

Can I Divorce in a China Court?

Description

I was approached for advice by a foreigner in regard of his contemplated divorce in China with his wife who is also a foreigner.

The facts of the case are: the couple, the husband from USA and the wife from East Asia, got married outside of China; the husband has been working in a Chinese city for more than 3 years, establishing his domicile in China under the Chinese civil procedures law; they have separated with each other for more than 2 years, a factor that prompted the husband to seek divorce. The husband wished to divorce in China without going to America.

So the primary and foremost question is whether the husband can litigate to divorce in Chinese courts. In legal jargon, does Chinese court at the domicile place of the husband have jurisdiction over the divorce?

Unfortunately, because there are no guidelines or interpretation from China Supreme Court on jurisdiction of such divorce cases, the answer to that question is not clear, varying from place to place in China, with some local courts exerting jurisdiction and some refusing to entertain such cases.

Many legal practitioners often argue, based on the territorial jurisdiction doctrine, that in such cases because one of the spouse resides in China for a period long enough (more than a year) to establish his or her domicile in China under China Civil Procedure Law, Chinese courts should have jurisdiction over such divorce cases. Accordingly, according to Section 22 of China Civil Procedure Law, in disputes over personal relationships such as those between family members, plaintiffs may sue in the courts in their domicile places when the defendants don't reside in China. And it is based on this legal provision that some courts in China have found ground to establish their jurisdiction over such divorce cases because the said Section 22 does not distinguish Chinese citizens and foreign nationals.

While that argument sounds plausibly true, in the most internationalized city in China, Shanghai seems to be very conservative in this regard.

In 2011, Shanghai High People's Court issued a guideline regarding court jurisdictions over certain cases in which it says that in foreign-related divorce cases, courts should focus on two elements/factors to establish jurisdiction, namely, nationalities of the parties and place of marriage (where the marriage is certified or registered). If neither of the two elements is concerned with China, Shanghai courts shall not exercise jurisdiction over such cases, unless the parties mutually agree to submit to Chinese courts and there is real need for Chinese courts to exercise jurisdiction. Therefore in our case, both parties are foreigners and their marriage was created outside of China, Shanghai courts will not entertain this divorce case.

However, in many places, there are even no such local rules and guidelines. Foreigners seek to end their marriage in China shall have to get a lawyer to argue with local courts in order to make a case in China. It is not an easy job but precedent cases in other places may lend help to your efforts.



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