Australian Government

Refugee Review Tribunal

Country Advice

China

China – CHN35704 – Divorce

7 December 2009

1. Is it possible for a person's mother to have divorced the person's father and their mother make arrangements about the property and children without the father's agreement or when she did not know his whereabouts?

Though no definitive answer to this question was found, the law requires both parties to be present and to have signed a divorce agreement in order for the divorce to be quickly dealt with by the marriage registration office. If these conditions are not met, the case should be dealt with by the court system. No cases were found where one person obtained a divorce without the other person being informed, apart from a number of fraudulent cases. Attempts to gain an expert opinion were unsuccessful.

Legal position

In China, divorce takes place according to the provisions of the *Marriage Law* (2001)[1] and the *Regulations on Marriage Registration* (2003). That these are the relevant pieces of legislation is confirmed by a prominent Chinese academic Dr Xia Yinlan in her recent article on divorce in China.[2] No English language copy of the *Regulations on Marriage Registration* (2003) was found, but a Chinese language version is attached with Google translation at Attachment 3.[3]

Chapter 4 of the 2001 *Marriage Law* covers divorce. It generally requires both parties to attend the local marriage registration office of the Civil Affairs Bureau and to sign a divorce agreement relating to the children and the property (Art.31). If both parties are present and have agreed on a divorce agreement, a divorce may be granted on the spot at the marriage registration office (Art.31). If only one party desires the divorce or if one party is missing or if an agreement cannot be reached on the children and property, the party desiring the divorce would need to apply to the People's Court to grant the divorce, according to Article 32:

[1] *Marriage Law of the People's Republic of China*, Adopted 10 September 1980 & 28 April 2001, People's Republic of China – Ministry of Foreign Affairs website http://www.fmprc.gov.cn/eng/3625/3630/t18322.htm – Accessed 10 August 2009 – Attachment 1.

[2] Xia, Yinlan 2009, 'Comments and reflections on Chinese divorce registration system', *Frontiers of Law in China*, Vol.4, No.2, pp.281-2 – Attachment 2. Dr Xia is, according to her article "a professor and doctoral tutor and the dean of the School of International Studies in China University of Political Science and Law. She is also the vice chairman of Beijing Women's Federation, the member of the executive committee of China Women's Federation, the director of Marriage and Family Legal Research Institution under the supervision of China Law Society …" Her article also notes "She's one of the experts in drafting the P.R.C. Law on the Protection Of Women's Rights (revised), the Marriage Law of P.R.C. (revised) and the Regulation of Marriage Registration of P.R.C., and she is still active in participating in the legislation activities of China." (p.292)

[3] '婚姻登记条例（2003 年 8 月 8 日国务院令第 387 号发布）' (Marriage Registration Ordinance (August 8, 2003 the State Council Order No. 387 issued)) 2003, Ministry of Civil Affairs of the People's Republic of China website http://www.mca.gov.cn/article/zwgk/fvfg/jczqhsqjs/200706/20070600000136.shtml – Accessed 3 December 2009 – Attachment 3.

> Article 32 When one party alone desires a divorce, the organizations concerned may carry out mediation, or the party may appeal directly to a people's court to start divorce proceedings.
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> In dealing with a divorce case, the people's court should carry out mediation between the parties. Divorce shall be granted if mediation fails because mutual affection no long exists.
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> Divorce shall be granted if mediation fails under any of the following circumstances:
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> (1) bigamy or, cohabitation of a married person with any third party;
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> (2) domestic violence or, maltreatment and desertion of one family member by another;
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> (3) bad habits of gamble or drug addiction which remain incorrigible despite repeated admonition;
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> (4) **separation caused by incompatibility, which lasts two full years**; and
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> (5 **any other circumstances causing alienation of mutual affection**.
>
> **Divorce shall be granted if one party is declared to be missing and the other party thereby files an action for divorce.**

Similarly the *Regulations on Marriage Registration* (2003) (at Attachment 3) discuss divorce in Chapter 3 (Articles 9-14).[4] These also call for both parties to be present at the marriage registration office (art. 9), and to sign an agreement relating to child support, property and debts (art. 10).

Situation where one party to a divorce is in prison

No information was found on this situation in the sources consulted. Dr Xia Yinlan in her recent article on divorce in China[5], does not mention such a situation. Dr Xia notes that the 2003 regulations removed the need and power for the authorities to check and control all aspects of the divorce. She worries that the new regulations provide too much freedom for individuals to obtain fast divorces and that there is now insufficient protection for disadvantaged parties. She notes there is no requirement for officials to review the marriage agreement in relation to its legitimacy, fairness or effects on the children. She notes that insufficient checking by the marriage registration office could result in a divorce being granted under fraudulent or deceitful circumstances. She states:

> Thirdly, there lack legal remedies for the party who has not truthfully expressed his/her will. One of the most important conditions for consensual divorce through registration procedures is that both parties to the agreement express their wills truthfully and voluntarily. The complete civil capacity of both parties and the truthful expression of wills of both parties with consensus is the precondition for the effectiveness of the agreement. However, in practice, there are many circumstances resulting in the untrue expression of the wills of the parties, such as where a party is a person without capacity of civil conducts or a person with limited civil capacity; where the agreement is reached by menace or **fraud** of a party; where **false expression of wills** are made by both parties through conspiracy to cheat the marriage registry;

[4] '婚姻登记条例（2003 年 8 月 8 日国务院令第 387 号发布）' (Marriage Registration Ordinance (August 8, 2003 the State Council Order No. 387 issued)) 2003, Ministry of Civil Affairs of the People's Republic of China website http://www.mca.gov.cn/article/zwgk/fvfg/jczqhsqjs/200706/20070600000136.shtml – Accessed 3 December 2009 – Attachment 3, supplied with Google translation. NOTE: Google translations can often be poor and can contain errors - as such they give only a rough indication of the contents of a document. For any further reliance on this information, a better translation should be obtained.

[5] Xia, Yinlan 2009, 'Comments and reflections on Chinese divorce registration system', *Frontiers of Law in China*, Vol.4, No.2, pp.281-2 – Attachment 2.

> or where a party fails to express his/her will to divorce in person. For those circumstances, if the marriage registry has not discovered them in a timely manner and handled the divorce registration on the spot, the divorce will have legal force immediately. (p.288)

No reports of cases of divorce where one party is in prison were found in searches of English or Chinese language sources. *China Daily* reports that a man obtained a divorce without his wife's knowledge in 1999, by having another woman pose as his wife.[6]

Other reports indicate that, in cases where one party cannot attend the marriage registration office, the divorce application must be handled by the court and will take at least nine months if the other party cannot be contacted:

- A Shanghai legal advice website offers an opinion on the procedure when one party is absent, overseas or missing. It states "According to our country's law, if one party can't go back China to finish the divorce registration procedure, such divorce can only been settled by the court other than applying to the civil administration office".[7] This website notes that, in such a case, the court will try to contact the absent party to obtain their agreement to the divorce settlement. If the other party cannot be contacted within nine months, the court can make a judgment, but only on the personal divorce and not on the division of property.[8]

- The China Family Law Research Center website on divorce[9] states:

> When applying for a divorce registration, the couple have to apply by themselves other than asking someone else to do it, and even lawyers could not act as agency as well, which is a bit different from foreign countries. **If one party couldn't appear, they will have to go to the court.**

Expert advice was sought from seven academics who specialise in Chinese society or Chinese law, but only three responded to calls and correspondence and none of these were able to give any information on this case.[10]

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[6] 'Divorce granted 10 years ago deemed invalid' 2009, *China Daily Online* (Source: Henan Commercial Daily), 21 November http://www.chinadaily.com.cn/cndy/2009-11/21/content_9015920.htm – Accessed 4 December 2009 – Attachment 4.

[7] Wang, Edwin 2009, 'Different kind of foreign divorce cases', Wang Yuejian Lawyer website, 18 September, point 1 http://www.cnlawyerforforeigner.com/shownews.asp?newsid=60 – Accessed 7 December 2009 – Attachment 5.

[8] Ibid. point 1B(2).

[9] 'China Family Law – Divorce in Shanghai' (undated), China Family Law Research Center http://www.familylaw.com.cn/cases/03.htm – Accessed 7 December 2009 – Attachment 6.

[10] The following academics were contacted by telephone or email: Dr Anita Chan, Dr Tamara Jacka and Dr. Sally Sargeson (Contemporary China at the Australian National University), Dr Sarah Biddulph (University of Melbourne), Dr. Elaine Jeffreys (China Studies, Sydney University of Technology), Dr Zhang Yun (ex of University of Technology – author of thesis *A study on the divorce problem in contemporary China*) and Dr. Margaret Y.K. Woo (Northeastern University School of Law, Boston). Only Dr Chan, Dr Jacka and Dr Jeffreys responded, but they had no information on the matter. (Copies of the correspondence are available on ISYS.) The author of the article cited at Attachment 2, Dr Xia Yinlan was not contacted as she is currently at a university in China.

2. Marriage and Divorce Regulations in Fujian.

Sources indicate that Fujian, including Fuqing, follows the national standards for marriage and divorce outlined in the national *Marriage Law* (2001) and the *Regulations on Marriage Registration* (2003), rather than apply separate provincial regulations.

The Shanghai regulations on marriage and divorce, currently on the Shanghai government website in English and referred to in MRT Research Response CHN35505, are from 1999 and were passed before the *Regulations on Marriage Registration* (2003) which radically changed divorce procedures (as was described in the previous question). These 1999 *Procedures of Shanghai Municipality on the Administration of Marriage Registration* are now out of date. It should be noted that they were "formulated in accordance with the Marriage Law of the People's Republic of China (hereinafter referred to as Marriage Law) and the Regulations on the Administration of Marriage Registration"[11], i.e. they conformed to the national regulations of the time.

No provincial regulations relating to marriage were found in Chinese language searches of the Fujian government website (www.fujian.gov.cn) The website contains a (Chinese language) list of instructions for divorce registration (at Attachment 7)[12] which describes the requirements and procedures for divorce in Fujian. It notes that the legislative basis is the national Marriage Law and Marriage Registration regulations, and does not list any separate Fujian regulations. .

[11] *Procedures of Shanghai Municipality on the Administration of Marriage Registration*, Shanghai Municipal Government website http://www.shanghai.gov.cn/shanghai/node17256/node17413/node17427/userobject6ai917.html – Accessed 2 October 2009 (not attached).

[12] '国内公民离婚登记服务' (Civil divorce registration services for domestic citizens) (undated), Fujian government website, http://www.fujian.gov.cn/wsbs/bm/smzt/200710/t20071006_36946.htm – Accessed 4 December 2009 – Attachment 7.

Attachments

1. *Marriage Law of the People's Republic of China*, Adopted 10 September 1980 & 28 April 2001, People's Republic of China – Ministry of Foreign Affairs website http://www.fmprc.gov.cn/eng/3625/3630/t18322.htm – Accessed 10 August 2009.

2. Xia, Yinlan 2009, 'Comments and reflections on Chinese divorce registration system', *Frontiers of Law in China*, Vol.4, No.2, pp.280-292.

3. '婚姻登记条例（2003 年 8 月 8 日国务院令第 387 号发布）' (Marriage Registration Ordinance (August 8, 2003 the State Council Order No. 387 issued)) 2003, Ministry of Civil Affairs of the People's Republic of China website http://www.mca.gov.cn/article/zwgk/fvfg/jczqhsqjs/200706/20070600000136.shtml – Accessed 3 December 2009

4. 'Divorce granted 10 years ago deemed invalid' 2009, *China Daily Online* (Source: Henan Commercial Daily), 21 November http://www.chinadaily.com.cn/cndy/2009-11/21/content_9015920.htm – Accessed 4 December 2009

5. Wang, Edwin 2009, 'Different kind of foreign divorce cases', Wang Yuejian Lawyer website, 18 September http://www.cnlawyerforforeigner.com/shownews.asp?newsid=60 – Accessed 7 December 2009.

6. 'China Family Law – Divorce in Shanghai' (undated), China Family Law Research Center http://www.familylaw.com.cn/cases/03.htm – Accessed 7 December 2009 .

7. '国内公民离婚登记服务' (Civil divorce registration services for domestic citizens) (undated), Fujian government website, http://www.fujian.gov.cn/wsbs/bm/smzt/200710/t20071006_36946.htm – Accessed 4 December 2009.