

## Studies and Investigations on Overseas Divorce Property Division

ZHOU Xiujuan<sup>[a],\*</sup>; LI Nan<sup>[a]</sup>

<sup>[a]</sup>School of Law, Changchun University of Science and Technology, Changchun, China.

\*Corresponding author.

Received 12 June 2013; accepted 20 September 2013

### Abstract

This paper starts from investigating foreign countries' divorce property division and points out the legislation defects of Chinese divorce property division from two aspects which are the scope of community property of the spouses and the effect of property division. At last, the paper proposes some suggestions on introducing foreign experiences in order to realize further development of laws.

**Key words:** Community property of the spouses; Property division scope; Property division effect

ZHOU Xiujuan; LI Nan (2013). Studies and Investigations on Overseas Divorce Property Division. *Cross-Cultural Communication*, 9(5), 55-58. Available from: <http://www.cscanada.net/index.php/ccc/article/view/j.ccc.1923670020130905.2724> DOI: <http://dx.doi.org/10.3968/j.ccc.1923670020130905.2724>.

### INTRODUCTION

Due to different economic and political environments and culture differences in every country around the world, the legislation on marital property division varies from country to country. However, the overall legislation tendency develops toward a much fairer and more reasonable direction which is more favorable for protecting couples' legal rights and the third party's benefits and also for the stability of the society. As the first socialist country in the world, the former Soviet Union had brought great impact on other socialist countries around the world no matter in the aspects of politics, economics, or legal systems (*Divorce law sociology*, 1991, p.242). After liberation, China had been using the

former Soviet Union's mode to construct political and economic systems. Of course, Chinese legislation work had also been greatly influenced by the former Soviet Union. However, as the most advanced capitalist country in the world, United States' matrimonial property regime is a typical representative of the common law countries. Therefore, the paper introduces legislations of divorce property division in Russia and the USA and also analyzes China's current situation, problem, and methods for resolving problems by basing on the analysis.

### 1. RUSSIAN DIVORCE PROPERTY DIVISION LEGISLATION

After the collapse of the Soviet Union, Russia issued new family law in 1995 which makes detailed stipulations on divorce property division.

Article 33 of the 1995 "The Family Code of the Russian Federation" provides that "The legal regime of the spouses' property shall be the regime of their joint property. The legal regime of the spouses' property shall operate, unless otherwise is stipulated by the marriage contract." According to Article 34 of the 1995 "The Family Code of the Russian Federation", the following properties are community property of the spouses.

#### 1.1 Property Acquired by the Spouses During Their Marriage

"To the property, acquired by the spouses during their marriage (to the spouses' joint property) shall be referred the incomes of each of the spouses from his labor activity, from his business activity and from the results of his intellectual activity, pensions and allowances, received by both of them, and also the other monetary receipts, which are not specially target-oriented (sums of material assistance, those paid out in compensation for a loss inflicted by disablement because of a grave injury or because of another damage done to the health, etc.). The

spouses' joint property shall also be the movable and the immovable things and securities, acquired at the expense of their joint incomes, participation shares, deposits and shares in capital put into credit institutions or into other kinds of commercial organizations, and any other property acquired by the spouses in the period of their marriage, regardless of the name of which of the spouses it was acquired or the name of which of the spouses the monetary means were put in." (Article 34, 1995).

### **1.2 Property Division Under Special Family Relation**

"The right to the spouses' joint property shall also be enjoyed by the spouse who kept the house or who looked after the children in the period of the marriage, or who did not have an independent income because of other valid reasons." However, in the circumstance that during the period of separation, the property acquired by the husband and the wife separately can be recognized as individual ownership by the court when the family relation ends.

In addition, there is another type of spouses' joint property—transformed spouses' joint property. "The property of each of the spouses may be recognized as their joint property if it is established that in the period of the marriage at the expense of the spouses' common property or of the property of each of the spouses, or of the labor of one of the spouses deposits were made, which considerably increased the value of this property (capital repairs, reconstruction, re-equipment, etc)." (Article 37, 1995).

## **2. USA DIVORCE PROPERTY DIVISION LEGISLATION**

The USA is a federal country whose laws and regulations are different from state to state. Before the USA adopted the law and regulation on equal division of spouses' property, most common law states carried separation of property regime. Spouses can only get the property under his or her name when divorce. In other words, except few states which adopt community property principle, the name of the property is the decisive elements when deciding the ownership of divorced property. The 1971 Worth case in New York State shook the rigorous and unfair method for dealing property gained by spouses' mutual efforts during marriage (Xia, 1998). Afterwards, common law states' courts started to explore the advantages of community property regime. Currently, most states which used to adopt separation of property regime have now been using dual property regime and using fair division to divide spouses' property. In addition, there are some states which adopt singular separation of property regime. The scope of spouses' property is:

### **2.1 Definition on Community Property of States Which Adopt Spouses' Community Property**

There are only a few states adopt spouses' community property regime. According to community property law,

the original property of one party of a marriage as well as property which is given by others or inherited belongs to individual property (Wang, 2003, p.123). In addition, unless there is contrary agreement between the spouses, all property gained during marriage belongs to community property of the spouses no matter who acquired the properties. According to 1983 Uniform Marital Property ACT, marital property is: all property acquired by the spouses in marriage is community property and every spouse has half inalienable interests upon the community property (Wang, 2009). The following are exceptions to the above statement: a. property acquired as gift or inherited property which is left to one of the spouses; b. property which is exchanged by one's individual property; c. individual property which is recognized by judgment, martial property agreement, or other written agreements; d. unearned increment of individual property; e. compensation for the damages of individual property; f. compensation for personal accident but the compensation for marital property loss does not count or the ownership belongs to one or both parties of the spouses which should also be recognized as community property. The definitions of spouses' community property differ but usually are familiar with Uniform Marital Property. Property and income acquired during marital relations, such as wages, houses, furniture, and automobiles etc., no matter who acquired the property or whose name is on the property, they are all community property.

### **2.2 Definitions of Community Property in Dual Property Regime States**

The so-called dual property regime refers that spouses' property is divided into marital property and individual property. Marital property is divided fairly during divorce while individual property still belongs to the individual. In dual property regime states, marital property is usually defined as any property acquired by any party of the marriage while individual property is acquired before marriage and certain part of property during marriage. However, the details differ from state to state. Some states generally give the definition of martial property and list exceptions. For example, the family law of the New York state stipulates: any property acquired by the spouses or one of the spouses during the marriage and before the execution of divorce agreement or marital procedure, no matter the ownership belongs to either one of the spouses or both of them, is marital property. Marital property does not include the following individual properties: a. property gained by one of the spouses before marriage; b. property acquired after marriage through gift, legacy, and inheritance; c. compensation for personal damages of one party; d. property exchanged from individual property or value-added individual property, and individual property agreed through written agreements by both of the spouses. However, some other states give detailed scope of marital property and further provide individual property or non-marital property

scopes. For example, Ohio family law provides the following as marital property: a. movable and immovable property acquired by one or both spouses during marriage; b. fruits of the above mentioned property; c. any earnings or added value of personal property generated because of one or two parties' labor, capital, or any other forms of contributions while their spousal relationship subsists; d. any compensation obtained legally from the state or city. After all, in any kind of dual property systems, the most individual properties or non-marital properties include: a. property obtained by donation, bequest, and inheritance; b. property exchanged with individual property; c. value-added part of individual property; d. property excluded by valid agreements between the spouses; e. property gained after judicial separation.

### 3. LEGISLATION DEFECTS OF CHINESE DIVORCE PROPERTY DIVISION

The biggest defect of Chinese spouses' community property regime is that the scope of the community property is too narrow.

The property divided during divorce is the spouses' community property. Properties belong to husband, wife, or children individually and community property of the family cannot be divided as spouses' community property. Therefore, it is necessary to define the exact scope of spouses' community property before dividing it correctly. Chinese marriage law stipulates: "The following items of property acquired by husband and wife during the period in which they are under contract of marriage shall be jointly possessed: a. wages and bonuses; b. any income incurred from production or management; c. any income incurred from intellectual property; d. any property inherited or bestowed, with the exception of those as mentioned in Article 18 (c) of this law; e. other property that shall be jointly owned. Both husband and wife shall have equal rights in the disposal of jointly owned property. It is undeniable that spouses' community property regime is more useful for reflecting the essence of spouses' relation than other regimes which is decided by the ethic nature of marriage life. Spouses' community property has played a very important role in implementing equality of men and women, protecting women's legal interests especially those who engage in housework without any income or low income, strengthening family cohesion, and maintaining family stability.

### 4. SUGGESTIONS ON CHINESE DIVORCE PROPERTY DIVISION LEGISLATION

The authors of the paper suggest learning from Russian and the USA's related legislations to define Chinese spouses' community property scope in detail.

#### 4.1 Intellectual Property Earnings Generated During Marriage

Article 12 of the 2004 explanations on several issues of marriage law of the P.R. China stipulates, intellectual property income which is acquired or can definitely be acquired during marriage can be recognized as spouses' community property. This provision deprives the community right of the other party of the marriage who does not participate in the creation of the intellectual property and causes unfairness for him or her.

Thus, the authors think that apart from expanding the dividable intellectual property income to definitely can be acquired interests, we should give the spouse who does not participate in the creation process the right to ask for division of the expected interests of which the creation is finished during marriage but gained after divorce.

#### 4.2 Interests of Investment Made by One of the Spouses With His or Her Individual Property During Marriage

The 2004 explanations on several issues of marriage law of the P.R. China (2) stipulates that the earnings made by a party of the marriage with his or her own property belong to the spouses during the marriage. We should pay attention to such property because not all "marital earnings" belong to the spouses as community property. In other words, it is not fair for the owner of the original property. This paper thinks that when deciding the ownership of the earnings made by a party of the marriage with his or her own property, the reason of getting the earnings should also be considered. Whether the earnings generate because of the other party's partial or complete contributions. For example, some states of the USA clearly provide that the value added part is the community property of the spouses if the increased value generated because of the other party's contribution or efforts (Cai, 2003, p.194).

### REFERENCES

- Article 34. (1995). The Family Code of the Russian Federation.  
Article 37. (1995). The Family Code of the Russian Federation.  
Cai, F. H. (2003). *Spouses' property disputes analysis*. People's Court Press.  
Chen, W. (2000). *Studies on Chinese marriage and family law legislation*. Beijing people press.  
*Divorce law sociology*. (1991). M. X. Chen, & J. H. Xu (Trans.). Beijing: Peking University Press.  
Harry, D. (1999). *Krause: Family law*. Beijing Law Press.  
He, J. L. (2005). On the application of the principle of equity in Chinese divorce property division. *Studies in Law and Business*, (1), 104.  
Jiao, C. B. (2006). On Chinese divorce property division legislation defects. *Journal of Tangshan Teachers College*, (1), 28.

- Lin, X. X. (2001). *Studies on family and marriage law*. China Politics and Law University Press.
- Liu, X. S. (2002). Several issues in divorce property division. *Shandong Justice*, (3-4).
- Ma, Y. (2002). *Explanations of difficult issues in new marriage law*. The People's Court Press.
- McCathy, J. T. (1996). *McCarthy on trademarks and unfair competition* (Vol. 1, pp.2-37). Rochester, NY: Clark Boardman Callaghan.
- Richard, A. (2003). *Posner: Economic analysis of law*. China Citic Press.
- Wang, H. (2003). *Marriage and family law*, (1). Law Press.
- Wang, Q. (2009). *Family Law*. Retrieved from <http://law.lytu.edu.cn/ReadNews.asp?NewsID=115>
- Wang, X. Y. (2006). *Division of divorced stock rights* (Master's thesis). China Politics and Law University.
- Wu, C. Z. (2002). *Marriage and family law theory*. China Politics and Law University Press.
- Xia, Y. L. (1998). *American modern marriage and family law regime*. China Politics and Law University Press.
- Xia, Y. L. (1998). *American modern marriage and family law regime* (p. 232). China Politics and Law University Press.
- Xu, Y. (1997). *Corporate law theory*. Beijing Law Press.