

Divorced or separated?

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On Immigration Department Form ID 91 for applying for an extension of stay by a non-permanent resident of Hong Kong, there is an apparently innocuous line headed 'Marital Status', followed by a short series of boxes, one of which is to be ticked. These boxes are labelled: 'Bachelor/Spinster'; 'Married'; 'Divorced'; 'Separated'; and 'Widowed'.

Apparently simple and innocuous, but tick the wrong box and one is liable to prosecution for making a false statement to an immigration officer under s 42 of the Immigration Ordinance (Cap 115), a maximum penalty on indictment of a fine of HK\$150,000 and imprisonment for 14 years, or on summary conviction to a fine at level six and imprisonment for two years.

It is assumed that one's legal marital status is straightforward; if one has not gone through any form of a legally recognised marriage ceremony then one is a bachelor or a spinster. If one has gone through such a ceremony, one is married and continues to be in such a status until the Family Court (or equivalent in a foreign country) has either made a decree absolute of divorce or granted a decree of nullity of marriage under s 20 of the Matrimonial Causes Ordinance (Cap 179) (MCO). 'Separation' would apply where a decree of Judicial Separation has been granted under s 24 of the MCO, or the District Court has made an order under s 5 of the Separation and Maintenance Orders Ordinance (Cap 16). In each of those cases, a specific order from the court would have been made and the formal legal procedure should have been followed, so that each of the parties knows with certainty how and when the order was actually made by the court.

Most people, upon the breakdown of a marriage, apply for a decree of divorce. However, provision is made in s 24 of the MCO for a decree of Judicial Separation for those who, for religious or other reasons, want a practical and legal end to their relationship, but without breaking the venerated status of a marriage celebrated in church 'whom God has joined in holy matrimony let no man put asunder'. Hence, the box 'Separated' – with a capital 'S' – should apply to those who have obtained such a decree. However, in the past few years, the Immigration Department has introduced a new twist, which has caused considerable confusion and distress, particularly if one is arrested, called for an interview at the immigration investigation office and put on bail.

The new 'twist' is that to prove an irretrievable breakdown of the marriage the parties may prove that they have lived apart for one year (if both parties consent to divorce) or at least two years (when no consent is required).

It seems that the Immigration Department examines divorce petitions lodged with the Family Court, and it may now threaten a party to a petition with prosecution based on either of the grounds of 'separation' if that party during the period of having lived apart completed an application for extension of stay and ticked the box 'Married'. The investigation is based on the assertion that the party has failed to disclose a change in his/her matrimonial status as evidenced by lodging a petition based on having lived apart.

In a recent example of what can happen – a couple divorced on the grounds of having lived apart for two years. The decree absolute was granted in 2009. One of the parties re-married in 2010. Subsequently, the couple who divorced were summoned for investigation for having completed their applications for extension of visas in 2007 and 2008 declaring their status as ‘Married’, not ‘Separated’.

The Director of Immigration is also the Registrar of Marriages, so his view of what constitutes ‘marital status’ is naturally of great importance.

In Legislative Council proceedings, Dr Hon Margaret Ng, a Member of LegCo and who represents the Legal Functional Constituency, raised a question to try to clarify the current attitude of the Immigration Department in relation to the definition of ‘marital status’: see LegCo Question 3 (15 June 2011); available at: www.legco.gov.hk and www.info.gov.hk. The reply by the Deputy Secretary for Security, Mr Lai Tung-kwok, did nothing to clarify, but instead rather confuses the situation even further. He did not refer to Judicial Separation proceedings at all. Instead, his reply was:

“In accordance with the Matrimonial Causes Ordinance, a husband and a wife may enter into a separation agreement or, in other cases, either party may apply to the court for separation under the ordinance. Under the common law, apart from considering whether the applicant is living with his/her spouse, factors such as whether the applicant is still maintaining husband-and-wife relationship with his/her spouse (eg whether they have ceased to recognise the existence of their marriage and whether he/she intends to reconcile with his/her spouse, etc) *will be taken into account before judging whether they have been ‘separate’*. Immigration officers will provide appropriate assistance to application in case they raise any doubt when filling in their marital status.” (emphasis added)

It seems there is a new extension of the law to equate the filing of a divorce petition based on the period of time the couple have been living apart with a change in the marital status of the couple.

The reply from the Deputy Secretary for Security now seems to extend this to the entering into a separation agreement. The traditional view has always been that a separation agreement relates only to the personal arrangements between the couple, and the agreement itself does not change their legal marital status.

This also raises the matter as to whether an immigration officer should make such decisions, or whether such matters should be dealt with solely by the Family Court.

The question also arises that if the applicant, having lodged a petition for divorce based on a period of separation, but before the decree is granted, ticks ‘Separated’, is he/she in fact making a false representation as to his/her legal marital status?

The matter of marital status should be clear and easy to understand and not complicated by the uncertainties the Deputy Secretary for Security has set out in his reply to Ms Ng’s question. It also removes the certainty that was provided by the law as it used to be interpreted and extends the power of immigration officials.

Marriage is an institution enshrined under the Basic Law. If there is a breakdown in relations between the parties, it should be a matter of public policy to attempt reconciliation. If one follows the reply, an application for extension of stay can be refused. The party applying can be forced to leave Hong Kong and thus greatly reducing the possibility of a reconciliation and probably hastening, in practical terms, the end of the marriage.

Another point is that there is a gap of at least 42 days from the grant of a decree nisi for a party to apply for the grant of a decree absolute – one of the reasons for which is a last chance for reconciliation. This is a very strong indication that it is only the decree absolute that puts an end to the marriage, and that the marital status of both parties is ‘married’ up to the final act of the court in granting the decree absolute.

The Sex Discrimination Ordinance

The clear cut definition in the past of ‘marital status’ has, however, been made more difficult by the definition of ‘marital status’ in the Sex Discrimination Ordinance (Cap 480). Section 2 provides:

Marital status means the state or condition of being –

- (a) single;
- (b) married;
- (c) married but living separately and apart from one’s spouse;
- (d) divorced; or
- (e) widowed.

The Ordinance does not give any further guidance as to the meaning of (c); there is no indication of the length of time or the reasons for the separation. There is no provision as to who reaches the decision and after what process.

Probate

Marital status is very important with regards to matters of probate, especially intestacy. The Probate Registry holds firmly to the traditional means of establishing marital status – the provision of duly authorised documents from the official body with powers to issue such documents. An example of the value of standing by the traditional means of establishing marital status is shown by a recent case where a couple, well into late-middle age and married for many years, suffered in that the husband developed Alzheimer’s disease while his wife was diagnosed with cancer. She left Hong Kong to go abroad for treatment, which, after about a year, was not successful and she passed away.

Fortunately for the family, the traditional legal definition of ‘marital status’ applied: the couple were still married. But what distress could have been caused to the grieving family if it had to go into the whys and wherefores of whether or not they were still married or if they were separated.

In that case, both the husband and wife were Hong Kong Permanent ID Card holders – but if either of them were not, and either had to apply for an extension of stay, particularly if the husband was suffering from Alzheimer’s, how could they deal with the questions of the

immigration officers and depend solely on the officer's decision as to whether or not either were to be prosecuted?

The Immigration Department would no doubt resort to their usual comment that they treat each case on its merits, but the general public has the right to know the interpretation the Immigration Department will give to the words on their forms, and if the Immigration Department's interpretation is not that which the general public understands by 'marital status', the Immigration Department should put the applicant on notice before the form is completed.

Further considerations

There is also the aspect as to whether a non-permanent resident on lodging a petition for divorce based on either of the grounds of having lived apart, should be warned that such a petition may expose either party to the marriage to investigation by the Immigration Department with a view to possible prosecution.

There has been considerable discussion recently on the value of pre-nuptial agreements. If the new interpretation of 'marital status' by the Immigration Department is to stand, it would be a new factor to be taken into account in drafting such agreements.

Conclusion

Hong Kong prides itself on the 'rule of law'. Any step that removes the certainty of interpretation and application of the law is an intrusion. It would be a simple act by the government to clarify the uncertainty that has now been introduced into this aspect of life that affects so many people here.

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