Child Custody and Visitation under Chinese Laws

Description

International or cross-border marriages in China and with Chinese have been on steady rise in the past, and thus international or cross-border divorces have seen increase as well in China. We have been repeatedly approached by clients who wish to divorce in China with his or her spouse that is also a foreigner.

With regard to divorce (without regard to child custody), you can refer to other posts on this blog:

Can I Divorce in a China Court?

Easy married, hard divorced in China

Deal with the property in China after you get divorced in your home country

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One of the fierce battles in a divorce war is the fight for child custody and the child visitation for the party that does not win the custody for their child or children. Now if you are caught in a divorce war in a China court, you need to know the rules related to awarding child custody under Chinese laws.

I. **Child Custody**

?1? Concept of Custody

Here it is kind of messy regarding children custody under Chinese laws. First of all, China Marriage Law doesn't mention the word "custody" in any of its 51 articles. Instead, it uses the term "maintenance" or "support", and when the court orders that the child lives with one spouse, it refers to that as awarding direct maintenance to that parent. In effect, it is largely correct to replace the word "maintenance" or "support" with "custody".

Custody as a basic and fundamental institution in civil laws is now more clearly provided in China General Provisions of Civil Code (taking effect from October 1, 2017).

Parents are the statutory custodians for their minor children. Even upon divorce, both parents are still considered as custodians for the child even though the physical custody is awarded to one parent. This is indeed an old provision in the precedent version of China General Provisions of Civil Code, that has causing a lot of confusion in practice, as it doesn't distinguish physical custody and legal custody toward the child. Sadly, the new General Provisions does not touch on child custody of divorced parents neither.

But now, China General Provisions of Civil Code allows qualified custodians to agree on the actual custody over a child, a new provision which in my opinion enables the divorced the parents to agree on specific matters of child custody by one spouse while not deprives the right to custody of the other.

In the meantime, ironically, while joint custody of child is the norm for divorced parents as mentioned above, it shall be noted that generally the parent having physical custody is the one that shall assume tort liability if the child has committed tortious conducts against others. In other words, joint custody does not result in joint liability, illogical and unfair. We have noted cases where the other parent who doesn't have physical custody of the child is called to pay damages to others if the first-mentioned parent is not able to pay those damages alone.

(2) How to Obtain Custody in A Divorce

The general principle for courts to award custody to divorcing parents is to see who will be give the best benefits and best serve the child, taking into account various factors of family conditions. For example, the court will consider the availability of grandparents who are able to assist in the daily care of the child.

In judicial practice, courts tend not to break the status quo of the child's life. For example, if the child has been living with one parent or grandparents for long, the court will be more likely to keep the current situation unless the other parent has much better conditions to offer, not just financially but also emotionally.

So for divorce cases involving fight for child custody, it is advisable for the parent to cultivate a favorable status quo for the child's life before filing the divorce case.

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II. **Child Visitation**

If one parent loses the fight for child custody in China court, he or she may wish to protect his or her visitation right to see the child regularly.

It is always a difficult situation to deal with child visitation when the parents are from two different countries, much depending on the post-divorce chemistry of the parents.

With regard to divorce with Chinese wife, if the child custody is granted to the wife, it is more likely that the ex-husband will have a tough time to visit the child as very often the Chinese wife is more difficult to deal with after divorce. To make things worse, China courts very often cannot help much after the divorce with regard to child visitation as they tend not to enforce such personal rights.

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