

Q&As

Description

The Q&As below are related only to cross-border family laws and practice. These questions and answers are published by China Supreme Court, and we have just translated them for your reference.

I. Questions on Litigation Procedures

1. In a lawsuit, the parties voluntarily divorce and agree on property issues and the handling of debts and claims, can a third party [apply for a retrial](#) because the court's civil mediation document which confirms the agreement violates his/her legitimate rights and interests?

A: The parties to a divorce dispute case can only be the two parties to the marriage, and no third party outside the case is listed as a party to the divorce litigation in China.

In general, there is no legal basis for any third party to apply for retrial of divorce case for the ground that the mediation agreement violates his/her legitimate rights and interests, and the People's Courts in China shall reject it. However, if a court finds that there is indeed a mistake and a retrial is necessary, the Court shall go through the trial supervision procedure in accordance with the spirit of the relevant laws.

2. Where the debtor (the enforcee subject to court judgment) has divided the community property of the spouses through the divorce agreement (in the case of amicable divorce without going to China court) or the divorce judgment of the court, can a China court directly add the debtor's former spouse as a new enforcee and enforce against former spouse's properties?

A: According to the spirits of the relevant laws, the divorce agreement of the parties or the divorce judgment of the court on the division of property is only binding on both spouses, but not on other creditors. If the debts in question were incurred before the marriage or after the divorce, the said former spouse cannot be added as an enforcee to go after his or her properties.

3. In divorce proceedings, when the value of property is being disputed between the parties, is it necessary to appoint an appraiser to evaluate it?

A: If the value of the property is in dispute, the parties may determine and deal with the property through negotiation, bidding, valuation, appraisal, auction, etc. The principle of taking care of the rights and interests of the children and the wife and the principle of taking care of the party who is not at fault should be adhered to when dealing with splitting of the property, so it is not necessary to commission an agency to evaluate the property.

4. In divorce proceedings involving the division of the family joint property (meaning there is a co-owner or more beyond the divorcing parties), can such other family members be added as joint litigants?

A: The parties may be informed to file a separate lawsuit or to suspend the divorce proceedings in respect of the division of the joint family house, and other family members should not be added as joint

litigants in China divorce proceedings.

[Jason Tian Comments: in China court divorce proceedings, only the couple are the parties to the divorce proceedings, no other party is allowed to join the proceedings raising their concerns or claims. After all, divorce is only between two of the couple.]

5. Where the divorce lawsuit involves the division of the family joint house, after the court suspends the divorce lawsuit, the divorced couple and family members do not file a lawsuit to determine the right and division of the house, then how to handle the divorce case?

A: In such cases, courts may explain to the parties concerned the legal consequences of not suing for the determination of the right and division of the house, and seek their opinions on the division of the joint family house involving the common part of the spouses.

If the parties agree not to claim interests in the family joint property in the divorce proceeding, the Courts shall resume; if the parties insist on the division, the courts may impose the time limit for them to file a lawsuit with competent court, after expiry of which the courts shall notify the parties to resolve their dispute in a separate case, the divorce proceedings shall then resume.

6. Where a husband sues his wife for divorce and a wife sues her husband for a crime of bigamy, can the two cases be heard simultaneously?

A: Under Chinese laws, the two are different proceedings, civil litigation of divorce should be suspended, and later on resume when the criminal proceedings for bigamy concludes.

7. What procedures should be applied to the case of marriage annulment?

A: Marriage annulment is a non-litigious case, courts may apply the provisions of Special Procedures in China Civil Procedures Law. Matrimonial property splitting and child support issues shall be handled separately from the issue of marriage annulment.

8. Can the claim for divorce damages be handled together during the divorce proceedings in China?

A: According to the relevant judicial interpretations by China Supreme Court, they can be dealt with together. The party who has the right to file a claim for damages must be the one who is not at fault for the divorce, and the parties must be legally married and not in a cohabitation relationship.

9. Should the court support a party who, instead of suing for divorce, sues for damages against the other party during the marriage?

A: Courts shall not support such a claim solely for damages.

[Jason Tian Comments: *in divorce proceedings in China, the party who is at no fault for the failure of the marriage has a right to claim for damages arising from the divorce including material and spiritual damages. However, it shall be noted that if the no-fault party is the plaintiff to the divorce litigation, then he or she must raise the claim for damages together with the divorce claims, and won't have a chance to separately sue for damages after divorce is done. On the other hand, if the no-fault party is the defendant in the divorce proceedings, then she or he may sue for damages together during divorce proceeding or separately in a new case after the divorce is declared by court.]*

10. Is the legal consequence of declaring a party missing or dead the same as that of divorce by default?

A. The legal consequences of declaring a party missing or dead and of granting a divorce in default judgement are different. The main difference lies in whether the marriage between husband and wife can be restored according to the relevant laws.

11. If a party to a divorce case claims to divide marital properties only after the expiry of evidence discovery time limit or at the time of court hearing, should it be dealt with together or separately?

A: In the above case, courts may not hear the case together and inform the parties to file a separate case. However, if the other party agrees to defend the claim, considering the special nature of the divorce case, permission may be granted, and the court shall re-designate the period of evidence discovery for the new claim, which can be agreed between the parties.

[Jason Tian Comments: *with amendment of new China Civil Procedures Law, addition of a new claim can be permitted before the closing arguments if such new claim, in nature, can be heard together with original claims.]*

12. In a divorce case, if the defendant refuses to appear in court without a valid reason after being legally summoned, will a divorce judgment be issued in court?

A: Since a divorce case in China mandates a mediation process, courts shall generally treat the case with caution when a party doesn't appear in court, and shall generally not issue a default judgment, except however for cases in which constructive notices are served.

13. If a divorce case is withdrawn by the plaintiff but in the meantime, the defendant requests for divorce, should such request from defendant be regarded as a counterclaim and thus be tried in the same divorce proceeding or should the court tell defendant to start divorce in another case?

A: The defendant shall need to file another case.

14. If a divorcing party does not pursue the criminal liability of his or her spouse for bigamy but only requests to deal with the divorce only, should the court allow that? Should the court take the initiative to report bigamy crime found to the relevant departments for handling?

A: Courts shall grant permission, but it shall not affect the party to file a private prosecution case of bigamy by his spouse according to the Criminal Procedure Law thereafter. The courts shall take the initiative to report and transfer the bigamy found to the public security department for handling.

15. The husband sues for divorce and the court only finds out during the trial that the wife is in the period of pregnancy, within one year after delivery or within six months after termination of pregnancy. In this regard, should the court dismiss the lawsuit because the husband's lawsuit does not meet the criteria of case filing, or should the court deal with the substantive matter based on the merits?

A: If the above situations are found, the courts shall dismiss the lawsuit initiated by the husband for not meeting the criteria of case filing. However, if the court considers it necessary to accept the case filing, for reasons such as that the wife has a material fault (bigamy, concubinage resulting in pregnancy and the husband cannot forgive, or the wife committed domestic violence to the extent that the husband's personal security is seriously threatened), the court can accept the case and deal with its substantive aspects.

16. In a divorce case, can the father or mother be allowed to appear in court on behalf of the defendant in the absence of forensic conclusion that the defendant is mentally ill?

A: In case of the above, if there is no conclusion from forensic agency that the defendant is mentally ill, the party shall not be found as being incapable of civil conducts, and his or her father or mother cannot be allowed to appear in court on behalf of the defendant as the legal representative.

17. If in a divorce case, the defendant asks the plaintiff for compensation arising from spiritual damages, is it a counterclaim? Should such claim be heard in the ongoing divorce proceeding?

A: It is not a counterclaim, but should be heard together as one of the claims in the divorce lawsuit.

18. How should the People's Court deal with a divorce damage claim filed by one spouse based on Article 46 of the Marriage Law (now Article 1091 of the Civil Code) after the couple have concluded amicable divorce at the Civil Affairs Bureau ?

A: As long as the party has not waived the divorce damages in the divorce agreement and the divorce is filed within one year after the registration of the divorce, courts shall accept the case (pay attention to certain provisions belong to the preclusive period, which cannot be suspended or interrupted).

19. Where a [creditor sues to recover the debts of the decedent](#) during his lifetime, and the statutory heirs expressly renounce the inheritance, how should courts deal with this situation?

A: In order to protect the legitimate rights and interests of creditors, courts shall find that the renunciation of inheritance be invalid, notify the statutory heirs to participate in the lawsuit, and rule that the inheritors shall settle the debts to the extent of the value of estates of the decedent in accordance with the laws.

[Jason Tian Comments: *under China laws, an estate is not considered as having legal standing in lawsuits. In practice, creditors will always sue the heirs for recovering debts incurred by the deceased. To avoid the situation of having no defendants in lawsuits brought by creditors when all heirs waives their right of inheritance, courts will disregard such waiver for purpose of civil procedures law.]*

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