closely that in the UK. For instance, both jurisdictions do not have a clear demarcation between maintenance and property division in ancillary proceedings. As a relevant illustration, Hong Kong's Court of Final Appeal in *LKW v DD*⁹ adopted the 'equal sharing' principle in the English landmark case of *White v White*¹⁰. A 'yardstick of equal division of property' is to be applied after meeting the parties' financial needs when the court exercises its discretion with surplus assets pursuant to section 7 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) (MPPO), unless considerations in that section call for a departure.

⁵ Census and Statistics Department, 'Women and Men in Hong Kong: Key Statistics 2013 Edition' <<http://www.statistics.gov.hk/pub/B11303032013AN13B0100.pdf>> accessed 31 January 2014.

⁶ Ibid.

⁷ Ibid.

⁸ Hubbis, 'Using Pre-nuptial Agreements: An Interview with Rita Ku, Withers' <<http://www.hubbis.com/articles.php?aid=1347591407>> accessed 31 December 2013.

⁹ [2010] HKCFA 70; (2010) 13 HKCFAR 537[2010] 6 HKC 528; FACV16/2008 (12 November 2010).

¹⁰ [2000] UKHL 54, [2001] 1 AC 596.

LKW v DD not only shows how divorce cases in the UK have a bearing on our courts, but also clarifies for lower courts that the fairness principle in *White v White* for ancillary relief applies. The decision may cause unease for couples with disparate financial standings. PNAs, with their common use being to safeguard the wealth of one party from substantial division on divorce, are naturally at odds with the rule in *LKW v DD*.

‘Should pre-nuptial agreements be recognized and enforceable in Hong Kong?’ This question presupposes that PNAs are currently not recognized and unenforceable in Hong Kong. To date, there has yet to be any Hong Kong case authority primarily on the issue of PNAs, but the signs are that we follow the approach in the UK. Reference has to be drawn from UK case law. Historically, PNAs were void and contrary to public policy in the UK for allowing couples to provide for the breakup of their union. In *N v N*¹¹, it was held that ‘a pre-nuptial agreement that would be binding in Sweden would be “no more than material consideration in this court under section 25 Matrimonial Causes Act 1973”’ (the UK equivalent to section 7 of the MPPO). A similar approach was held by Ribeiro PJ in the main judgment of *LKW v DD* (obiter):

It has also been suggested that prenuptial and post-nuptial agreements might be classified as instances of ‘conduct’. I would be more inclined to regard them as relevant matters brought in under the general rubric of ‘all the circumstances’ (under section 7(1) of MPPO)¹².

PNAs are therefore recognized by Hong Kong courts only to a peripheral extent and carry such limited weight as the courts will attach to them in exercising the discretion under section 7 MPPO. Neither are PNAs binding on Hong Kong courts.

Other common law jurisdictions, however, have come to recognize PNAs through legislations. In Australia, PNAs are recognized as binding financial agreements in the Family Law Act 1975. New Zealand followed in 1976 with the Property (Relationships) Act 1976. The Uniform Premarital Agreement Act was introduced for individual states in the US to adopt in 1983. In the meantime, the UK courts have slowly but surely grown more receptive towards PNAs. Considerable weight was placed on the PNA in *Crossley v Crossley*¹³. Although the judgment was given on the unique facts of the case, i.e. both parties were of

¹¹ *N v N* (Foreign Divorce: Financial Relief) [1997] 1 FCR 573, [586 to 587].

¹² At [105].

¹³ [2007] EWCA Civ 1491, [2008] 1 FLR 1467.

mature age and of considerable wealth, both had married before and their marriage did not last long, the case represents the willingness of the UK Court of Appeal in recognizing PNAs when the facts call for it.

No discussion on PNAs would be complete without the 2010 UK Supreme Court decision in *Granatino v Radmacher*¹⁴, whereby the old rule that PNAs are contrary to public policy was announced obsolete, albeit *obiter*¹⁵. The case involved a German heiress and a French investment banker who executed their PNA in Germany, where the agreement was recognized. The Supreme Court ruled in 8:1 majority that as the PNA in question dealt with financial relief for the husband with *White v White* fairness (the husband's needs were amply provided for), the PNA should be given effect¹⁶.

Falling short of popular perception, the *Granatino* case did not give an emphatic green light for PNAs. At best, it only states that PNAs are no longer void and substantial weight is to be given to them, but the courts are not bound by PNAs, especially when their provisions are unfair. Yet the case is still a big step forward. The courts of Hong Kong, on the other hand, have yet to clarify the position in any landmark ruling. In view of the uncertain position post-*Granatino* and expectation for the recognition of PNAs, the Law Commission for England and Wales (LCEW) has issued consultation papers¹⁷ to drive for recognition for 'qualifying nuptial agreement' through legislation.

Marital property in a comparative perspective

A highly relevant concept to PNAs is marital or matrimonial property regime, which dictates how and sometimes when property is divided between spouses, thereby rendering certainty. Regimes range from separate property, meaning literally everything remains separate during marriage, to the total community of property¹⁸, whereby all property is shared between spouses, and the middle ground of community of acquests¹⁹ whereby property is classifiable into matrimonial or relationship (to which both spouses are entitled) and non-

¹⁴ [2010] UKSC 42.

¹⁵ Ibid at [52].

¹⁶ Ibid at [75].

¹⁷ The first paper 'Marital Property Agreements' (Law Com No 198) was issued in 2011 and a supplementary paper 'Matrimonial Property, Needs and Agreements' (Law Com No 208) was issued in 2012. The LCEW's final recommendations will be published in early 2014. <<http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm>> accessed 30 January 2014.

¹⁸ Adopted in countries such as the Netherlands and Sweden.

¹⁹ Adopted in countries such as France and New Zealand.

matrimonial or separate (not subject to sharing). If a default statutory regime is in place, it is usually accompanied by statutory recognition for PNAs to allow couples the freedom to contract out of it. One example is New Zealand's Property (Relationships) Act 1976.

Closer to home, Mainland China also has a marital property regime. Article 18 of the Marriage Law 2001 stipulates that property belonging to one party before marriage and property acquired by one party during marriage by will or gift, amongst others, shall belong only to that party. By Article 19, the parties can enter into a binding written agreement whereby property acquired by either during marriage shall be in that party's sole possession, thus offering added financial protection.

Hong Kong, by contrast and like the UK, does not have any statutory marital property regime. In fact, a survey conducted in 2011 reveals that Hong Kong is among the few places where no marital property regime exists and PNAs are not enforceable²⁰. That does not, however, prevent the court in finding non-matrimonial property in divorce cases. In *LKW v DD*, Ribeiro PJ noted²¹ that property acquired before or during marriage by one party from a source wholly external to the marriage such as by gift or inheritance may, depending on the duration of the marriage and at the court's discretion, be excluded from sharing at divorce, echoing the views of Lord Nicholls in *White v White*. On the other hand, the Court of Final Appeal in the same case tentatively commented that assets derived from a business or investment by one party ('unilateral assets') during marriage should be subject to the equal sharing principle.

The problem is, much of it depends on the court's discretion, hence litigants can only speculate on the outcome. The lack of clear guidelines has resulted in vastly disparate relief amounts in the big-money case of *TCWF v LKKS*²². The ancillary relief awarded by the lower court totaled \$1.47 billion, whereas the Court of Appeal reduced it to \$445.5 million. The huge difference resulted from the inclusion and subsequent exclusion on appeal of the husband's business interests in Japan, which was funded by his father and could be bought back by him at a nominal US\$1, in the matrimonial property. If Hong Kong had a clear

²⁰ Resolution, 'Family Agreements: Seeking Certainty to Reduce Disputes' <

http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf > accessed 30 January 2014.

[Table 1]. The other jurisdictions are England, Wales, Scotland, Guernsey, Ireland and Isle of Man. A total of 24 jurisdictions were surveyed.

²¹ At paragraphs 90-94.

²² CACV166/2012.

marital property regime, or in fact recognizes PNAs which may have covered the property in issue, such incongruent judgments might have been avoided.

The brief comparative study above shows that the general trend is towards greater autonomy to spouses over their finances, through marital property regime and/or acceptance for PNAs. As argued below, Hong Kong has every reason to emulate, or to begin a serious consultation and discussion in the very least.

High time for reform

While it is widely speculated that the courts of Hong Kong will follow the *Granatino* position, the wait for that ruling can be indefinite. It is submitted with arguments below that a better way is to preempt the uncertainty by way of a consultation and legislative proposal. Questions on recognizing PNAs can be addressed by weighing the pros and cons in a consultation. Some ideas are suggested here to support the argument that recognition is beneficial:

Reducing litigation

Ancillary relief proceedings are both financially and emotionally draining. PNA supporters advocate that gruesome litigation can be avoided if a PNA has been signed in the first place. The fact that *Granatino* is itself a case with a PNA seems a powerful rebuttal to this argument. Yet this case came about at a time when the UK courts' attitude towards PNAs was ambiguous. It is foreseen that should PNAs receive statutory recognition in Hong Kong, litigations challenging their enforceability will reduce and be replaced by challenges on their formality and surrounding circumstances. It is hence difficult to predict which way the number will go.

Encouraging marriage?

It is suggested that when spouses can take more control of their finances with PNAs, they would be more willing to get married. However, the Chinese culture dominant in Hong Kong has always gravitated towards marriage than cohabitation. The number of marriages in Hong Kong has grown steadily from 1986 to 2012. Do we need to encourage marriage further by recognizing PNAs?

Possible negative impacts

So far two supportive arguments have been assessed. Naysayers will go on to raise the class feature of PNAs as an opposition. PNAs are generally perceived to be reserved for the wealthy to prevent their inheritance or hard won fortune from falling into their less well-off former spouses. Although their use has been,

according to family lawyers, on a remarkable rise²³, still it is not particularly popular. Why then should we legislate something that may not relate to the wider public, and prevent redistribution of wealth?

Other doubts about PNAs concern their rigidity. No PNA can accurately predict and cover all the future circumstances of a couple's married life, such as the addition or reduction of properties, career changes or birth of children. While a PNA can be useful for a short marriage, too many changes can take place in one that lasts for decades to hold the spouses strictly to their PNA. Some may argue against having a PNA hanging over a crumbling marriage, that a mistreated spouse may be discouraged from divorce in view of an undesirable PNA.

Upholding individual's autonomy

Despite these reservations, much can be gained from making PNAs enforceable than not. It would allow couples the autonomy to dictate their own resources based on the cornerstone of our civil legal system, the freedom of contract. Currently, maintenance agreements concluded during marriage are recognized under section 14 of MPPO. Couples can make financial arrangements with respect to rights and liabilities toward one another after divorce. Why is this statutory allowance not extended to agreements for property division? If couples want to make comprehensive plans for the event that their marriage does not work out, our law should give them the choice. Such would be the hallmark of a liberal, modern and open-minded legal system.

In a way, PNAs are comparable to insurance policies, only the coverage is insulation against unpredictable property sharing. They can be useful not just for the rich, but also for the growing number of people entering second marriage who wish to protect their financial interests built up in a first marriage, or those of children from a previous marriage. Also, as people in general are marrying later, they may have more assets accumulated from their career that they wish to protect. Others may not be able to marry without a PNA due to family pressure, or have to marry in places where PNAs or marital property regime are recognized. Recognition for PNAs would provide a crucial choice and much needed peace of mind both to marrying couples and to their family.

Achieving certainty and keeping up with international standards

More certainty can be achieved, both in and out of courtrooms, if PNAs are recognized. The cases discussed earlier have highlighted how vague our courts'

²³ Hazel Parry, 'Savvy Couples Sign Up to Protect Their Assets' *SCMP*, 21 November 2010

<<http://www.scmp.com/article/731127/savvy-couples-sign-protect-their-assets>> accessed 7 January 2014.

positions on non-matrimonial property are, and that can only cost the litigants, the courts and the wider public. Given the case, it is better to let the spouses decide for themselves by PNAs, subject to the fairness perimeters maintained by the courts. Couples would know what to expect, and judges have reference points in PNAs to infer the parties' intention in deciding ancillary relief.

With an array of topics topping the public discussion agenda, the status of PNAs is easily overlooked. Yet high-profile divorce cases never fail to attract public interest, partly perhaps due to the suspense of how much the parties will be awarded. Awareness and understanding about financial rights on divorce can be enhanced by legislation preceded by consultation.

Recognition would also put Hong Kong on a par with a host of jurisdictions. This is particularly important since cross-border marriages and overseas weddings are common these days. Local couples no longer have to shop around for the right jurisdiction that recognizes PNAs. Fears about the rigidity and intimidating effect of PNAs can be countered by statutory allowance for variation and ultimately the courts' scrutiny of the circumstances surrounding the agreements.

As an answer to the view that PNAs 'kill the romance', the silver lining is, PNAs can make marriage purer in nature. Rather than undermining the institution of marriage, recognition for PNAs can only strengthen it because numeric calculations are now done prior to the nuptials.

In short, the advantages in recognizing PNAs are worth taking action. The question left to be asked is, how should we implement the PNA regime?

Recognizing PNAs: practical considerations

With a marital property regime?

PNAs can be recognized with or without a statutory marital property regime. Although marital property regime is beyond the scope of this essay, it is worth considering whether an overhaul of our laws in this area is desirable. The ramification of implementing a default statutory marital property regime is two-fold. On the positive side, by stipulating certain properties are non-matrimonial and not subject to division on divorce, it has the effect of forestalling some, if not all marital property litigations. Legislation can codify the obiter judgment in *LKW v DD* and make the rules clearer. On the down side, a regime risks being too rigid and a burden to the unsuspecting brides and bridegrooms-to-be – they have to be first alerted of its existence and be legally advised, and may then

have to take the trouble to enter into a valid PNA to get out of it, something which they would not have to do under the current system. This may mean more trouble than benefit for some.

Although the LCEW provisionally proposes introducing a rule that property held in the sole name of one party received as a gift or inheritance or acquired before marriage is not subject to sharing on divorce²⁴, taking this as far as legislation may not be desirable in Hong Kong due to delicate cultural differences. Where do we draw the boundaries for non-matrimonial property to begin with? The LCEW's proposal is narrow in approach. By contrast, mainland China's Marriage Law includes such items as 'articles for daily use specially used by one party' (Article 18(4)) and 'other property which should be in the possession of one party' (Article 18(5)), besides gift, inheritance and pre-acquired property, as non-matrimonial. Should unilateral assets be included as matrimonial property, as Ribeiro PJ noted obiter in *LKW v DD*? It is submitted that given the fluid and still-evolving scope of non-matrimonial property at this stage, it is best to let our courts develop the idea further, before a consultation is launched for marital property regime. This essay will thus not take the matter further.

Should the scope of PNAs be restricted to gifted, inherited and pre-acquired property, or can they cover unilateral and other assets? Following the autonomy argument above, no limitation should be set for now, except prohibiting an agreement from leaving a former spouse and children in need of maintenance (discussed below). The obiter comment by Ribeiro PJ is but a tentative one. As submitted above, our concepts on matrimonial versus non-matrimonial property can do with more clarity. Flexibility should be allowed to PNAs, whereas too restrictive an approach may make their use unpopular, thus robbing this area of an opportunity for development.

Legislating for PNAs

PNAs are a different issue. The time is ripe for statutory recognition which at the same time stipulates the requirements for an enforceable PNA. Various requirements will be examined in the following to arrive at viable recommendations for Hong Kong.

²⁴ LCEW, 'Matrimonial Property, Needs and Agreements' (Law Com No 208, 2012) [6.41].

Requirements for valid contracts fulfilled

PNAs are in effect contracts and as such, should represent the parties' intention to create legal relations supported by consideration. Yet PNAs are contracts of an entirely different kind – made between spouses, they defy the presumption of no intention to create legal relations in domestic agreements and are usually not supported by consideration. The Uniform Premarital Agreement Act of the US and New Zealand's Property (Relationships) Act²⁵ specify that such an agreement is enforceable without consideration. For the avoidance of doubt, such provisions can be included in our law.

For pragmatic purposes, PNAs must be in writing and signed by both parties to be binding and effective. Another contractual requirement is the absence of vitiating factors, meaning mistake, misrepresentation, duress and undue influence. The latter two factors have been the most discussed, and it is not hard to see why. Duress is the exertion of illegitimate pressure inducing the other party to enter into a contract. Would the imminence of wedding amount to duress to a heavily pregnant woman? Probably no, as the pressure exerted, although unfair, may not be illegitimate. Also the party still has the power to walk away from the PNA. Such is also the stance taken by the LCEW. Hence the test for duress is to be the same as that in the law of contract.

Undue influence is presumed in relationship of sufficient trust and confidence and a transaction inexplicable by ordinary motives. The relationship between people who are getting married appear to satisfy the first part of the requirement, although *Royal Bank of Scotland Plc v Etridge (No 2)*²⁶ held that the relationship of husband and wife is not one that always gives rise to the presumption. The existence of undue influence is therefore fact sensitive. As long as no vitiating factor is present, a PNA should be regarded as a valid contract.

Full and frank disclosure of assets

PNAs go beyond the standard contractual requirements. One or both parties to a PNA must disclose all assets at the time of the PNA so that the other party can make an informed decision in entering the agreement. In other words, in view of the fees and effort involved in making a financial disclosure, only the party who is seeking to enforce a PNA, usually the side with properties to protect, has the

²⁵ At NRS 123A.040 and section 21K respectively.

²⁶ [2001] HKHL 44.

burden of doing so. Failure to disclose substantial asset may render the PNA void at the court's discretion.

Independent legal advice

This is mandatory in Australia and New Zealand²⁷, but the LCEW recommends that absence of such advice should not in itself invalidate the PNA. In Hong Kong, the current position as perceived by some practitioners is that independent legal advice is 'preferable' for a PNA to be effective²⁸. It is submitted that independent legal advice for both parties should be made a prerequisite for a binding PNA, but the parties should be allowed to engage the same solicitor for cost consideration, provided that the solicitor acts in each party's interest and discusses with them separately. A PNA is simply too important a contract for any party to enter into without taking legal advice. Instead of leaving it to the courts to weigh on the effect of the absence of advice on a PNA, more certainty can be afforded by making it compulsory.

Timing and unconscionability

This is related to the issue of duress. It has been suggested that a PNA hastily signed on the day before the wedding cannot be fair for fear that it is thrust upon a party, hence a buffer should be set between the signing day and the wedding. While one local practitioner recommends six weeks, others simply suggests 'well in advance'²⁹. It is impractical to draw an exact line before which a PNA is considered pressure-free. What is the exact difference between 21 and 42 days before wedding? It is true also in Hong Kong that a wedding is planned a year in advance, so where should the date be set?

It is submitted that no definite deadline should be set. Rather, as a safeguard for the party with less bargaining power (usually the one with fewer financial resources), references can be drawn from Australia and the US, where

²⁷ See section 21F of New Zealand's Property (Relationships) Act 1976 and section 90G(1)(b) of Australia's Family Law Act 1975.

²⁸ Hubbis, 'Using Pre-nuptial Agreements: An Interview with Rita Ku, Withers' <<http://www.hubbis.com/articles.php?aid=1347591407>> accessed 31 December 2013; ONC Lawyers, 'Pre-nuptial agreement' <http://www.onc.hk/pub/oncfile/publication/family/0802_EN_Prenuptial_Agreement.pdf> accessed 31 December 2013.

²⁹ Ibid.

‘unconscionability’ is a factor upon which the court can set aside a PNA³⁰. New Zealand has a similar provision in its Property (Relationships) Act 1976 for agreements which ‘were unfair or unreasonable in the light of all the circumstances at the time it was made’³¹.

Such a provision should be included in Hong Kong’s PNA legislation to empower the courts to scrutinize the unique circumstances of each PNA. Timing is but one of the considerations here – if the PNA is signed at haste, have the parties had sufficient legal advice and reasonable amount of time to consider it? Even if duress or undue influence cannot be established, unconscionability may be found in a PNA, rendering it unenforceable. The proviso thus acts as a statutory protection for the vulnerable party.

Jurisdiction, fairness and limitation

It is crucial that no PNA can exclude or oust the jurisdiction of the courts on ancillary relief. Despite the effect of statutory reform being that the court will have to give full weight to validly entered PNAs, it will still have the statutory duty under section 7 MPPO in making the discretionary exercise. Disputing parties will also have to submit the formalities and surrounding circumstances of their PNA to the court’s scrutiny.

Importantly, the court will have the power to examine if PNAs meet the principle of fairness as affirmed in *LKW v DD*, in the sense that they must not leave one party’s needs unprovided for. It may be tempting to cut off an ex-spouse’s maintenance by a PNA. Our courts will see to that clause being unenforceable with the power under section 15 MPPO with regards to financial arrangements. The US Uniform Premarital Agreement Act provides that a PNA clause modifying or eliminating maintenance is only void if it results in the ex-spouse being on public assistance³². This threshold is too high. Instead the ‘needs’ strand of fairness should be the benchmark against which our courts can judge on the facts of each case.

Last but not least, a party cannot rely on a PNA to contract out of responsibility for the children of that marriage.

³⁰ Australia’s Family Law Act 1975, s 90K(1)(e) and the US Uniform Premarital Agreement Act, NRS 123A.080 1 (b).

³¹ Section 21J(4)(c).

³² NRS 123A.080 2.

Conclusion

In this age of heightened individualism and financial autonomy, when many jurisdictions around us recognize PNAs and allow them to lessen the judiciary's burden in deciding divorcing parties' finances, Hong Kong has stagnated in this area. The time has come to make laws for PNAs, and hopefully by doing so, the long overdue clarification of principles on marital property can be facilitated. A thorough collection of views and nuanced law drafting can balance demands and hesitations. Finally, our courts and legal system shall be the gatekeepers to ensure fairness alongside respect for individual autonomy.

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