Current State, Developments and Trends of Chinese Family Law From Recent Cases Reported by the Supreme People's Court

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I. INTRODUCTION

This article provides an overview of the evolution of Chinese family law, its current state, and the trends and developments in China's recent family law reform as illustrated in the family and marriage law Typical Cases (*dianxin anli*), published by China's highest court, the Supreme People's Court ("SPC").

The SPC periodically publishes Typical Cases to address the most pressing legal and policy issues put in front of the Chinese courts.[1] Each Typical Case report includes a statement of determinative facts, the trial court and/or appellate court's legal reasoning and decisions, and the SPC's commentary on the legal or social issues presented in the case. Although without precedential effect, Typical Cases "attain unofficial precedent status,"[2] and Chinese courts "generally follow or respect" Typical Cases.[3] The publication of these Typical Cases was part of the SPC's effort to improve uniformity and predictability of legal outcomes in family law cases.[4]

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[1] Liu Zuoxiang （刘作翔）, *Zhongguo Anli Zhidao Zhidu De Zuixin Jinzhan Ji Qi Wenti* （中国案例指导制度的最新进展及其问题） [*Chinese Guiding Cases System's Most Recent Developments and Challenge*] Dongfang Faxue （东方法学） [Oriental Law], 2015 Vol. 3. Typical Cases (*dianxing anli*) should be distinguished from Guiding Cases (*zhidaoxing anli*) published by the SPC under a formal Guiding Case System (*zhidaoxing anli zhidu*) established in 2015. Guiding Cases, although not precedential, may be referenced in court decisions. For decades, the SPC has published Typical Cases, which have no precedential effect. For in-depth analyses of China's Guiding Case system, *see* Cao Zhixun (曹志勋), *Lun Zhidaoxing Anli De "Canzhao" Xiaoli Ji Qi Caipan Jishu – Jiyu Dui Yigongbu De 42 Ge Mingshi Zhidaoxing Anli De Shizhi Fenxi* （论指导性案例的"参照"效力及其裁判技术—基于对已公布的 42 个民事指导性案例的实质分析）[*Discussing Guiding Cases' "Reference" Authority and Adjudicating Techniques- Based on Didactic Analyses of 42 Published Civil Matter Guiding Cases*]; Bijiaofa Yanjiu （比较法研究）6 J. COMP. L. 111-134 (2016), http://www.iolaw.org.cn/showNews.aspx?id=56018; Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 WASH. INT'L L.J. 269 (2017); Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016); Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369 (2002).

[2] Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 410 (2002).

[3] Judge Luo Xia, *China Judicial Reforms Are Creating Opportunities for Technology Transfer and Licensing*, 52 LES NOUVELLES 1, 2 (2017).

[4] Margaret Y.K. Woo, *Court Reform with Chinese Characteristics,* 27 WASH. INT'L L.J. 241, 260–61 (2017).

On December 4, 2015, the SPC published a set of forty-nine family and marriage Typical Cases (the "FMTCs"),[5] which were largely selected from FMTCs that were previously published by the SPC and chosen from the lower courts in three different regions, including Beijing,[6] Shangdong,[7] and Henan.[8] Contemporaneously, the SPC published Domestic Violence Typical Cases ("DVTCs")[9] and Crimes Involving Domestic Violence Typical Cases ("CDVTCs").[10]

Each FMTC contains three parts, "Basic Facts" (*jiben anqing*), which illustrates the fact pattern of the case, "Adjudication Outcome" (*caipan jieguo*), which outlines the trial court and sometimes the appellate court's decisions, and "Exemplary Significance" (*dianxing yiyi*), which is the SPC's commentary on the case. Although the FMTCs do not report everything that takes place in the courtroom in each case, they nonetheless provide a broader understanding of Chinese family law, its application in the courts, and the direction the SPC is steering the Chinese courts to in the area of family law.

Part I of this article provides an introduction to the legislative development, recent reform, and current framework of Chinese marriage and family law. Part II illustrates Chinese divorce court practice and its recent reform. The brief examination of China's family law and its court

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[5] "Yong Gongkai Cu Gongzheng Jianshe Hexin Jiazhi" Zhuti Jiaoyu Huodong Hunyin Jiating Jiufen Dianxin Anli（"用公开促公正 建设核心价值"主题教育活动婚姻家庭纠纷典型案例）["Promote Justice Construct Core Value through Transparency" Focused Education Campaign: Family and Marriage Disputes Typical Cases] (Dec. 4, 2015), http://www.court.gov.cn/zixun-xiangqing-16211.html.

[6] *Jiating Hunying Jiufen Dianxin Anli (Beijing)* (家庭婚姻纠纷典型案例（北京）)) [Family and Marriage Disputes Typical Cases (Beijing)] ("FMTCs BJ") (Nov. 20, 2015)，http://www.court.gov.cn/zixun-xiangqing-16035.html.

[7] *Jiating Hunying Jiufen Dianxin Anli* [Shandong] (家庭婚姻纠纷典型案例（山东）) [Family and Marriage Disputes Typical Cases (Shandong)] ("FMTCs SD") (Nov. 20, 2015), http://www.court.gov.cn/zixun-xiangqing-16036.html.

[8] *Jiating Hunying Jiufen Dianxin Anli* [Henan] (家庭婚姻纠纷典型案例（河南）) [Family and Marriage Disputes Typical Cases (Henan)] ("FMTCs HN") (Nov. 20, 2015), http://www.court.gov.cn/zixun-xiangqing-16037.html.

[9] Zuigao Renmin Fayuan Gongbu Shiqi Jiating Baoli Dianxing Anjian (最高人民法院公布十起家庭暴力的典型案例) [the Supreme People's Court Published Ten Domestic Violence Typical Cases], 2015 SUP. PEOPLE'S CT. GAZ. 2, http://gongbao.court.gov.cn/Details/a5da2b2a791db0241dae1b6ed8e579.html.

[10] Zuigao Renmin Fayuan Fabu She Jiating Baoli Fanzui Dianxing Anjian (最高法发布涉家庭暴力犯罪典型案) [the SPC Published Crimes Involving Domestic Violence Typical Cases] Mar. 4, 2015, http://www.court.gov.cn/zixun-xiangqing-13615.html.

practice in Part I and Part II will expose the conflicts between Confucian tradition, Maoist nationalism ideology, and remnants of peasant economy, and the need to adopt legal mechanisms to address new family and marriage issues arising from an increasingly industrialized, urbanized, and diverse China. By reviewing the FMTCs, Part III describes Chinese family law and how it is applied in Chinese courts. A closer look of the FMTCs reveals Chinese courts' willingness to accommodate customs, traditions, and prevailing social practices through the flexible application of formal laws.[11] Chinese courts' pushback on the Maoist legal-nationalist agenda is also evident in the FMTCs. Chinese courts, when dealing with real-life issues, often choose to utilize whatever legal mechanism is most likely to lead to a speedy, effective, and fair resolution to the problem at hand, regardless of whether such legal mechanism is native or Western in origin.

II. LEGISLATIVE DEVELOPMENT AND FRAMEWORK

Family law is shaped by "innumerable factors" in economy, history, culture, religion, and politics.[12] Chinese law governing family and marriage is certainly the product of China's unique economic, political, and cultural evolution.[13]

Traditional Chinese families, deeply rooted in China's Confucian tradition[14] and peasant economy,[15] are different from those in Europe and North America.[16] Many marriage and familial customs derived from China's peasant economy and Confucian tradition not only remain relevant to Chinese people's present views of marriage, divorce, and family life but also exert great influence on China's contemporary legislative and judicial process.[17] It is widely observed that from the end of the imperial time to the establishment of the Chinese Communist Party's ("CCP") rule in 1949, the

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[11] *See*, *e.g.*, Philip C.C. Huang, *The Modern Chinese Family: in Light of Economic and Legal History*, 37.5 MODERN CHINA 459 (2011); Xin He & Kwai Ng, *Pragmatic Discourse and Gender Inequality in China*, 47 LAW & SOC'Y REV. 279 (2013) [hereinafter He & Ng, *Pragmatic Discourse*].

[12] Barbara Stark, *Only in New York: The Geography of Family Law*, 29 WIS. J.L. GENDER & SOC'Y 21, 21 (2014).

[13] Huang, *supra* note 11, at 459-97 (2011) (pointing out that the conjoining of an urban China and a rural China led to the unique development pattern of modern Chinese family and the laws governing it).

[14] Amy H. L. Shee, *Impact of Globalisation on Family Law and Human Rights in Taiwan*, 2 NAT'L TAIWAN U. L. REV. 21, 32 (2007).

[15] Huang, *supra* note 11, at 481-85.

[16] James M. Raymo et al., *Family in East Asia: Continuity and Change*, 41 ANNU. REV. SOCIOL. 471, 471-92 (2015).

[17] *See* Huang, *supra* note 11 (2011).

marriage and family laws of the Republic of China (1912-1949) had little to no bearing in Chinese people's real life.[18]

Modern Chinese family law has undergone several transformations since the establishment of the People's Republic of China ("PRC") in 1949.[19] In the first three decades since the PRC's inception, the laws of marriage and divorce had been the Maoist party-state's political tools to construct and control a social, ethical, and moral order befitting Mao's regime.[20] While declaring its commitment to gender equality and greater protection of women and children, the PRC used the laws of marriage and divorce mainly for its own agenda, not for protection of individual rights.[21] Divorce and other family disputes were dealt with under the party-state's tight control.[22] Some of Maoist family law concepts and juridical practices remain firmly embedded in Chinese family law and Chinese people's daily life to this day.[23] In 1978, China embarked on an ambitious post-Mao legislative campaign to make new laws needed for a market-oriented economy and society. A decade later, various legislative, judicial, and administrative developments altered the legal framework within which Chinese marriage and family had existed. Particularly, the new Marriage Law of 1980 had relaxed marriage and divorce regulations and depoliticalized Chinese family law. [24]

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[18] *See*, *e.g.*, Alison W. Conner, *Don't Change Your Husband: Divorce in Early Chinese Movies*, 40 CONN. L. REV. 1245; Jiang Dong, *China's Latest Marriage Law Amendment and Family Property: Tradition and Modernity*, 9 FRONTIERS L. CHINA 604, 609-12 (2014).

[19] *See*, *e.g.*, Liu Weifang (刘维芳), *Shilun Zhonghua Renmin Gonghe Guo Hunyinfa de Lishi Yanjin* (试论《中华人民共和国婚姻法》的历史演进) [*On the People's Republic of China Marriage Law's Historical Development*] *Dangdai Zhongguoshi Yanjiu* (当代中国史研究) [Contemporary Chinese History Studies] Vol. 1. (2014) http://law.cssn.cn/fx/fx_hyfx/201508/t20150807_2110632.shtml [hereinafter Weifang]; Michael Palmer, *Child and Family Law in China: Bring the law back in*, THE FUTURE OF CHILD AND FAMILY LAW: INTERNATIONAL PREDICTIONS, (Elaine E. Sutherland ed., 2012) [hereinafter Palmer].

[20] Neil Diamant, *Revolutionizing the Family: Politics, Love and Divorce in Urban and Rural China*, 4-7 (2000) [hereinafter Diamant].

[21] Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J.L. & FEMINISM 99, 101, 106-07 (2003).

[22] *See* Philip C.C. Huang, *Divorce Law Practices, the Origins, Myths and Realities of Judicial "Mediation,"* 31 MODERN CHINA 151, 166, 171-74 (2005) [hereinafter Huang, *Divorce Law Practices*] (describing the Maoist divorce law practice).

[23] William Partlett & Eric C. Ip, *Is Socialist Law Really Dead?*, 48 N.Y.U. J. INT'L L. & POL. 463 (2016).

[24] Zhonghua Renmin Gonghe Guo Hunyin Fa (中华人民共和国婚姻法) [the People's Republic of China Marriage Law] (promulgated and effective Sept. 10, 1980); *see also* Wu Canzhen (巫昌祯), *Zhongguo Hunyinfa De Xin Fazhan – 1978-2008 Nian Xiuding*

By the turn of the twenty-first century China had transformed markedly in governance, economy, and demographics as a result of the departure from Maoist ideology, rapid development of a market-oriented economy, high-paced urbanization, swift industrialization, and mass migration. Family structure, marriage, and Chinese people's views of them changed drastically in this post-Mao era. Domestic migration contributed to the redefinition of Chinese women's identities in marriage and family.[25] Global migration brought demographic, cultural, and social diversity into Chinese families.[26] Now, large extended, multi-generational, patriarchal, patrimonial, patrilineal, and patrilocal families are being replaced by a variety of family structures.[27] Individualization and privatization of marriage, family, and personal relations have been palpable.[28] The marriage

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Hunyinfa Jishi (中国婚姻法的新发展--1978-2008 年修订婚姻法纪实) [New developments of Chinese Marriage Law: Memo of the Marriage Amendment (1978-2008)], Chaoyang Falü Pinglun （朝阳法律评论）[Chao Yang Law Review http://law.cssn.cn/fx/fx_hyfx/201508/t20150807_2110632.shtml; Weifang, *supra* note 19; Yang Dawen (杨大文), *Liang Bu Hunyinfa San Ge Lichengbei* (两部婚姻法三个里程碑) [*Two Marriage Laws Three Milestones*], Guangming Ribao (光明日报) [Guangming Daily] Mar. 4, 2011, at 11.

[25] *See* Woo, *supra* note 21, at 102–03.

[26] In the case of global migration, marriage migration across the border from surrounding countries into China began two decades ago and is flourishing. Tens of thousands of foreign women are flocking to China for marriage, pushed by poverty at home and sucked in by China's dramatic shortage of women. *See*, *e.g.*, Simon Denyer et al., *Too Many Men*, WASH. POST (Apr. 18, 2018), https://www.washingtonpost.com/graphics/2018/world/too-many-men/?utm_term=.a4446e8bb4a9; Foreign investors and workers poured in China and many of them married and became long-term residents. *See*, *e.g.*, Hsiu-Hua Shen, *Becoming 'the first wives': gender, intimacy, and regional economy between Taiwan and China*, *in* EAST ASIAN SEXUALITIES: MODERNITY, GENDER, AND NEW SEXUAL CULTURES (Liu Jieyu, et. al., eds. 2008).

[27] Hu Zhan & Peng Xizhe (胡湛, 彭希哲), *Zhongguo Dangdai Jiatinghu Biandong De Qushi Fenxi – Jiyu Renkou Pucha Shuju De Kaocha* (中国当代家庭户变动的趋势分析--基于人口普查数据的考察） [*Household Changes in Contemporary China: an Analysis Based on Census Data*], Shehuixue Yanjiu (社会学研究) [Sociolgical Studies], Vol 3, 145-244 (2014)，http://oa.shxyj.org/UploadFile/Issue/gtjf3i0e.pdf; *see also*, Wang Yuesheng (王跃生), *Dangdai Zhongguo Jiating Jiegou Biandong Fenxi* (当代中国家庭结构变动分析) [*An Analysis of the Changes in Contemporary Chinese Household Structures*], Zhongguo Shehuikexue (中国社会科学) [Social Sciences in China], Vol. 1 (2006), http://iple.cssn.cn/webpic/web/iple/upload/2012/07/d20120731144844071.pdf.

[28] Deborah S. Davis, *Privatization of Marriage in Post-Socialist China*, 40.6 MODERN CHINA 551, 551–77 (2014) (an in-depth study of Chinese marriages since 1990 based on census data and interviews with urban residents in Guangzhou and Shanghai) [hereinafter Davis].

rate decreased sharply,[29] while the crude divorce rate rose from 0.18% in 1978[30] to 2% in 2010, and then to 3.02% in 2016.[31] Bigamy, domestic violence, concubinage, and other social malaise led to public debates over the state of Chinese marriage, family, and society, and the need for legal mechanisms to remedy these social ills infecting Chinese society. The mainstream narrative that emerged from these public debates was that Chinese people are increasingly seen living in a moral vacuum in which self-interests and predatory instincts are left unchecked.[32] In agreement with this reading of contemporary Chinese society, the Chinese government has put a renewed emphasis on "rule by law" (*fazhi*).[33] The current administration vowed to construct an effective family law system to fill the

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[29] *See* Zhonghuan Remnin Gonghe Guo Mingzheng Bu 2017 Nian Shehui Fuwu Fazhan Gongbao (中华人民共和国民政部 2017 年社会服务发展统计公报) [Ministry of Civil Affairs of the People's Republic of China 2017 Social Services Progress Statistics Report], Figure 14; *Jiehun Dengji (wan dui) 1985-2016* (结婚登记 (万对) 1985-2016) [*Number of Marriage Registrations (ten thousand) 1985-2016*], Zhonghuan Remnin Gonghe Guo Guojia Tongjiju Guojia Shuju (中华人民共和国国家统计局国家数据) [National Bureau of Statistics of the People's Republic of China National Data], http://www.mca.gov.cn/article/sj/tjgb/2017/201708021607.pdf.

[30] Yang Juhua & He Shaohua (杨菊华 何炤华), *Shehui Zhuanxing Guocheng Zhong Jiating De Bianqian Yu Yanxu* (社会转型过程中家庭的变迁与延续) [*Continuity or Change? Chinese Family in Transitional Era*], Renkou Yanjiu (人口研究) [Population Research] Vol. 38, No. 2 36-51 (2014), http://rkyj.ruc.edu.cn/CN/article/downloadArticleFile.do?attachType=PDF&id=3273.

[31] *Cu Lihunlu* 1985-2016 (粗离婚率 1985-2016) [Crude Divorce Rate 1985-2016], Zhonghuan Remnin Gonghe Guo Guojia Tongjiju Guojia Shuju (中华人民共和国国家统计局国家数据) [National Bureau of Statistics of the People's Republic of China National Data], http://data.stats.gov.cn/easyquery.htm?cn=C01&zb=A0P0C&sj=2016.

[32] Andrea E. Pia, *"We Follow Reason, Not the Law:" Disavowing the Law in Rural China*, 39 POL. & LEGAL ANTHROPOLOGY REV. 276, 276-79 (2016).

[33] Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifazhiguo Ruogan Zhongda Wenti de Jueding (中共中央关于全面推进依法治国若干重大问题的决定) [*CCP Central Committee's Decision Concerning Some Important Issues on Promoting Governing the Nation by Law*] (Oct. 28, 2014), http://www.csrc.gov.cn/shenzhen/ztzl/ssgsjgxx/jgfg/zh/201506/t20150612_278982.htm; *see also*, *Li Peng Qiangdiao Xiugai Hao Hunyinfa Dui Jiaqiang Shehuizhuyi Jingshenwenmin Jianshe Yiyi Zhongda* (李鹏强调修改好婚姻法对加强社会主义精神文明建设意义重大) [*Li Peng Emphasizes Amending the Marriage Law Has Significant Impact on Socialist Spiritual Civilization Building*]; Renmin Ribao (人民日报) [PEOPLE'S DAILY] (Oct. 27, 2000), http://www.people.com.cn/GB/channel1/11/20001027/289867.html (In his speech given at the eve of the new Marriage Law of 2001, Li Peng, the former chairman of the People's Congress of China (PCC), emphasized that the new marriage law was to restore the moral order in Chinese society, to cure the moral ills that had come with the market economy and most importantly to maintain social stability).

alleged moral vacuum and to regulate Chinese people's private life by law.[34] In this context, the PRC has made substantial stride in reforming and formalizing its family law framework.[35]

Major revisions to the 1980 Marriage Law in 2001 ("2001 Marriage Law") were the center of China's latest family law reform.[36] The Marriage Law was revised in response to the demands for greater protection of women and children's rights and more sophisticated legal mechanisms capable of handling complex and multifaceted family and marital disputes arising from an increasingly urbanized, diverse society.[37] Provisions for protection and compensation for domestic violence victims were added in the 2001 Marriage Law.[38] Most notably, the 2001 Marriage Law coined the contractual nature of marriage, introduced the concept of nuptial agreements, and instituted an equitable property distribution regime.[39] Through the SPC Interpretations on Some Issues Concerning the

[34] *See* Weifang, *supra* note 19; Palmer, *supra* note 19.

[35] For detailed reports of China's family law building in the post-Deng era, see Michael Palmer, *Transforming Family Law in Post-Deng China: Marriage, Divorce and Reproduction*, THE CHINA QUARTERLY, No. 191, China's Legal System: New Developments, New Challenges 675-95 (Sept. 2007).

[36] Zhonghua Renmin Gonghe Guo hunyin fa (中华人民共和国婚姻法) [The People's Republic of China Marriage Law] (promulgated Sept. 10, 1980, amended on Apr. 28, 2001) [hereinafter Marriage Law].

[37] *See* Ma Yinan (马忆南), *Zhongguo Hunyi Jiatingfa De Chuantong Yu Xiandaihua – Xie Zai Hunyinfa Xiugan Zhiji* (中国婚姻家庭法的传统与现代化 – 写在婚姻法修改之际) [*Chinese Marriage and Family Law's Tradition and Modernization – Written at the Time When the Marriage Law Being Revised*], Beijing Daxue Xuebao (Zhexue Shehuikexue Ban) (北京大学学报（哲学社会科学版）) [J. PEKING U. PHIL. & SOC. SCI.], Vol. 38(1): 60-68 (2001).

[38] Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 257-69 (2004).

[39] *See* Huang, *supra* note 11; Valerie L. Chang, *No Gold Diggers: China's Protection of Individual Property Rights in the New Marital Property Regime*, 45 GEO. WASH. INT'L L. REV. 149, 154 (2013).

Application of the Marriage Law (I),[40] (II) (revised 2017),[41] and (III)[42] (hereinafter the "Marriage Law Interpretations (I), (II) and (III)"), the SPC implemented detailed rules of a marital property system that resembles an equitable distribution regime.[43] The SPC received a frenzy of criticism from legal scholars and women's rights advocates for "monetizing" marriage based on imported Western legal concepts, such as contractual marriage, separate property, and nuptial agreements.[44] Criticism aside, to a

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[40] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gonghe Guo Hunyin Fa Ruogan Wenti De Jieshi (yi) (最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释 (一)) [the Supreme People's Court Interpretations on Some Issues Concerning the Application of the People's Republic of China Marriage Law (I)] (promulgated by the Sup. People's Ct., Dec. 25, 2001, effective Dec. 27, 2001) 2002 SUP. PEOPLE'S CT. GAZ. 1 [hereinafter Marriage Law Interpretations (I)].

[41] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gonghe Guo Hunyin Fa Ruogan Wenti De Jieshi (er) (最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释 (二)) [the Supreme People's Court Interpretations on Some Issues Concerning the Application of the People's Republic of China Marriage Law (II)] (promulgated by the Sup. People's Ct., Dec. 4, 2003, effective Apr. 1, 2004, revised Feb. 20, 2017, effective Mar. 1, 2017) 2017 SUP. PEOPLE'S CT. GAZ. 6, http://gongbao.court.gov.cn/Details/d3cf73bb8cd914c57ac8bae7b2a93b.html. [hereinafter Marriage Law Interpretations (II)].

[42] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gonghe Guo Hunyin Fa Ruogan Wenti De Jieshi (san) (最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释 (三)) [the Supreme People's Court Interpretations on Some Issues Concerning the Application of the People's Republic of China Marriage Law (III)] (promulgated by the Sup. People's Ct., July 4, 2011, effective Aug. 13, 2011) 2011 SUP. PEOPLE'S CT. GAZ. 9, http://gongbao.court.gov.cn/Details/16ca02c89be0d26a8f50f6c803a3c1.html [hereinafter Marriage Law Interpretations (III)].

[43] The SPC regularly issues judicial interpretations as directives to the lower courts. When a statute is enacted or amended, the SPC often issues detailed court rules in the form of judicial interpretations or opinions to guide the lower courts' application of the new statute or amendments. For studies on the SPC judicial interpretations, *see* Li Wei, *Judicial Interpretation in China*, 5 WILLAMETTE J. INT'L L. & DISP. RESOL. 87 (1997); Eric C. Ip, *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 COLUM. J. ASIAN L. 367 (2011); Keith J. Hand, *Understanding China's System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 139 (2013).

[44] Some Chinese scholars vehemently opposed Marriage Law Interpretations (III), which recognizes non-marital separate property and defines residences acquired prior to the marriage or gifted by one party's parents as non-marital "individual property." They argued that by introducing the concept of non-marital separate property the new marriage law would encourage divorce and discourage marriage. *See*, *e.g.*, Zhao Xiaoli (赵晓力), *Zhongguo Jiating Zibenzhuyihua De Haojiao* (中国家庭资本主义化的号角) (*the Bugle Call for the Capitalism-ization of the Chinese Family*) Wenhua Zongheng (文化纵横) [BEIJING CULTURAL REVIEW] Vol. 1 (2011) (claiming that the new marital property system betrays the Chinese familial value and moral principles), http://www.21bcr.com/project-post/zhongguojiatingzibenzhuyihuadehaojiao/; Jiang Shingong (强世功), *Sifa Nengdong*

considerable extent the 2001 Marriage Law and the subsequent Marriage Law Judicial Interpretations have turned away from "close surveillance" and moved instead toward privatization of marriage,[45] providing greater protections of individual rights and clearer rules to address the new economic reality of China's growing middle class.[46]

Xia De Zhongguo Jiating – Cong Zuigaofayuan Guanyu Hunyinfa De Sifa Jieshi Tanqi (司法能动下的中国家庭——从最高法院关于《婚姻法》的司法解释谈起) [*The Chinese Family Under Judicial Initiative—Beginning with the Judicial Interpretations of the Supreme Court*] Wenhua Zongheng (文化纵横) [BEIJING CULTURAL REVIEW] Vol. 1 (2011) (arguing that the new marital property regime separates the economic partnership and the emotional bond, which are integral components of a marriage, and consequently simplifies the divorce process; the divorce rate would then rise as a result of simpler, cheaper and easier divorces.), http://www.21bcr.com/sifanengdongxiadezhongguojiatingcongzuigaofayuanguanyuhunyinfadesifajieshitanqi/; Zhang Xianglong (张祥龙), *Biaozhunhua Panjue Jiang Daozhi Hunyin He Jiating De Shuailuo* (标准化判决将导致婚姻和家庭的衰落) [*Standardization of Adjudication Will Cause the Decline Of Marriage And Family*] Shehui Guancha (社会观察) [SOCIAL OUTLOOK], Vol. 3 (2011) (arguing that that uniform application of law in property distribution in divorce cases would cause unfair outcomes in divorce cases and consequently discourage people from getting married), http://www.sass.stc.sh.cn/detailAction.do?method=GetNewsContentWithNoOther.

[45] Davis, *supra* note 28.

[46] The SPC and family law practitioners rigorously defended the new marital property regime. *See*, *e.g.*, Ma Yina (马忆南), *Hunyinfa Xin Sifa Jieshi – Lixing Yu Ganqing De Chongtu* (婚姻法新司法解释－理性与情感的冲突) [*the New Marriage Law Judicial Interpretations – the Conflict between Rationality and Emotion*], Shehui Guancha (社会观察) [SOCIAL OUTLOOK], Vol. 3 (2011) (defending the SPC's rules in defining pre-marital property, separate property and marital property), http://www.sass.stc.sh.cn/detailAction.do?method=GetNewsContentWithNoOther; Zhang Xianmin (张先明), *Pinglun*: *Yang Lixin Lei Mingguang Jiedu Hunyinfa Jieshi (III)* (评论: 杨立新、雷明光解读《婚姻法解释（三）》) [*Op-Ed: Yang Lixin and Lei Mingguan Explaining the Judicial Interpretations on the Marriage Law (III)*], *Renmin Fayuan Bao* (人民法院报) [THE PEOPLE'S COURT DAILY] (Sept. 9, 2011), http://www.dffyw.com/faxuejieti/zh/201109/25122.html (explaining the necessity of the SPC efforts to unify provisions governing properties in the Property Law, the Contract Law and the Marriage Law); Song Yuan (宋媛), *Lüshi Cheng Xin Hunyinfa Zuixin Jieshi Pianxiang Qiangzhe Xi Wudu* (律师称新婚姻法最新解释偏向强者系误读) [*Attorneys Assert the Allegation that Most Recent Judicial Interpretations on the New Marriage Law Favor the Moneyed Party Is a Misreading*], Guoji Xianqu Daobao (国际先驱导报) [INTERNATIONAL HERALD LEADER] (Aug. 19, 2011; Long Jun (龙俊), *Fuqi Gongtong Caichan De Qianzai Gongyou* (夫妻共同财产的潜在共有) [*Inherent Community Ownership in Husband and Wife's Common Property*], Faxue Yanjiu (法学研究) [CHINESE J. L.], Vol. 4, 20 (2017), http://www.faxueyanjiu.com/ch/reader/create_pdf.aspx?file_no=20170402&year_id=2017&quarter_id=4&falg=1 (arguing that the new marital property regime does not cause breakdown of marriages and proposing that a spouse's non-monetary contribution during the marriage must be considered in determining distribution of marital property and debts.).

III. FAMILY MATTER ADJUDICATION PROCEDURE

Family matter proceedings in Chinese courts are governed by the People's Republic of China Civil Procedure Law (the "Civil Procedure Law").[47] Family matters, which are considered as general civil matters, are heard in courts of general jurisdiction.[48] Courts of general jurisdiction are divided into four levels: county-level Basic People's Courts (*jiceng remnin fayuan*), municipal Intermediate People's Courts (*zhongji renmin fayuan*), provincial Higher People's Courts (*gaoji renmin fayuan*) and the Supreme People's Court (*zuiguao renmin fayuan*).[49] Courts of general jurisdiction at each level may exercise initial jurisdiction as the court of first instance based on the importance and complexity of a case,[50] and its higher court at the next level would then have appellate jurisdiction as the court of second instance.[51] Decisions made by a court of second instance are final and not appealable.[52] However, under specified circumstances a re-adjudication (*zaishen*) through the trial supervision procedure (*shenpan jiandu chengxu*) may be allowed after an appeal.[53] In most family law cases, the initial actions are commenced in county-level basic People's Courts; appeals are taken as of rights in municipal Intermediate People's Courts; and re-adjudications after the appeal are sought in provincial High People's Courts through the trial supervision procedure.

The Civil Procedure Law provides a summary procedure (*jianyi chengxu*) at the Basic People's Court level for cases with little factual

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[47] Zhonghua Renmin Gonghe Guo Minshi Susong Fa (中华人民共和国民事诉讼法) [The People's Republic of China Civil Procedure Law] (promulgated Apr. 9, 1994; amended Oct. 28, 2007, Aug. 31, 2012; effective Mar. 1, 2013) [hereinafter Civil Procedure Law].

[48] Zhonghua Renmin Gonghe Guo Renmin Fayuan Zuzhi Fa (中华人民共和国人民法院组织法) [The People's Republic of China Organic Law of People's Courts] (promulgated July 1, 1979, effective Jan. 1, 1981, amended Sept. 2, 1983, amended Dec. 2, 1986 and amended Oct. 31, 2006) art. 28 (Chinese courts are divided into two tracks: courts of general jurisdiction and courts of special jurisdiction. Courts of general jurisdiction hear all matters, except for matters related to military, transportation, maritime and intellectual property that are adjudicated in special courts with exclusive jurisdiction).

[49] *Id.*, arts. 17-32; *see also* Yulin Fu, *The Chinese Supreme People's Court in Transition*, 59 IUS GENTIUM 13, 13–14 (2017); Margaret Woo, *The Dynamism of China's Civil Litigation System*, 48 IUS GENTIUM 141, 143 (2016).

[50] Civil Procedure Law, Chapter 13 Procedure of First Instance.

[51] Civil Procedure Law, Chapter 14 Procedure of Second Instance.

[52] Civil Procedure Law, art. 175.

[53] Civil Procedure Law (2017), Chapter 16 Procedure for Trial Supervision.

disputes, small claims, or that may be resolved through mediation.[54] Most family disputes are resolved through the summary procedure.[55]

Chinese courts operate within a framework designed to seek "objective facts" (*keguan shishi*), to apply the law "correctly" based on the "objective facts," and to deliver justice and order.[56] Under this framework, Chinese judges are equipped with expansive "fact-seeking" power at the trial level as well as the appellate level. As "fact-seekers" instead of "facts-finders," Chinese judges, not the parties, lead the discovery process.[57] At the trial, the judge, not the parties, examines the evidence, questions the witness, and makes active inquiries into the merits of each case.[58] The presiding judge also allocates the parties' burden of proof in each case.[59]

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[54] Civil Procedure Law art. 133 (To limit the number of cases for full adjudication and trials, all civil cases are assessed and assigned to one of the following litigation tacks: (1) expedited procedure used for cases with little or no factual disputes; (2) mediation used for cases that are more substantial likely to be settled; (3) simplified procedure used for many civil cases in which the facts are relatively undisputed and the amount in controversy is below RMB 5,000 (USD 825); and (4) ordinary procedure for cases that will likely require a trial); Woo, *supra* note 49, at 145-46.

[55] The SPC reported that 73.05% of cases were heard through the summary procedure. *See* Renminfayuan Xinwen Chuanmei Zongshe (人民法院新闻传媒总社) [the People's Court Media and Press Office], *Zuigao Renmin Fayuan Fabu Diyi Jidu Shenpan Zhixing Gongzuo Shuju Xinshou Anjian Shu Jixue Zengzhang Jiean Shu Tongbi Zengjia Zhengti Yunxin Shitai Wen Zhong Xiang Hao* (最高人民法院发布第一季度审判执行工作数据 新收案件数继续增长 结案数同比增加 整体运行态势稳中向好), [*the Supreme Court Release the First Quarter Adjudication and Enforcement Data – the Number of New Cases Increase Continues, the Number of Concluded Cases Increases at the Same Rate, Overall Function Steady and Improving*], Zuigao Renmin Fayuan Xinwen (最高人民法院新闻) [Press Release], https://www.chinacourt.org/article/detail/2018/05/id/3295839.shtml; *see also*, *Zuigao Renmin Fayuan Sifa Dashuju Zhuanti Baogao Lihun Jiufen* (2017) （最高人民法院司法大数据专题报告离婚纠纷 (2017)) [*The SPC Judicial Data Subject Report: Divorce Disputes (2017)*], http://www.court.gov.cn/upload/file/2017/10/13/16/39/20171013163908_87275.pdf; *Zuigao Renmin Fayuan Sifa Dashuju Zhuanti Baogao Lihun Jiufen* (2018) (最高人民法院司法大数据专题报告离婚纠纷 (2018)) [*The SPC Judicial Data Subject Report: Divorce Disputes (2018)*], http://www.court.gov.cn/upload/file/2018/03/23/09/33/20180323093343_53196.pdf.

[56] Civil Procedure Law, art. 2; *see also* Philip C.C. Huang, CHINESE CIVIL JUSTICE, PAST AND PRESENT 135-72 (2012) [hereinafter Huang, CHINESE CIVIL JUSTICE].

[57] *See* Judge Elizabeth Fahey & Judge Zhirong Tao, *The Pretrial Discovery Process in Civil Cases: A Comparison of Evidence Discovery Between China and The United States*, 37 B.C. INT'L & COMP. L. REV. 281 (2014) [hereinafter Judge Fahey] (comparing judges' roles in evidence gathering process).

[58] John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law,* 47 TEX. INT'L L.J. 455, 470–71 (2012) [hereinafter Capowski].

[59] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gonghe Guo

Although litigants bear the burden of proof,[60] Chinese law does not provide extensive discovery devices.[61] Consequently, litigants have to rely upon the court's discovery orders[62] and its sanction power in collecting evidence.[63] More importantly, Chinese courts may investigate and collect evidence sua sponte in specific types of cases, including cases concerning divorce, custody, and other personal relations.[64] To ensure accuracy and impartiality, a court's *sua sponte* investigation and collection of evidence must be conducted by at least two judges and a court stenographer.[65] Any error of facts or law may constitute grounds for reversal at the appeal or re-adjudication level because Chinese courts are obliged to ascertain all relevant facts in each case, including undisputed or unalleged facts.[66] Therefore, Chinese courts' appellate review is not limited to questions of law.[67] Instead, it must encompass the trial court's application of law and findings of fact[68] insofar as an appellate court may question the parties and conduct additional investigation sua sponte.

The Chinese civil justice system's principal function is to deliver justice and to restore social order and harmony. Hence, Chinese judges are more concerned with substantive justice than with procedural justice and are more inclined to render results that serve perceived justice than to strictly apply the letter of the law.[69] Chinese judges have a strong sense that

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Minshi Susong Fa De Jieshi (最高人民法院关于适用中华人民共和国民事诉讼法的解释) [The Supreme People's Court Interpretations on the Application of the People's Republic of China Civil Procedure Law] (promulgated Dec. 18, 2014, effective Feb. 4, 2015) [hereinafter Civil Procedure Law Interpretations], 2015 SUP. PEOPLE'S CT. GAZ. 5, 6, art. 90-93; http://gongbao.court.gov.cn/Details/63ff48da6a9792f8ad1cb65a8b99d1.html.

[60] Civil Procedure Law, art. 65.

[61] Capowski, *supra* note 58, at 468-69; *see also* Judge Fahey, *supra* note 57.

[62] Civil Procedure Law Interpretations, arts. 94-96.

[63] Civil Procedure Law, arts. 65, 67.

[64] Civil Procedure Law, arts. 64, 67; Civil Procedure Law Interpretations, arts. 94, 96; Zhong Jianhua et al, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 400 (2004) [hereinafter Zhong]; Capowski, *supra* note 58, at 468-69.

[65] Civil Procedure Law Interpretations, art. 97.

[66] Zhong, *supra* note 64, at 419–21.

[67] Civil Procedure Law, art. 169.

[68] Civil Procedure Law, art. 168.

[69] Jiahong He, *Promoting the Procedural Justice in China*, 7 FRONTIERS L. CHINA 171, 171-172 (2012); *see also* Gao Qicai et al. (高其才 王晨光 冯泽周), *Chengxu, Faguan Yu Shenpan Gongzheng – Shanghai Dengdi Faguan Fangtan Zongsu* (程序、法官与审判公正 -上海等地法官访谈综述) [*Procedure, Judge and Fair Adjudication – Review of Interviews with Judges from Shanghai and its Surrounding Areas*], Faxue (法学) [L. & SCI.] Vol. 8 (2000) 6, 6-8, http://www.socio-

their decisions should go beyond the technical aspects of law and balance legalism against other essential factors including social norms, common sense, and *qingli* (accepted code of conduct).[70] Normally, family law judges, often playing the role of *parens patriae*, have more discretion in family law cases than in any other field of private law.[71] In family disputes, Chinese judges are expected to exercise judicial discretion and act as *fumu guan* (father and mother official), a Chinese term equivalent to *parens patriae*, not only for the children but also for the elderly, for the family as a whole, and sometimes even for the entire village.[72] The societal expectation that family law judges must advocate substantive justice, fairness, and

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legal.sjtu.edu.cn/Uploads/Papers/2011/MGN110503032218258.pdf (finding that Chinese judges are more concerned with substantive justice based on extensive interviews with judges in Shanghai); Jiang Guohua & Han Yuting, (江国华 韩玉亭), *Lun Faguan de Juese Kunjingg* (论法官的角色困境) [*On the Dilemma of Judges' Role*], (法制与社会发展) [L. & SOCI. DEV.] Vol. 2 (2015), 15-28, http://law.cssn.cn/fx/fx_msfx_988/201604/t20160421_2978122.shtml (finding that Chinese judges are more concerned of substantive justice based on a series of surveys conducted among nearly 3,000 Chinese judges on four issues: (1) whether maintaining social stability overweigh neutral adjudication in their judicial decision making process; (2) whether the facts and applicable law overweigh public opinion or political influence in their decision making in a case; (3) whether political policy consideration overweigh the existing law in their judicial decision making process; (4) whether substantive justice overweigh procedural justice in their judicial decision making process).

[70] *See*, *e.g.*, Wang Qun (王群), *Lun Faguan De Zhize Ji Qi Juese Diwei* (论法官的职责及其角色定位) [*On Defining Judges' Duties and Role*], Faxue （法学） [JURISPRUDENCE], July 22, 2013, https://www.chinacourt.org/article/detail/2013/07/id/1038642.shtml (asserting that to apply law correctly based on objective facts is the minimum duty of a judge and every judge has a higher duty, which is to protect social justice and fairness).

[71] Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401 (1996); *see also* Solangel Maldonado, *Bias in the Family: Race, Ethnicity, And Culture in Custody Disputes*, 55 FAM. CT. REV. 213 (2017) (describing judges' use of discretionary power in custody disputes in U.S. courts).

[72] *See* Jiang, *supra* note 69, at 15-28 (finding the belief that an ideal judge should not be an indifferent neutral arbitrator based on a survey among litigants, attorneys and judges on whether an ideal judge would be neutral or proactive in adjudicating a case); *see also* Feng Yuqing et al., *Popularized Judiciary in Rural China: Paternalistic Approaches and Enchanted Legal Consciousness*, 44 HONG KONG L. J. 651, (2014) (an empirical study on divorce litigants' expectations and perception of judges in rural Chinese courts, and the judges' paternalistic approach in adjudication to meet the litigants' expectations); Cai Hong (蔡 红), *Yongxin Jiangtou Fali Qing Naxin Tiejin Qunzhong Xin* (用心讲透法理情 拿心贴近群众心) [*Take Pains to Explain the Sense of Law, Through Your Heart to Approach the People's Hearts*] http://www.gdxfy.gov.cn/info.aspx?iid=1463&mid=84 (a local judge's essay on the local people's expectations of local judges as "*fumu guan*" and how local judges could meet these expectations by handling family disputes with compassion, diligence, patience, and fairness).

preservation of personal relations further reinforce Chinese judges' emphasis on substantive justice.[73]

China's family matter proceedings are conciliation-oriented and mediation-centered. The preference for conciliation over litigation derives from Chinese culture, custom, and Confucian philosophy, which emphasize stability and harmony in human relations.[74] Approximately 40% of family and marriage cases are settled through mediation each year in the last decade despite that more and more family and marriage cases are adjudicated instead of settled in recent years.[75] Mediation is essentially mandatory in family matters, particularly in divorce cases where the court must conduct mediation and can only grant divorce after its mediation efforts have failed.[76]

Chinese courts have been criticized for pushing mediation as a "quick resolution over adjudication and the delivery of justice."[77] The criticism, drawn from scant sociological observations, romanticized mediation theories, and misunderstanding of the judicial process in family disputes, is severely flawed.[78] First, it fails to recognize family litigants' interests and priority in family dispute resolution. More than litigants in other types of cases, "family litigants repeatedly and overwhelmingly

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[73] In recent years, Chinese public opinion has increasingly demanded judicial discretion. *See*, *e.g.*, Ji Weidong, *The Judicial Reform in China: The Status Quo and Future Directions*, 20 IND. J. GLOBAL LEGAL STUD. 185, 211 (2013) (discussing the impact of a widely accepted belief that judicial performance should be evaluated by the degree of people's satisfaction and that judges can adjust the application of law in accordance with mainstream attitudes.); Benjamin L. Liebman, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 COLUM. L. REV. 181 (2013) (finding state over responsiveness to individual grievances manifested in medical malpractice cases, where Chinese courts have adopted flexible interpretations of existing law and regulations to appease litigants and have resisted legal standards that the public view as unfair.); Jiang, *supra* note 69, at 24-25 (finding that Chinese litigants and attorneys want judges to act proactively and judges attempt to remain neutral based on a survey among litigants, attorneys and judges on whether an ideal judge would be neutral or proactive in adjudicating a case); *see also* Zhang Hai Long et. al (张海龙 宝峰), *Jiji Tansuo Jiashi Shenpan Xin Moshi* (积极探索家事审判新模式) [*Actively Explore New Family Matter Adjudication Models*] Renmin Fayuan Bao (人民法院报) [People's Court Daily] (Sept. 18, 2018), 2 (suggesting that the goal of family law matter adjudication is to restore harmony and the courts should explore innovative conciliatory dispute resolution methods to achieve this goal), http://rmfyb.chinacourt.org/paper/images/2018-09/18/02/2018091802_pdf.

[74] Cao Pei, *The Origins of Mediation in Traditional China*, DISP. RESOL. J., May 1999, 32-35; Xiaobing Xu, *Different Mediation Traditions: A Comparison Between China and the U.S.*, 16 AM. REV. INT'L ARB. 515, 515 (2005); *see also* Huang, CHINESE CIVIL JUSTICE, *supra* note 56.

[75] *See* Appendix Table 1.

[76] Marriage Law, art. 32.

[77] *Pragmatic Discourse*, *supra* note 11, at 99.

[78] *Pragmatic Discourse*, *supra* note 11, at 99.

invoke speed and cost as one of their highest priorities," and willingly, "knowingly and voluntarily forgo the opportunity to deploy doctrinal principles that might increase their take in return for a faster, smoother, more certain resolution."[79] Chinese family litigants prefer mediation also for privacy reasons.[80] Chinese people believe what happens in the family must stay in the family. Many even conceal their divorces from their family (including their children), and friends for decades.[81] A full adjudication requires thorough disclosure and investigation of each party's private life, including an open-court trial. Such exposure of one's private life is simply too much to bear for many Chinese litigants.

Faulting Chinese judges for the prevalence of mediation in family dispute resolution is unfairly cynical. Chinese judges, as many of their counterparts in other jurisdictions, are often pressured to settle and end disputes quickly for many reasons, such as burgeoning dockets.[82] The main reason for Chinese courts' extensive use of mediation may well be that mediation is a better dispute resolution approach than protracted litigation in family disputes. Mediation has been widely accepted as a more conciliatory, cost-efficient, and effective alternative to adversarial litigation in family law proceedings around the world.[83] Recognizing the detrimental impacts of the adversary process on family litigants,[84] courts mandate both directly or indirectly, mediation in numerous jurisdictions including thirty-two states in the United States ("U.S.").[85] Scholarly studies on judicial

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[79] Rebecca Aviel, Family Law and the New Access to Justice, 86 FORDHAM L. REV. 2279, 2296 (2018); *see also* Hon. Lynda B. Munro (Ret.) et al., *Administrative Divorce Trends and Implications*, 50 FAM. L.Q. 427, 440-441 (2016) [hereinafter Aviel] (describing simplified marriage dissolution evolved as litigants and courts' need for "a more efficient, less public, and more cost-effective" process to replace the costly and protracted traditional adversarial divorce).

[80] Zhang Wei (张 伟) *Jiashi Jiufen Jiejue Jizhi De Diaocha Yu Yanjiu* (家事纠纷解决机制的调查与研究) [*Surveys and Research on Family Matter Dispute Resolution Mechanism*]; Henan Caijin Zhengfa Daxue Xuebao (河南财经政法大学学报), 6 J. HENAN ADMIN. INST. POL. & L. 48, 61-62 (2012).

[81] Diamant, *supra* note 20, at xii, 12.

[82] Woo, *supra* note 49, at 252–56; *see also* Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

[83] Holly Joyce, Comment, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIM. L. 447, 447 (1997) [hereinafter Joyce].

[84] Aviel, *supra* note 79, at 2280.

[85] Jacqueline Nolan-Haley, *Mediation: The Best and Worst of Times*, 16 CARDOZO J. CONFLICT RESOL. 731, 738 (2015); *see also* Overview Of Judicial Mediation In The World: Mediation, The Universal Language of Conflict Resolution, First International Conference on Judicial Mediation, Paris, October 16-17, 2009, (Béatrice Brenneur eds 2010) [hereinafter Brenneur]; European Network of National Observatories on Childhood, Family Mediation in the European Union Survey Report (June 2005) and National Council of Juvenile and Family Court Judges, Custody Mediation Where Domestic Violence Is

mediation in Chinese family proceedings based on court archives, interviews, and courtroom observations have not yet provided sufficient evidence to suggest whether Chinese judges' strong penchant for mediation is motivated solely by self-interests or whether it is more of a logical response to family litigants' needs and preferences.[86]

In Chinese courts, mediations are administrated by the presiding judge, ergo labelled as "judicial mediation."[87] Each mediation session is conducted by the judge frequently in open court on record and occasionally off the record in more private settings. American family law practitioners may find Chinese "judicial mediation" similar to formal or informal settlement conferences hosted by the presiding judge or the judge's staff throughout the course of family matter proceedings.[88] Around the globe, judges are more and more involved in facilitating resolution and settlement of family conflicts.[89] "Judicially hosted" settlement conferences or mediations are hailed by some attorneys and judges as the "cheaper, better,

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[86] *See*, *e.g.*, Huang, *Divorce Law Practices*, *supra* note 22 (studying China's divorce law practices based on archival records of 216 court cases spanning from 1953 to 1995); Martha J. Bailey, *Mediation of Divorce in China*, 8 CAN. J.L. & SOC. 45 (1993) (a study on divorce mediation based on group interviews in 1990); Feng Yuqing & Cao Qing, *Popularized Judiciary in Rural China: Paternalistic Approaches and Enchanted Legal Consciousness*, 44 HONG KONG L. J. 651 (2014) (a study on divorce adjudication at a trial court in rural China based on court archives, courtroom observations and interviews); Xin He, *Routinization of Divorce Law Practice in China: Institutional Constraints' Influence on Judicial Behavior*, 23 INT'L J.L. POL'Y & FAM. 83 (2009) (a study on court-mediated reconciliation based on interviews and courtroom observations); Jian Wang, *To Divorce or Not to Divorce: a Critical Discourse Analysis of Court-Ordered Divorce Mediation in China*, 27 INT'L J.L. POL. & FAM. 74-96 (2013) (a study on mandatory mediation in forty-eight divorce cases based on recordings of the mediation sessions); Woo, *supra* note 21 (a study on divorce litigations based on in-depth interviews with twenty-nine female divorce litigants); He & Ng, *Pragmatic Discourse*, *supra* note 11 (a study on Chinese courts' practice in divorce cases based on observations of over 20 divorce trials); Xin He & Kwai Hang Ng, *In the Name of Harmony: The Erasure of Domestic Violence in China's Judicial Mediation*, 27 INT'L J.L. POL. & FAM. 97 (2013) (examined judicial medication in Chinese courts based on observations of court hearings, trials, and interviews with judges); Kwai Hang Ng & Xin He., *Internal Contradictions of Judicial Mediation in China*, 39 LAW & SOC. INQUIRY 285 (2014) [hereinafter *Internal Contradictions*].

[87] The Civil Procedure Law, art. 94. For observations and discussions on China's judicial mediation, see Minzner, *supra* note 82; *Internal Contradictions, supra* note 88 (2014); *see also* Woo, *supra* note 4, at 252–56.

[88] For in-depth comparison of Chinese judicial mediation and Western ADR approaches, including mediation, see Huang, CHINESE CIVIL JUSTICE, *supra* note 56, at 195-99 (2012).

[89] Jean-François Roberge & Dorcas Quek Anderson, *Judicial Mediation: From Debates to Renewal*, 19 CARDOZO J. CONFLICT RESOL. 613, 614 (2018); *see also*, Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73 (2017) (discussing judges' increasing involvement in settling disputes in U.S. courts).

faster" family dispute resolution approach.[90] Although effective, as opponents to judge-facilitated mediation correctly pointed out, a presiding judge's impartiality may be undermined by acting as a mediator.[91] Nonetheless, the inherent flaws of judicially-hosted mediation or judicial mediation administrated by the presiding judge are hardly institutional, systemic problems unique to Chinese courts.

As part of China's current major overhaul of its judicial system,[92] a specialized family law adjudication system is being constructed.[93] In June 2016, the SPC initiated a two-year family law pilot program in over 100

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[90] Gregory D. Brown, *The Judicially Hosted Settlement Conference-My Case in the Balance: Musings of a Trial Attorney*, DISP. RESOL. MAG., Spring 2011, at 8; *see also*, Hon. Kristena A. LaMar, *I Think I Blew It*, DISP. RESOL. MAG., Spring 2011, 12-14 (suggesting that in family disputes, settlement conferences conducted by presiding judges and attended by the litigants are more effective than with mediations conducted by a neutral); Hon. Stephen G. Crane, *Judge Settlements Versus Mediated Settlements*, DISP. RESOL. MAG., Spring 2011, 20-22 (insightful review of pros and cons of judicially hosted settlement conferences and private mediations); Wayne D. Brazil, *Judicial Mediation of Cases Assigned to the Judge for Trial - Magistrate Judges Celeste F. Bremer and Karen K. Klein*, DISP. RESOL. MAG., Spring 2011, 24-27, [hereinafter Brazil] (two judges' insights in judge-conducted settlement conferences).

[91] Brazil, *supra* note 90, at 26; *see also* He & Ng, *Pragmatic Discourse*, *supra* note 11.

[92] Zuigao Renminfayuan Yuanzhang Zhou Qiang (最高人民法院院长周强) [the Supreme People's Court Chief Justice Zhou Qiang], *Zuigao Renminfayuan Guanyu Renminfayuan Quanmin Shenhua Sifa Gaige Qingkuang De Baogao – 2017 Nian 11 Yue 1 Ri Zai Dishier Jie Quanguorenmindaibiaodahui Changwuweiyuanhui Di Shisan Ci Huiyi* (最高人民法院关于人民法院全面深化司法改革情况的报告—2017 年 11 月 1 日在第十二届全国人民代表大会常务委员会第三十次会议) [*the People's Supreme Court's Report on the State of Comprehensive and Further Judicial Reform - presented on November 1, 2017 at the 12th National People's Congress Standing Committee's 13th Conference*], http://www.npc.gov.cn/npc/xinwen/2017-11/01/content_2030821.htm.

[93] Zuigao Renmin Fayuan Guanyu Kaizhan Jiashi Shenpan Fangshi He Gongzuo Jizhi Gaige Shidian Gongzuo De Yijian (最高人民法院关于开展家事审判方式和工作机制改革试点工作的意见) [the Supreme People's Court Opinions on Family Matter Adjudication Procedures and Mechanism Reform Pilot Program] (Apr. 23, 2016), http://www.court.gov.cn/zixun-xiangqing-37372.html; *see* Du Wanhua (杜万华), *Lun Shenghua Jiashi Shenpan Fangshi He Gongzuo Jizhi Gaige* (论深化家事审判方式和工作机制改革) [*On Further Reforms of Family Matter Adjudication Procedures and Mechanisms*], Zhongguo Yinyong Faxue (中国应用法学) [China Applied Jurisprudence] Vol. 2, 1-9 (2018) [hereinafter Du], http://yyfx.court.gov.cn/upload/file/2018/04/10/15/34/20180410153449_99367.pdf, (the SPC's review of the family matter adjudication pilot program and pronouncement of comprehensive reform in family matter adjudication process in Chinese courts); *see also*, Mu Wang (王牧), 家事审判专业化的实施背景和具体建构), https://www.chinacourt.org/article/detail/2018/01/id/3145885.shtml (describing challenges faced by a county court in family matter adjudication and proposing some solutions).

intermediate and first-instance courts throughout China.[94] In June 2018, based on the experience acquired through the pilot program the SPC started a new family matter adjudication system.[95] A specialized family matter adjudication body is currently being created. Intermediate courts and basic level courts must now establish a specialized family law division, or at the minimum, designate a panel of judges to handle family matters.[96] Courts at all levels are required to establish a family matter mediation program.[97] Refined rules regarding mediation are being incorporated in the new family matter adjudication procedure, under which the court may either conduct mediation on its own or appoint outside mediators in family law matters.[98] New procedural rules controlling family matters are also in the process of being instigated. The courts' investigative power has been expanded through court-appointed family matter investigators (*jiashi diaochayuan*).[99] Now, full financial disclosure is mandatory in all divorce cases,[100] personal safety orders may be issued during the pendency of divorce actions,[101] and custody and property issues may be bifurcated.[102] By enacting these new regulations, the new system attempts to incorporate therapeutic counseling in family law proceedings through "a psychological counseling procedure" (*xinli shudao chengxu*), mandatory divorce "cooling" period, psychological

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[94] Zuigao Renmin Fayuan Guanyu Kaizhan Jiashi Shenpan Fangshi He Gongzuo Jizhi Gaige Shidian Gongzuo De Yijian (最高人民法院关于开展家事审判方式和工作机制改革试点工作的意见) [the Supreme People's Court Opinions on Family Matter Adjudication Procedures and Mechanism Reform Pilot Program] (Apr. 23, 2016), http://www.court.gov.cn/zixun-xiangqing-37372.html.

[95] Zuigao Renmin Fayuan Guanyu Jinyibu Shenhua Jiashi Shenpan Fangshi He Gongzuo Jizhi Gaige De Yijian (Shixing) (最高人民法院关于进一步深化家事审判方式和工作机制改革的意见(试行)) [the Supreme People's Court Opinions on Further Reforms of Family Matter Adjudication Procedures and Mechanisms (Trial Implementation)] (July 18, 2018), art. 46, [hereinafter Reformed Family Matter Adjudication Procedures].

[96] Reformed Family Matter Adjudication Procedures, *supra* note 94, art. 15-27.

[97] *Id.* art. 7.

[98] *Id.* arts. 6-14.

[99] Reformed Family Matter Adjudication Procedures, *supra* note 94, art. 15. China's new "family matter investigator" system is a legal transplant originated from Japan, Taiwan, and South Korea. *See*, Feng Yuan & Yao Yiqi (冯源 姚毅奇), *Jiashi Sifa Gaige Zhong Diaochaguan De Juese Ganyu* (家事司法改革中调查官的角色干预) [*Family Matter Judicial Reform Investigating Officers' Role and Intervention*] Zhongguo Faxue (中国法学) [China Legal Science] Vol. 6 (2017) (discussing the origins of the family matter investigator program and the need for it in Chinese courts).

[100] Reformed Family Matter Adjudication Procedures, *supra* note 94, art. 44.

[101] *Id.* arts. 35, 45.

[102] *Id.* art. 39.

intervention, home visits, domestic violence prevention network, and post-action follow-up inquiries.[103] The new system allows the court to suggest psychological therapy or counseling for children or the parties in any family matter, particularly in cases involving domestic violence or children.[104]

In the past four decades, the U.S. and comparable common law jurisdictions have gradually turned away from the conventional adversarial procedure to a judicial system that promotes collaborative, interdisciplinary, and problem-solving family dispute resolution.[105] Chinese family court reformers have whole-heartedly embraced therapeutic justice, holistic intervention, and expansive judicial discretion in China's conciliatory, relationship-preservation-oriented, mediation-centered family law procedures.[106] China's reformed family court system has been successful in enhancing separating families' ability to reconstruct positive relationships and has improved access to civil justice.[107]

The problem-solving family court model certainly has its natural appeals to Chinese family law reformers. However, the West's family court reform is far from perfect, and the problem-solving family court model has some major failings. For example, using family courts as service providers to address individual problems or societal predicaments has rarely been effective, but always been expensive.[108] The expansion of juridical power in micromanaging litigants' personal and family life risks due process violations, loss of privacy, and infringement of individual rights, particularly the rights of poor and vulnerable populations.[109] At the same

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[103] *Id.* arts. 28-34.

[104] *Id.* arts. 28, 31.

[105] For an overview of the paradigm shift in family dispute resolution in the United States, its underlying jurisprudence and the problems arising from the family court restructuration, *see*, Jana B. Singer, Dispute Resolution and the Post-divorce Family: Implications of A Paradigm Shift, 47 FAM. CT. REV. 363 (2009); Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 905 (2010); *see also* Patrick Parkinson, *The Idea of Family Relationship Centres in Australia,* 51 FAM. CT. REV. 195, 196 (2013) (describing the development of alternative family dispute resolution from a court-centric approach to a community-centric approach in Australia).

[106] Du, *supra* note 93, at 6-8.

[107] Aviel, *supra* note 79, at 2291-95.

[108] For discussions of family courts' institutional incompetency in delivering social services, *see*, Singer, *supra* note 105, at 367; Murphy, *supra* note 105, at 897-900. For discussions of the evolvement of problem-solving family courts and the challenges and problems faced by problem-solving family courts, *see*, Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258 (2008); Family Defense and the Disappearing Problem-Solving Court, 20 CUNY L. REV. 171, 175 (2016).

[109] Singer, *supra* note 105, at 367; *see also* Spinak, *supra* note 108, 178-85 (2016) (detailing inadequate legal representation of indigent parents in termination of parental rights proceedings); Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB.

time, cession of judicial authority in fact-finding and decision-making to nonlegal groups, such as mental health professionals, social workers, and nonlawyer mediators puts families at risk of bias and irreparable harm.[110] "Therapeutic justice" turns into "therapeutic tyranny" in many cases. To implement the family matter adjudication reform, an astronomical amount of funding will be needed to train, recruit, and manage additional judicial, non-judicial, and quasi-judicial staff. This includes mediators, financial evaluators, custody evaluators, parenting coordinators, and mental health service providers. Chinese people have long cherished conciliation and revered judicial discretion but also have resolutely resisted the state's invasions of family life. Therefore, it remains to be seen how Chinese people will respond to an interdisciplinary, therapeutic judiciary.

IV. FAMILY LAW TYPICAL CASES

The FMTCs cover a wide range of family law issues, including divorce, child custody and visitation, child support, marital property and debts division, financial support of an indigent dependent spouse, and compensatory damages to the spouse who has suffered the other spouse's abuse.

A. *Marriage and Divorce*

Marriage and dissolution of marriage are typically handled by the marriage registration authorities in China.[111] Divorce may be obtained based on the parties' mutual consent by registering the divorce with a marriage registration authority.[112] Absent mutual consent to divorce, a spouse may seek divorce in court.[113] Chinese courts are directed to "better maintain social stability and improve the social happiness index" by "exercising caution in granting divorces" and keeping the divorce rate low.[114] The SPC urges the lower courts to discourage divorce and encourage reconciliation for the sake of family harmony and societal stability.[115] 63%

L. REV. 7 (2004) (detailing the problems faced by battered women in the justice system).

[110] Murphy, *supra* note 105, 900-05; *see also* Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193 (2005) (outlining the jurisprudential and evidentiary problems regarding psychological opinions and recommendations in custody matters).

[111] Marriage Law, arts. 8, 32.

[112] Marriage Law, art. 32.

[113] Marriage Law, art. 33.

[114] FMTC 15.

[115] FMTC 39.

of divorce actions were dismissed for failure to establish grounds for divorce in 2017.[116]

1. *Ganqing Polie,* Irretrievable Breakdown of Mutual Affection as Grounds for Divorce

A divorce may be granted only when the court finds that a couple's mutual affection has ruptured (*ganqing polie*), in other words the marital relation has truly irretrievably broken down.[117] Generally, there is an irretrievable breakdown of marital relation when one of the following condition has occurred: bigamy and adultery; domestic violence and abandonment; drugs, gambling, and other addictions; living separately for more than two years due to lack of mutual affection (*ganqing*); and irretrievable breakdown of mutual affection (*ganqing poli*).[118] The SPC specifies fourteen circumstances under which a couple's marital relation should be deemed as irretrievably broken down and a divorce should be granted. Such circumstances include inability to have sex due to incurable disease, incurable mental illness, fraud, adultery, criminal conviction, arranged marriage, and other factors.[119]

Whether there is an irretrievable "breakdown of mutual affection" (*ganqing polie*) is determined based on the totality of the circumstances of the case.[120] Squabbles over housework or other family affairs are not sufficient grounds for divorce, particularly when a couple has young children.[121] Consider *Tang v. Jiang*.[122] Tang and Jiang were married in 2009. Each of them had a failed first marriage. Tang had a daughter from her previous marriage. Tong and Jiang had a daughter together in 2013. Less than a year after the child's birth, Tang filed for divorce. Both parties alleged that they had argued a lot because of differences in personality and lifestyle.

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[116] The SPC Sifa Dashujü Zhuanti Baogao Lihun Jiufen (司法大数据专题报告离婚纠纷) [Judicial Key Data Subject Report: Divorce Disputes], http://www.court.gov.cn/upload/file/2017/10/13/16/39/20171013163908_87275.pdf.

[117] Marriage Law, art. 33.

[118] Marriage Law, art. 32.

[119] Zuigao Renming Fayuan Guanyu Renming Fayuan Shenli Lihun Anjian Ruhe Rending Fuqi Ganqing Que Yi Polie (最高人民法院关于人民法院审理离婚案件如何认定夫妻感情确已破裂的若干具体意见) [Several Specific Opinions of the Supreme People's Court on How the People's Court Should Determine Whether Husband and Wife's Mutual Affection Has Actually Broken Down in Adjudication of Divorce Cases] (promulgated Nov. 21, 1989, effective Dec. 13, 1989)，1990 SUP. PEOPLE'S CT. GAZ. 1, http://gongbao.court.gov.cn/Details/ee0f781acf12e660044c99dfca52b9.html [hereinafter Marital Relation Breakdown Opinion].

[120] FMTC 28.

[121] FMTC 28.

[122] FMTC 39.

The trial court found that the parties' mutual affection (*ganqing*) had not irretrievably broken down and denied Tang's divorce petition. The court determined that the parties' reconciliation was possible because they were compatible as well-educated professionals of good moral character and had a good relationship in the first five years of their marriage before their daughter's birth. The trial court denied Tong's divorce petition and asked the parties to consider the welfare of their children and be more supportive and considerate to each other. The SPC praised the *Tang* court's decision and affirmed that marital squabbles and disagreements do not justify a divorce.

Similarly, in *Zhao v. Yang*[123] the court declined to grant a divorce after finding that the parties might be able to reconcile. Zhao and Yang met, fell in love, and got married within six months after they had met. After four years of marriage, Zhao and Yang had two daughters. Zhao left home and stayed with her parents after an argument with Yang. Yang begged her to return home several times. Zhao refused to return and filed for divorce. The court found that Zhao and Yang's relationship was fractured but not yet broken and a divorce would be detrimental to the children's welfare. The court dismissed the case and denied Zhao's divorce petition. The trial court directed the parties to make good efforts to maintain family harmony and provide their children a nurturing environment.[124]

In recent years, the number of "gray divorce" cases, where a party seeks a divorce often after a decades-long marriage, has gradually increased in China. While affirming that divorce should be granted when there are sufficient divorce grounds, the SPC has suggested that late-life divorces should not be readily granted as older couples' marriages are more about family responsibilities and their divorce would affect not only themselves but also their children and even grandchildren. The SPC presumes that older couples are more likely than not to resolve their marital discords and repair their relationships after having been able to do so for decades. In other words, the SPC believes that the breakdown of a long marriage is unlikely to be irretrievable and thus there is little reason to dissolve any marriage of a long duration.[125] *Liu v. Li* is one of these so-called "gray divorce" cases.[126] Liu and Li married in 1980. They had a son, who also married and had his own children. After thirty-six years of marriage, Liu filed for divorce in 2012. The court denied his petition. Liu brought his second divorce action in 2014. The court again denied his petition for divorce. The court reasoned that Li and Liu had been married for nearly forty years and had gone through many hardships together; and that although the couple quarreled over the

[123] FMTC 47.

[124] FMTC 47.

[125] FMTC 15.

[126] FMTC 15.

years, their marital relation had not irretrievably broken down. The court scolded Li for her short temper and directed her to be more considerate to Liu's feelings. The court also asked Liu to forgive Li for her bad temper and repair the marriage for the sake of their son and grandchildren.

While attempting to keep the divorce rate low, Chinese courts are nonetheless realistic about how much the courts can do to stop divorces. The SPC has reaffirmed that a divorce should be granted when a married couple's mutual affection has irretrievably broken down (*ganqing poli*).[127] Commenting on *Sun Fengjie v. Wang Yuping*,[128] the SPC clarified that the breakdown of mutual affection warrants a divorce if any one of the statutory conditions has occurred.[129] In *Sun Fengjie v. Wang Yuping*,[130] Sun and Wang were married in 1993 and had a daughter in 1994. The parties argued often and had physical altercations during the marriage. They separated in 2007. In 2011, the parties entered a divorce settlement agreement but did not obtain a divorce registration because their daughter was preparing for her college entrance exam. Sun filed for divorce in 2012 and then again in 2013. He withdrew his complaint at both times due to lack of evidence for breakdown of mutual affection (*ganqing polie*). Sun filed for divorce a third time in 2014. The trial court granted the divorce despite Wang's vehement objection. Wang appealed. The appellate court affirmed the divorce, reasoning that there was sufficient evidence of irretrievable breakdown of the parties' marital relation in that the parties had been living separately since 2007 and had only communicated with each other with written notes and text messages. The SPC explained that Sun and Wang's mutual affection had irretrievably breakdown (*ganqing polie*) as a statutory circumstance, as they had lived separately for over two years.[131]

Divorces are sometimes quickly granted when the court finds that a marriage is doomed to fail for lack of a foundation of mutual affection (*quefa ganqing jichu*).[132] To illustrate, in *Peng v. Li*, Peng was seventy years old and Li was fifty-two when they got married in January 2009. The couple fought often because their adult children could not get along. In February 2015, the couple separated. Peng then filed for divorce. The court quickly granted the divorce. The SPC observed that Peng and Li's marriage was both parties' second marriage and lacked a solid foundation of mutual affection (*quefa ganqing jichu*). The SPC reasoned that Peng and Li's marriage had to be dissolved because they never had any mutual affection (*ganqing*) and there was no possibility of reconciliation. Commenting on

[127] FMTC 28; Marriage Law, art. 32.

[128] FMTC 28.

[129] Marriage Law, art. 32 § 3.

[130] FMTC 28.

[131] FMTC 28.

[132] Marital Relation Breakdown Opinion, art. 2.

Peng v. Li, the SPC cautioned that seniors should consult with their adult children before getting remarried and that adult children should be understanding to their parents' emotional needs.[133]

2. Annulment of Marriage

The Marriage Law provides that a marriage is void on any of the four grounds: bigamy, consanguinity, incurable illness, and if either party to the marriage is younger than the statutory marriable age.[134] A marriage is also voidable if the marriage was entered into under duress.[135]

In *Sun v. Tian*,[136] Tian used a false identity to register his marriage to Sun. Within a month of the marriage, Sun found out that Tian's identification documents were falsified. Tian disappeared when he learned that Sun found out the truth. Sun filed for divorce soon after Tian's disappearance. The court served Tian by publication. The court rejected Sun's request for annulment but granted him the divorce. In its commentary on *Sun v. Tian*, the SPC reasoned that concealment or misrepresentation of one's identification is not a sufficient ground for annulment, a marriage can be annulled only when the marriage was entered under coercion or duress and therefore Sun's marriage could not be annulled but should be dissolved. The SPC further stipulated that the marriage must be dissolved in any case where a party falsified identification to register a marriage and the other party who provided his/her true identification seeks to dissolve the marriage.

3. Cohabitation

Under Chinese law, marriage is the only institution within which sexual behavior is allowed. Non-marital sex is not tolerated officially.[137] Regardless whether a cohabitation relationship is immoral or unlawful, the courts must divide property acquired during cohabitation and determine any

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[133] FMTC 24.

[134] Marriage Law, art. 10. Marriage Law, art. 6 provides the marriable age as 22 for men and 20 for women.

[135] Marriage Law, art. 11.

[136] FMTC 48.

[137] Marriage Law, art. 3, 4, 46(2). The SPC has directed that a court must reprimand parties in non-marital cohabitation cases and may impose civil penalty if either party is married. *See* Zuigaorengmingfayuan Guanyu Renming Fayuan Shenli Weiban Jiehun Dengji Er Yi Fuqi Mingyi Tongju Shenghuo De Ruogan Yijian (最高人民法院关于人民法院审理未办结婚登记而以夫妻名义同居生活的若干意见) [Some Opinions of the Supreme People's Court on People's Courts' Adjudication of Cohabitation as Husband and Wife without Marriage Registration] (promulgated Nov. 21, 1989, effective Dec. 13, 1989) [hereinafter Cohabitation Opinion], Preamble, 1990 SUP. PEOPLE'S CT. GAZ. 1 http://gongbao.court.gov.cn/Details/ee0f781acf12e660044c99dfca52b9.html; *see also* Marriage Law Interpretations (II), art. 1 § 1 (The SPC has further stipulated that a spouse may bring an action to compel dissolution of the adulterous cohabitation relationship engaged by his or her spouse).

issues concerning children born out of these relationships when a cohabitation relationship breaks down.[138] In the past two decades, the SPC has developed a set of rules for non-marital cohabitation cases.[139]

The SPC has acknowledged that *de facto* marriage remains common, particularly in rural China as many peasants are unaware that a marriage is not official until it is formally registered in the civil registry. [140] In this context, the SPC treats *de facto* marriages entered prior to February 1, 1994, as legal marriages and permits retroactive registration of *de facto* marriages entered after February 1, 1994.[141] *De facto* marriages entered after February 1, 1994, but not registered are treated as non-marital cohabitation.

Ma v. Wei[142] illustrates how Chinese courts handle difficult issues in cohabitation cases. Ma and Wei met and fell in love while working as migrant workers in a city far away from their hometown. In March 2012, they were married in a traditional wedding ceremony in their hometown. After the wedding ceremony, the parties lived together as husband and wife but never registered their marriage. Their daughter was born in June 2012. Wei left Ma and the child in December 2013 after an argument with Ma. Ma could not locate Wei ever since. Ma could not complete the child's household registration (*hukou*) due to Wei's absence, and so Ma sought custody of the child and dissolution of cohabitation. The trial court approached Ma's case methodically. The trial court first considered the legal status of Ma and Wei's relationship, and found that Ma and Wei were not legally married because they did not register their marriage and thus their relationship had to be dealt with as "cohabitation." Then, the trial court considered whether an order to dissolve a cohabitation relationship should be entered. The court found that neither Ma or Wei was married to another person and thus an order to dissolve cohabitation was not needed.[143] Lastly, the trial court considered the issues of custody and support for Ma and Wei's daughter. The trial court examined the evidence pursuant to Article 2 of Some Provisions of the SPC on Evidence in Civil Procedures,[144] and found

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[138] Marriage Law Interpretations (II), art. 1 § 2.

[139] *See e.g.*, Cohabitation Opinion; Marriage Law Interpretations (I), arts. 2, 4, 5; Marriage Law Interpretations (II), arts. 1, 2.

[140] FMTC 44.

[141] Marriage Law Interpretations (II), art. 5.

[142] FMTC 44.

[143] Marriage Law Interpretations (I), art. 1.

[144] Zuigao Renmin Fayuan Guanyu Minshisusong Zhengju De Ruogan Guiding (最高人民法院关于民事诉讼证据的若干规定) [The Supreme People's Court's Certain Provisions on Evidence in Civil Procedures] (promulgated Dec. 6, 2001, effective Apr. 1, 2002), 2002 SUP. PEOPLE'S CT. GAZ. 1, http://gongbao.court.gov.cn/Details/0d82ddc253c5a8a44fbea92ea600bb.html [hereinafter Evidence Opinions] (The parties concerned shall be responsible for producing evidence to prove the facts that their own allegations are based on or the facts that their refutations to

that the child had been under Ma's sole care since Wei disappeared, Wei's whereabouts were unknown, and removing the child from her current environment would be detrimental to the child's wellbeing. Thus, the court decided that it would be beneficial to the child's physical and mental health, and a protection of her legal rights for the child to be raised by Ma. The court also found that Ma's request to be solely responsible for his daughter's support did not violate any law. The trial court concluded that Ma shall have custody of his daughter and Wei shall not pay any child support.[145]

When determining property distribution between cohabitation partners, Chinese courts consider the totality of the circumstances and equitable factors other than the titled ownership. Consider *Wang Li v. Zhang Wei.*[146] Wang and Zhang had lived together since 2001. In 2002, they purchased a home for RMB 30,000 in Zhang's name. They borrowed RMB 13,000 from Qiu to purchase the home. They also borrowed additional loans in a total amount of RMB 10,000 to pay for joint expenses. Wang and Zhang repaid Qiu when they were living together. Wang and Zhang still had some debts when they separated. Considering that Wang and Zhang had been living together as husband and wife for a long period of time, the court ruled that all income, assets, and debts acquired during their cohabitation period were the parties' joint property and liabilities. The court then divided the value of the home as well as the unpaid debts equally between the parties. The SPC explained that with a few exceptions provided by law all property acquired during the marriage is marital property jointly owned by the spouses,[147] whereas the source of funds used to acquire the property determines whether any property acquired during cohabitation is the cohabitants' joint property.[148]

B. *Marital Faults*

The Marriage Law makes domestic violence, adultery and other marital faults grounds for divorce and provides civil compensatory damages for marital faults at the time of divorce.[149]

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the other party's allegations are based on. Where a party cannot produce any evidence, or the evidence produced are insufficient to support the facts on which the allegations are based, such party with the burden of proof shall bear any unfavorable consequences).

[145] FMTC 44.

[146] FMTC 26.

[147] Marriage Law, arts. 17, 18.

[148] Marriage Law Interpretations (II), art. 1 § 2; Cohabitation Opinions, arts.10, 11.

[149] Marriage Law, art 46(3); Marriage Law Interpretations (I), arts. 28-30.

1. Domestic Violence

The SPC defines domestic violence as "beating, restraining, torturing, imprisoning or any other action that caused a family member physical or emotional injury," and provides that "continuing, frequent domestic violence conducts constitute criminal abuse."[150] The SPC reported that about 9% of divorce actions filed in Beijing courts involve domestic violence.[151]

a. Personal Safety Protection Order

Any person that has suffered domestic violence or is at risk of domestic violence is entitled to an order of protection for his/her personal safety.[152] Chinese courts are required to determine whether to issue a personal safety protection order within seventy-two hours or within twenty-four hours in case of an emergency, after a petition is made.[153] In *Chen v. Zhang*, [154]the court issued a personal protection order for wife Chen and granted her divorce based on twenty-four years of domestic abuse. The court found that Zhang instituted unreasonable rules in the household to exert control over the wife and often scolded her and even beat her when she "disobeyed" his "house rules." The trial judge observed the husband's controlling behavior throughout the case in open court. The court granted the wife a divorce and issued a personal protection order forbidding the husband from assaulting, threatening, stalking, and harassing the wife and their adult daughter.

In *the Matter of Zhong*, [155] the court issued a personal safety protection order for Zhong against Chen, Zhong's ex-husband. After the parties were divorced, Chen had refused to leave the marital residence and demanded to eat and sleep with Zhong as though they had not been divorced. Chen attempted to restrict Zhong's social life by beating, disparaging, and threatening her. After he was removed from the marital residence by the police, Chen used his visitation with the parties' children to stalk, harass, and intimidate Zhong. The court found that Chen's behavior constituted typical "break-up violence" and was likely to escalate to more serious crimes. Thus, the court issued a personal safety protection order enjoining

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[150] Marriage Law Interpretations (I), art. 1.

[151] FMTC (BJ) 2.

[152] Zhonghua Renmin Gonghe Guo Fan Jiating Baoli Fa (中华人民共和国反家庭暴力法) [The People's Republic of China Anti Domestic Violence Law] (promulgated Dec. 27, 2015) [hereinafter Anti Domestic Violence Law), arts. 23-32; Reformed Family Matter Adjudication Procedures, arts. 35, 45.

[153] Anti Domestic Violence Law, art. 28.

[154] DVTC 3.

[155] DVTC 6.

Chen from harassing, stalking, threatening, and assaulting Zhong, and ordered him to stay at least 200 meters away from Zhong, Zhong's home, and Zhong's workplace. In addition, the court forbade Chen from visiting the children at Zhong's residence.

b. Compensatory Award for Domestic Violence

Chinese law provides that a domestic violence victim may seek damages for bodily and emotional harm in connection with a divorce action and/or any criminal action against the abuser.[156] In addition to civil remedies of damages and orders of protection, domestic violence victims may bring private prosecutions against their abusers.[157]

The SPC has issued detailed guidelines on the handling of financial compensations for domestic violence through property distribution as well as compensatory damages in divorce cases.[158] Compensatory damages for domestic violence must be awarded when there is clear evidence of either "bodily harm" or "mental injury" supported by policy reports, forensic reports and medical records.[159] The amount of compensatory damage may include reasonable costs and expenses for treatment and rehabilitation, such as medical treatment expenses, nurse fees, travel expenses, and lost wages; loss of future income and future cost of care due to disability caused by the bodily injuries; and burial cost.[160]

In *Wang v. Jiang*, the parties had a short marriage without children. Throughout the marriage, the husband, Jiang, drank excessively and physically abused the wife, Wang. In 2009, the wife left home after another beating by the husband and filed for divorce. The wife sought compensation for emotional injury from the husband and division of marital property. The court granted the wife divorce, division of marital property, and compensatory damages for the emotional suffering inflicted by domestic violence. The SPC commended the court's decision in *Wang v. Jiang* and

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[156] Marriage Law, art. 46.

[157] Marriage Law, art. 45; *see also* Zhonghua Renmin Gonghe Guo Xing Fa (中华人民共和国刑事诉讼法) [The People's Republic of China Criminal Procedure Law] (promulgated July 7, 1979, amended March 14, 1997, effective Oct. 1, 1997), PRC LAWS art. 204 (China) [hereinafter Criminal Procedure Law].

[158] Zuiggao Renmin Fayuan Sheji Jiating Baoli Hunyin Anjian Shenli Zhinan (最高人民法院涉及家庭暴力婚姻案件审理指南) [the Supreme People's Court Guidelines for Hearing Marriage Cases Involving Domestic Violence], arts. 53-62 (Mar. 2008), http://yyfx.court.gov.cn/news/xq-42.html [hereinafter DV Guidelines].

[159] Zhonghua Renmin Gonghe Guo Qinquan Zeren Fa (中华人民共和国侵权法) [The People's Republic of China Tort Law] (promulgated Dec. 26, 2009, effective July 1, 2010) [hereinafter Tort Law], arts. 16, 22; *see also* DV Guidelines, *supra* note 158, art. 59.

[160] Tort Law, art. 16. For a detailed review of determination of compensation for physical and emotional damages, *see* Mo Zhang, *Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon*, 10 RICH. J. GLOBAL L. & BUS. 415, 471–78 (2011).

urged courts to award domestic violence victims compensatory damages, not only as compensations for the victims but also as a preventative measure against domestic violence.[161] Some critics however, are skeptical as to whether compensatory damages would be effective in achieving these goals.[162]

Chinese courts have been faithfully following the SPC's guidelines and making compensatory damage awards whenever justice and fairness requires so. *Zhang v. Chen*[163] hints at Chinese courts' willingness to forgo strict application of procedural rules in favor of fairness and substantive justice in domestic violence cases. Zhang and Chen were married in 2005. On May 26, 2008, Chen beat Zhang and caused her serious injuries, including a broken nose and broken knees. Zhang was hospitalized due to the injuries. Soon after the incident, Chen filed for divorce on June 11, 2008. On August 5, 2008, Zhang brought private prosecution action against Chen. Within her private prosecution action, Chen sought reimbursement of medical and travel expenses for her treatment of the injuries in the criminal case against Chen. Chen was convicted of assault and was ordered to reimburse Zhang roughly RMB 3,000 for her out-of-pocket hospital expenses.

Two years after the incident, on July 22, 2010, Zhang received a forensic medical report of her injuries and disability resulting from the injuries. On August 11, 2010, Zhang filed a civil suit for a total of RMB 60,000 for additional medical expenses, home care expenses, and damages based on the new forensic medical report. On August 11, 2011, the court granted the parties' divorce and awarded Zhang compensatory damages. In 2012, the trial court held that Zhang's civil suit brought on August 11, 2010, for additional compensation and damages was barred by the one-year statute of limitation that starts when the plaintiff knows or should have known of the injury.[164] The trial court found that in Zhang's 2010 civil suit against Chen the statute of limitations started from August 5, 2008, because Zhang had known about her injuries when she brought a private prosecution action against Chen on August 5, 2008. The trial court also found that Zhang had been compensated for her injuries in the private prosecution action and the divorce action. The trial court thus dismissed Zhang's 2010 suite for additional damages.

The appellate court reversed, relying upon the SPC's rule that "for personal injury that is obvious, the statute of limitations for compensation shall be computed from the date the injury is inflicted. If the injury is not

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[161] FMTC 2.

[162] Charles J. Ogletree, Jr. et al., *the Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 270 (2004).

[163] FMTC 31.

[164] Civil Procedure Law, arts. 136, 137.

discovered at the time but is later diagnosed after examination and is proven to be caused by the infringing act, the statute of limitations shall be computed from the date the condition of the injury is diagnosed."[165] The appellate court found that in Zhang's case the statute of limitations should not be computed from August 5, 2008, when Zhang brought the private prosecution case against Chen, but instead the statute of limitations began on July 29, 2010, when Zhang received the forensic medical report that fully assessed the extent of her injuries and the amount of financial damage resulting from the injuries. The appellate court awarded Zhang RMB 48,664.31 for damages, including additional medical expenses, home care cost, and emotional damages. The appellate court did not consider that the trial court had awarded Zhang compensatory damages within the divorce action, during which Zhang's forensic medical report had been available and that Zhang should have or could have offered the forensic medical report in her divorce action. It is unclear whether the trial court had computed its compensatory award based on Zhang's forensic medical report in the divorce action. It is clear, however, that the appellate court found the lower court's compensatory awards insufficient and thus awarded Zhang additional compensation despite procedural defects in her actions.

c. Criminal Domestic Violence

Chinese courts have shown great care in employing subjective justice in criminal cases involving domestic violence. Domestic violence crime subjects include not only family members but also anyone that has custodial, guardianship, or cohabitation relationship with the victim.[166] The SPC has called for lenient sentencing for domestic violence victims who have injured or killed his/her abuser in self-defense and more severe punishment for domestic abusers that have caused severe injuries or death of a domestic violence victim. The SPC explained that in cases where a domestic violence victim killed or injured his/her abuser in self-defense, lesser charges and lenient sentences could prevent domestic violence and diffuse "social conflicts" because in these cases the abusers often committed greater offenses and their victims', the conduct was often much less harmful to the society, and they were unlikely to repeat the offense.[167]

For example, in the *Wong* assault case, [168] Wong's husband, Hu had been abusive to Wong for years. Hu had an adulterous relationship with

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[165] 最高人民法院关于贯彻执行中华人民共和国民法通则若干问题的意见 [The Supreme People's Court Judicial Opinions on Certain Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China] (promulgated Apr. 2, 1988) (Partially Invalid), 1988 SUP. PEOPLE'S CT. GAZ., art. 268.

[166] CDVTC 4.

[167] FMTC 22.

[168] FMTC 22.

another woman, Yang. On the night of the incident Hu brought Yang home, to which Wong objected. Hu then started beating Wong first with a broomstick and then with a coat hanger. Wong tried to get away from Hu, but Hu chased after her. Wong grabbed a paring knife to defend herself. When she was trying to fight off Hu, Wong stabbed Hu in the chest. She immediately took Hu to the hospital, but Hu died from the stabbing wound. The trial court found that Wong accidentally killed Hu in self-defense and that Wong took immediate action to save Hu. Considering Hu's history of domestic abuse and adultery and that Hu attacked Wong first, the trial court sentenced Wong for three years imprisonment with five years of probation, which essentially allowed Wong to stay out of prison. [169]

In contrast, the SPC calls for harsher sentences of domestic abusers. In the *Zhu Chao Cun* abuse case, [170] Zhu and Liu were married in September 1998. In November 2011, Zhu and Liu were divorced by agreement. However, they continued living together after the divorce. Zhu often beat Liu and injured her numerous times. On July 11, 2011, Zhu and Liu had an argument over their daughter's education. Zhu beat Liu with a belt and demeaned Liu by claiming that their daughter was not his biological child. During the argument, Liu took a knife and killed herself. Zhu was held responsible for Liu's suicide and was sentenced to five-years imprisonment. The SPC explained that Zhu's long history of domestic violence was the direct cause of Liu's death and an aggravated factor in his sentencing.

2. Adultery

The Chinese government and the Chinese public both support the prohibition and criminalization of adultery. [171] Similar to those who are against adultery in the U.S.,[172] Chinese people believe that marital infidelity not only dismantles families but also destroys the moral fabric of society. Infidelity and concubinage, though widespread,[173] are regarded as immoral and unacceptable in Chinese society.[174] The SPC has declared that marital fidelity is a traditional Chinese virtue as well as a legal obligation and all adulterous relationships are prohibited by law.[175] Although adultery is no

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[169] FMTC 22.

[170] CDVTC 4.

[171] *See*, *e.g.,* Leslie Pappas, *China's New Family Values*, NEWSWEEK, 24 Aug. 1998, 36.

[172] Alyssa Miller, *Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and Their Effects on Women*, 41 FORDHAM INT'L L.J. 425, 435 (2018) [hereinafter Miller].

[173] Na Zhang, et. al., *Sexual Infidelity in China: Prevalence and Gender-Specific Correlates*, ARCH SEX BEHAV. 41, 861, 864 (2012).

[174] Miller, *supra* note 172.

[175] FMTC 12.

longer a crime under Chinese law,[176] adulterous relationships may be nonetheless prosecuted as bigamy,[177] which is a crime carrying significant prison time under Chinese penal law.[178] In addition to the penal liability, the Marriage Law imposes emotional damages caused by adultery or bigamy.[179]

Zhou v. Zhang[180] reflects the PRC's desire to regulate marriages and to enforce monogamy. Zhou and Zhang were married in 2003 and have two children. The parties were divorced in July 2013 on consent. After the divorce, Zhou found out that Zhang had an extra-marital affair and had a daughter born in May 2013. Zhou sued Zhang for compensatory damages for emotional injury caused by Zhang's adulterous conduct. Zhou was awarded RMB 15,000 as compensatory damages. The SPC explained that adultery is a violation of both the law and Chinese moral tradition, and therefore the adulterer must be punished and must compensate the injured spouse for emotional sufferings.[181]

Similarly, in *Lu v. Chen*[182] the wife received compensation for emotional damage resulting from the husband's adultery. The husband, Chen started living with another woman following the parties' separation. The court found that Chen's extramarital affair was the direct cause of the parties' divorce and caused his wife, Lu, emotional distress and harm. The court held that Chen was liable for breach of his duty of marital fidelity under Article 4 of the Marriage Law, which mandates that husband and wife must remain faithful to each other.[183] Chen was ordered to pay Lu compensatory damage in the sum of RMB 5,000.[184]

C. *Marital Property*

Chinese law does not mandate equal distribution of marital property. The Marriage Law requires that marital properties be distributed based on the principal of ensuring care of the children and protecting the wife's rights

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[176] Miller, *supra* note 172, at 434. Although adultery is rarely prosecuted, it remains a crime in twenty states in the United States; *see also*, Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 218 (1986).

[177] *See* Zhuo Jiangchun Chonghun Xinshi Tongzhishu (周江春重婚刑事通知书) [Zhuo Jiangchun Bigamy Criminal Matter Notice] Zuigaofa Xin Shen No. 109 (最高法刑申 109 号) (the Sup. People's Ct. Mar. 21, 2018) http://wenshu.court.gov.cn/content/content?DocID=b5a22093-b589-4549-b6ac-a8c4011009c4&KeyWord=%E9%87%8D%E5%A9%9A%E7%BD%AA.

[178] Criminal Law, art. 258.

[179] Marriage Law, art. 46 § 1, 2.

[180] FMTC 12.

[181] FMTC 12.

[182] FMTC (BJ) 5.

[183] Marriage Law, art. 4.

[184] FMTC (BJ) 5.

and interests.[185] The Marriage Law also distinguishes marital property (*fuqi gongyou caichan*) subject to division upon dissolution of marriage[186] and separate property (*fuqi yifangde caichan*) that is the titled spouse's individual property not subject to distribution at the time of divorce.[187] When there is no sufficient evidence to ascertain the nature of a certain asset, such asset is generally imputed as marital property.[188] The SPC has emphasized equity and fairness in marital property distribution based on true, accurate, and complete financial information.[189]

1. Financial Disclosure

The claimant bears the burden of proof under Chinese law.[190] Before the new mandatory financial disclosure was implemented in 2018,[191] Chinese law had not provided mandatory financial disclosure in matrimonial actions. Thus, it was extremely difficult for a non-titled spouse to provide sufficient marital evidence of property. The SPC estimated that nearly 60% of divorce disputes involved concealment of marital property.[192] There are nonetheless some tools available to compel financial disclosure. For instance, investigative orders may be issued upon a party's request to compel production of financial records. A party may also seek protective orders to preserve and protect marital property during a divorce action.[193]

In *Li v. Sun*,[194] Li and Sun were separated in 2001 and divorced in 2004. Ten years later, Li discovered that Sun concealed a residence that he acquired during the marriage. Li immediately brought a post-judgment action to seek her share of the residence. Sun argued that Li's action should be dismissed because the statute of limitation had long expired. Sun also argued that the plain language of the parties' settlement agreement clearly indicated that Li would receive the family home as her share of marital property and Sun would receive the remainder of the marital estate. The

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[185] Marriage Law, art. 39.

[186] Marriage Law, art. 17.

[187] Marriage Law, art. 18.

[188] Gongtong Caichan De Jieding (共同财产的界定) [Defining Marital Property] in Zhongguo Hunyinfa Shiyi (中华人民共和国婚姻法释义) [The National People's Congress Explanatory Report on the People's Republic of China Marriage Law] (hereinafter Marriage Law Explanatory Report), art. 39, http://www.npc.gov.cn/npc/flsyywd/minshang/2002-07/11/content_297448.htm.

[189] *See, e.g.,* FMTC 7; FMTC 23; FMTC 43.

[190] Evidence Opinions, art.1, 2.

[191] Reformed Family Matter Adjudication Procedures, art. 44.

[192] FMTC 43.

[193] FMTC 43.

[194] FMTC 47.

court found that Sun concealed the residence from Li at the time of divorce. The trial court pointed out that the parties' settlement agreement made specific provisions regarding properties in the husband's name, including the husband's company and car, and his personal belongings but made no mention of the second residence in question. The trial court reasoned that the residence in the husband's name is much more valuable than his car and would have been disposed if the wife had known of it. The court concluded that the omission of the second residence was obviously intended to conceal the residence from the wife. The trial court also found that because Sun purchased the residence when the parties were already separated, Li could not have known that the residence in dispute was purchased. The court held that the statute of limitation started when Li discovered that Sun had concealed the residence from her, therefore it had not yet expired. In its commentary on *Li v. Sun*, the SPC emphasized that pursuant to the Marriage Law Article 47, the lower courts should reduce or eliminate property awarded to any party that concealed, transferred, disposed of or damaged marital property, or incurred fraudulent debts to gain unfair advantages in marital property division.[195]

In *Lu v. Xu*, [196] the trial court issued an investigative order to compel production of financial records. Lu and Xu were married for eleven years with two children and had a successful restaurant. Xu withdrew the parties' entire savings from the parties' savings accounts after Lu filed for divorce. The parties disputed the amount of their savings. Xu also claimed that he had depleted the parties' savings on family expenses. However, Xu offered no evidence of the expenditures. The trial court issued an investigative order to the parties' bank and obtained records of the parties' bank accounts. The bank records showed that Xu had withdrawn over RMB 550,000 from the parties' savings accounts. The court distributed the RMB 550,000 equally between Lu and Xu. Commenting on *Lu v. Xu*, the SPC advised litigants to preserve financial records and secure witness testimony before starting a divorce action, to seek the court and attorneys' assistance in collection of evidence, and to obtain property protective orders during the pendency of an action.[197]

2. Agreements Concerning Marital Property and Separate Property

The PRC Contract Law is not applicable to any agreements concerning personal relationships, such as marriage. Agreements concerning separate property or marital property are governed by the Marriage Law.[198] The Marriage Law permits property agreements entered

[195] Marriage Law, art. 47.

[196] FMTC 43.

[197] FMTC 43.

[198] Zhonghua Renmin Gonghe Guo Hetong Fa (中华人民共和国合同法) [The People's Republic of China Contract Law] (promulgated Mar. 15, 1999, effective Mar. 15,

prior to, during and at the end of a marriage[199] but provides no clear rules policing such agreements, except for a few rules on the enforceability of divorce settlement agreements.[200]

It is well settled in Chinese courts that absent of any fraud or duress, a divorce settlement agreement is enforceable and binding after the marriage is dissolved.[201] In *Yu v. Gao*,[202] Yu and Gao were married on November 11, 2001, and had a son in 2003. The parties were divorced through mediation in 2009. The parties' divorce settlement agreement provided that Yu must transfer the marital residence to the parties' son after Yu paid off the mortgage. In 2013, Yu initiated a post-judgment proceeding to rescind the parties' divorce settlement agreement and to distribute the value of the marital residence between Gao and him. Gao argued that gifting the marital residence to the parties' son was an integral part of the parties' settlement agreement in exchange of her assuming all marital debts, and therefore Yu should not be allowed to rescind his gift to the parties' son. Both the trial court and the appellate court agreed with Gao. The SPC explained that although the Contract Law permits a grantor to unilaterally rescind any contract to give a gift before such contract is performed, the Contract Law provision is not applicable to any divorce settlement agreement, such as the one in the case of Yu and Gao. The SPC held that a party to a divorce settlement agreement may not unilaterally rescind the parties' agreement to gift any marital property to a third party as part of the divorce settlement, particularly if marital property is gifted to the parties' minor child(ren).

When a divorce settlement agreement is found invalid or unenforceable for formality reasons, Chinese courts must balance both parties' lawful interests and supply appropriate remedies to ensure a fair martial property division between the parties.[203] In *Liu v. Kong*,[204] Liu, the wife returned to her parents' home within weeks after the wedding and the parties remained separated ever since. Soon after Liu returned to her parents, the parties' families started negotiating the return of betrothal gifts given by the Kong family to Liu. During the negotiations, Liu acknowledged that she received a total of RMB 43,200 from the Kongs. Kong prepared a list of betrothal gifts that were given to Liu. Liu signed and acknowledged the list.

1999) [hereinafter Contract Law], art. 2; *see also* Marriage Law art. 19.

[199] Marriage Law, arts. 19, 39.

[200] Marriage Law Interpretations (II), arts. 8, 9, 25, 27; Marriage Law Interpretations (III), arts. 10, 14, 16.

[201] Marriage Law Interpretations (II), arts. 8-9.

[202] FMTC 1.

[203] Marriage Law Interpretations (III), art. 14.

[204] FMTC 32.

Liu's brother also endorsed the list and made a notation on the list, stating that the parties would obtain a divorce registration. The wife's family promised to repay the husband's family RMB 43,200. However, Liu and Kong did not obtain a divorce registration. Instead, Liu filed for divorce in court and Kong counterclaimed for return of betrothal gifts on the list. The court found that the list endorsed by Liu, Kong, and Liu's brother was not enforceable as Liu's brother does not actually owe anything to Kong, and that Kong and Liu's "list" had no effect pursuant to Article 14 of the Marriage Law Interpretations (III), which provides that any property settlement agreement entered in connection with a divorce registration shall be void in the event that the parties fail to register a divorce registration and the court shall distribute the marital property as if such agreement had never existed.[205] The trial court, nonetheless, received the betrothal gift list endorsed by Liu and her brother into evidence, accounted Kong's betrothal gifts and Liu's dowry, and determined that after offsetting the dowry that Liu brought to the Kong family, Liu must return Kong RMB 14,840.

3. Priority of a Spouse's Marital Rights

The concept of equitable distribution permits the courts to ignore legal title to a property and confer a non-titled spouse some rights to the property,[206] such as a non-titled spouse's entitlement to the appreciation in value of non-marital property and the right of exclusive occupancy of marital residence regardless of "which party holds legal or equitable title or is the lessee of" the residence.[207] Chinese law does not explicitly provide such priority of a non-titled spouse's marital rights over a titled owner. Chinese courts have to turn to the PRC Property Law (the "Property Law") to justify equitable remedies for a non-titled spouse.[208] Consider *Xin v. Yin*.

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[205] Marriage Law Interpretations (III), art. 14.

[206] Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 628 (1991).

[207] CAL. FAM. CODE § 6321; *see also Goldblum v. Goldblum*, 301 A.D.2d 567, 754 N.Y.S.2d 32 (2d Dep't 2003) (notwithstanding that the marital residence was husband's separate property, the wife was awarded exclusive occupancy of marital residence in that neither party had ability to obtain equivalent and suitable alternative housing for the wife and children); *Mazzone v. Mazzone*, 290 A.D.2d 495, 736 N.Y.S.2d 683 (2d Dep't 2002) (granting exclusive occupancy of the marital residence to the wife, until the parties' child reached age 18 or otherwise emancipated because the wife was disabled and was incapable of returning to her previous occupation as a legal secretary for the foreseeable future); *Acosta v. Acosta*, 301 A.D.2d 467, 753 N.Y.S.2d 506 (1st Dep't 2003) (the wife was awarded half of the appreciation in value and exclusive occupancy of the entire building in which the marital residence was located, although the building is the husband's separate property in that the wife made direct contribution in managing and maintaining the building and indirect contribution by homemaking and caring for the parties' child and the husband's younger siblings).

[208] FMTC 30; *see also* Pei Hua (裴桦), *Fuqi Caichanzhi Yu Caichanfa Guize De Chongtu Yu Xietiao* (夫妻财产制与财产法规则的冲突与协调) [*the Conflicts between*

[209] The plaintiff, Xin Guifang was the paternal grandmother of the defendant, Yin Zhigang. Xin's husband, Yin Shutian purchased a family home in 1980, where Xin had lived since. After Yin Shutian died in 1985, Xin and her son, Yin Huijin, continued living in the home. In 2012, Yin Huijin died. Without Xin's consent, Yin Huijin's son, Yin Zhigang moved into the family home after Yin Huijin's death. Xin then sued Yin Zhigang for exclusive occupancy of the family home. Yin Zhigang argued that he was the rightful owner of the family home as he inherited the home from his late father, Yin Huijin, who had bought the family home from his grandfather, Yin Shutian. Obviously, it would be unfair and impractical to evict an elderly grandmother from the home that she has lived in for over 30 years. To keep Xin in her home, the court first established that the sale of the home from Yin Shutian to Yin Huijun was void because the family home was Xin and Yin Shutian's joint marital property and the husband did not have the right to sell the family home without Xin's consent even though Xin was not the titled-owner. The court further found that the defendant, Yin Zhigang, had indeed inherited a part of his father and grandfather's interest in the family home pursuant to the PRC Succession Law despite the fact that the sale of the family home from his grandfather to his father was void. [210] However, Yin's interest was in the value of the home only, not in the possession or control of the home. At last the court concluded that as the owner, who had been occupying the family home, Xin had both the right of ownership and the right of possession of her home, and was therefore entitled to exclusive occupancy of the family home under the Property Law. [211] The SPC explained that a person in possession of a property, whether by contracts or by operation of law, has the right of possession (*zhanyouquan*) and may seek the return, restoration, and protection of his/her right of possession under the Property Law. [212] Following this logic, a spouse may acquire

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Marital Property Regime and Property Law Principals and their Reconciliation] Faxue Yanjiu (法学研究)[Chinese Journal of Law] Vol. 4, 3-19 (2017) (discussing the conflicts between marital property regime provided in the Marriage Law and legal principals concerning contract and property in the Contract Law and the Property Law, and proposing solutions to reconcile the conflicts), http://www.faxueyanjiu.com/ch/reader/create_pdf.aspx?file_no=20170401&year_id=2017&quarter_id=4&falg=1.

[209] FMTC 30.

[210] Zhonghua Renmin Gonghe Guo Jicheng Fa (中华人民共和国继承法) [The People's Republic of China Succession Law] (promulgated April 10, 1985, effective April 10, 1985), art. 9, 26.

[211] Zhonghua Renmin Gonghe Guo Wuquan Fa (中华人民共和国物权法) [The People's Republic of China Property Law] (promulgated March 16, 2007, effective Oct. 1, 2007) [hereinafter Property Law], art. 245.

[212] Property Law, art. 241; *see* Wang Mingsuo (王明锁), *Lun Suoyouquan Zhanyouquanneng Yu Tawuquan Kongzhanquan Eryuanzhi Falü Tixi De Goujian* (论所有权占有权能与他物权控占权二元制法律体系的构建) [*On the Dual Legal System of*

through the marriage the right of possession of the marital residence and other marital or non-marital property, regardless of the legal title of such property. The SPC pointed out that the purpose of the right of possession provisions is to "maintain and protect societal order and fairness."[213] Clearly, Chinese courts have adopted the concept of equitable distribution, despite the lack of explicit statutory authority in the Marriage Law.

4. Custom: Betrothal Gifts and Dowry

The exchange of betrothal gift and dowry has been a Chinese tradition for centuries. The Chinese government has waged numerous campaigns against it and attempted to outlaw the betrothal practice. The betrothal practice is characterized as monetization of marriage. "Money marriage" (*jingqian hunyi*) that base marriages on money instead of love corrupts society and often leads to violent disputes. However, this custom has not only survived but thrived in recent decades. With greater gender imbalance and growing family wealth, the cost of betrothal gifts often referred to as the "bride price," has skyrocketed.[214]

The "money marriage" problem has become a serious legal issue. Both the number of disputes and the disputed amounts continue to rise. Some disputes over betrothal gifts have led to violence in rural areas.[215] The SPC has stressed the importance of properly handling betrothal gift disputes in "maintaining a harmonious and stable social order."[216] The SPC has stipulated that at the time of divorce, betrothal gifts or dowry must be returned if (1) the parties have not registered the marriage; (2) the parties have registered the marriage but have not lived together; or (3) the premarital gifts have caused the donors hardship in supporting him/herself.[217]

In *Guo v. Lu*,[218] the marriage was arranged by the parties' parents through a matchmaker. The Guo family paid the Lu family a significant

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Ownership Possession Right and Non-ownership Right of Possession and Control] Falü Kexue (法律科学) [Science of Law] 6, 14 (2009) (discussing titled owner's the right of possession and non-titled persons' right of possession), http://article.chinalawinfo.com:81/article_print.asp?articleid=69300.

[213] FMTC 30.

[214] The skyrocketing cost of betrothal gifts has been widely reported; *see, e.g.*, Josh Ye, *How Much Does It Cost a Man to Get Married in China? Clue: It involves a Flat and Wads of Cash*, SOUTH CHINA MORNING POST (Feb. 20, 2017), https://www.scmp.com/news/china/society/article/2072313/cost-bridegroom-gifts-secure-permission-marry-soars-china.

[215] FMTC 13.

[216] FMTC 37.

[217] Marriage Law Interpretations (II), art. 10; *see also* FMTC 13; FMTC 37.

[218] FMTC 13.

amount of cash as a betrothal gift over approximately one and a half years. As soon as the agreed amount was paid in full, the couple registered their marriage and held a wedding ceremony. After the wedding, Lu refused to live with Guo. The marriage was thus never consummated. Guo filed for divorce and demanded Lu to return the betrothal gifts. Lu opposed the divorce and refused to return the gifts. Lu argued that Guo should not be allowed to divorce her as she was Guo's rightful wife of a formal marriage brokered by an honest matchmaker and celebrated by a proper wedding (*mingmei zhengqu*). The court found that the parties had never lived together and the marriage was arranged by their parents. The court granted the divorce, ordered Lu to return Guo the betrothal gifts and awarded Lu the furnishing and household appliances Lu's family given to the couple as Lu's dowry.

The case of Wang Peng and Xu Lili was much more complicated. Before Wang and Xu were married, the Wang family borrowed RMB 110,000 to pay for Wang Peng's betrothal gifts to Xu Lili, including a total of RMB 100,000 in cash and a motorcycle for Xu's parents. In addition, Wang's parents purchased furniture and appliances for Wang and Xu prior to the marriage. The parties were married in November 2010. In October 2012, Xu used the cash that she received as a betrothal gift to purchase a commercial van for Wang. Wang drove the van for hire to support the family. In October 2013, Xu left the marital residence after an argument with Wang and the parties had been separated ever since. Wang then filed for divorce. The court found that Wang and Xu's mutual affection was irretrievably broken down and granted the divorce. The court also found that without the van Wang would not be able to support himself or repay the debts that his family borrowed to pay for the betrothal gifts, and that the Wang family would suffer extreme financial hardship if the Xu family was allowed to keep the betrothal gifts. Therefore, the court decided that Wang may keep the van and ordered Xu's parents to return the motorcycle to Wang's parents.[219]

5. Public Order and Good Morals

To protect an innocent spouse's interest in marital property, Chinese courts often resort to public order and good morals (*gongxu liangsu*), an imported concept coined in the newly enacted the PRC General Provisions

[219] FMTC 27.

of Civil Law.[220] *Li v. Yang*[221] illustrates how Chinese courts apply "public order and good morals" in a typical case of transfer of marital assets from a husband to his mistress. Li and her husband, Song, had been married since 1998. Li and Song built a successful business together. In May 2011, Song met Yang and had an affair with her. Three months after they met, Song gave Yang RMB 660,000. Later, Li discovered the affair and the bank transfer of RMB 660,000 from Song to Yang. Li asked Yang to return the funds, but Yang refused. Li sued Yang for wrongful enrichment. Yang defaulted in the action. The trial court found that the gift from Song to Yang is void and null as Song's unilateral gift to his mistress violated public order and good morals (*gongxu liangsu*). The trial court ordered Yang to return RMB 660,000 to Song and Li. The SPC explained that Song had no right to dispose any marital property without Li's consent because spouses enjoy equal rights and interest in marital properties and a spouse may not unilaterally dispose of any marital property without the other's knowledge or consent.[222] More importantly, the SPC explained, Yang and Song's adulterous relationship violated public order and good morals (*gongxu liangsu*). The SPC concluded that Yang was unjustly enriched through her immoral relationship with Song and therefore Li is entitled to demand Yang to return the entire amount that Song gifted to Yang.

D. *Child Custody and Visitation*

The Marriage Law places on parents the duty to protect (*baohu*), discipline, and teach (*guanjiao*) their children. Parents are also liable for any damages that their children cause.[223] Parents share equal parental rights

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[220] Zhonghua Renmin Gonghe Guo Minfa Zongze (中华人民共和国民法总则) [The People's Republic of China General Provisions of Civil Law] (promulgated March 15, 2017), art. 153 § 2 (providing that "any civil legal conduct contrary to public order and good morals shall be void."); *see* Zheng Xianwen (郑显文), *Gongxu Liangsu Yuanze Zai Zhongguo Jindai Mingfa Zhuanxing Zhong De Jiazhi* (公序良俗原则在中国近代民法转型中的价值) [*The Public Order and Good Morals Principle's Significance in the Transformation of Chinese Modern Civil Law*], Faxue (法学) [Law Science], Vol.11, 87 (2017), (an overview of the adoption and application of "public order and good morals" in Chinese modern civil law codes and cases), http://www.cssn.cn/fx/201801/t20180115_3814669.shtml; *see also*, Cai Chang (蔡唱), *Gongxu Liangsu Zai Woguo De Sifa Shiyong Yanjiu* (公序良俗在我国的司法适用研究) [*a Study of Judicial Application of Public Order and Good Morals in Our Country*], Zhongguo Faxue (中国法学) [China Legal Science], Vol.6, 236 (2016), (a study of 699 published Chinese courts' decisions that relied on the principle of public order and good morals from 2007 to 2016, finding that the courts frequently rely on "public order and good morals" to rule against parties in adulterous relationships), https://www.iolaw.org.cn/showNews.aspx?id=62438.

[221] FMTC 23.

[222] Marriage Law Interpretations (I), art. 17.

[223] Marriage Law, art. 23.

and obligations, regardless of their marital status or living arrangement.[224] When parents are separated, the non-residential custodial parent has the right of visitation, and the residential custodial parent has the obligation to facilitate visitation.[225]

Issues concerning children of separated parents are inextricably intertwined with the best interests of the child.[226] The Marriage Law specifically mandates that child custody and visitation be determined based on the best interest of the child.[227] In determining child custody, the court must consider factors, such as the child's age, the need to maintain the stability of the child's life, the parents' child care ability, the child's relationship with grandparents as the child's caregivers, and whether each parents has or will have other children.[228] The parents may share custody if shared custody is in the child's best interest.[229] The preference and wishes of a child over the age of 10 must be considered in custody determination.[230] However, Chinese courts do not have the ability to appoint attorneys or guardian *ad litem* for children in any custody and visitation proceedings. Consequently, children, sometimes younger than ten, are forced to represent themselves in complicated custody matters.[231] Other than cautioning the courts that a child's wishes may not be determinative in any custody cases involving domestic violence,[232] the SPC has not yet issued any guidance on how to ensure a child's true voice is heard and his/her best interest is fully represented in highly-charged custody proceedings.

1. Child Custody

Commenting on *Chen v. Liang*, the SPC reiterated that courts should weigh the best interest of the child over any other factors, such as the parents'

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[224] Marriage Law, art. 36.

[225] Marriage Law, art. 38.

[226] Timothy Tippins, New York Matrimonial Law and Practice (2017), § 21:6.

[227] Marriage Law, art. 36, 38.

[228] Zuigao Renmin Fayuan Guanyu Renmin Fayuan Shenli Lihun Anjian Chuli Zinü Fuyang Wenti De Ruogan Juti Yijian (最高人民法院关于人民法院审理离婚案件处理子女抚养问题的若干具体意见) [the SPC Certain Operational Opinions on the People's Courts' Handling of Child Custody and Support Issues in Divorce Cases Adjudication] (promulgated Nov. 3, 1993), 1993 SUP. PEOPLE'S CT. GAZ. 4, [hereinafter Child Custody and Support Opinions], art. 1-5, 15, http://gongbao.court.gov.cn/Details/fe2716845ec32262402a5b14754eef.html.

[229] Child Custody and Support Opinions, art. 6.

[230] Child Custody and Support Opinions, art. 5.

[231] *See, e.g.*, FMTC 3 (where a four-year-old had to express her preference in a custody dispute); FMTC 25 (where an eight-year-old had to decide whether she wanted to stay with her abusive step-mother).

[232] DV Guidelines, *supra* note 158, arts. 43, 65.

marital status or financial ability in child custody determinations.[233] In *Chen v. Liang*, the trial court awarded custody of a boy to his unwedded mother. The parents, Chen and Liang, were not married. They had a son born in 2011. The child resided with Liang, the mother, and Chen's parents while Chen worked as a migrant worker in another city. Chen and Liang separated in March 2014. After the parties separated, the child first resided with Chen's parents and then moved in with Liang in March 2015. Chen returned home from his job and sought custody of the child, alleging that the paternal grandparents had been the child's primary caregivers. Breaking from the SPC's long-standing preference for grandparents who have been and can continue to be a child's caregivers,[234] the court awarded custody to Liang, an unwedded single mother. The court reasoned that although the paternal grandparents had been the child's primary caregiver, the child had resided with Liang since March 2015 and had been doing well under Liang's care, and therefore it would be in the child's best interest to grant Liang custody of her son.

Considering the best interest of the child, Chinese courts generally do not award child custody to any parent who has a history of domestic violence.[235] A parent's visitation right may be suspended by the court in the event that the visitation is not in the child's best interest and the parent's visitation right must be restored when any detriment or danger imposed by the parent's visitation no longer exists.[236] In *the Matter of Luo*, [237] the court found that the child's correspondence with the mother and the forensic medical report of the child's injuries were clear evidence of the father's physical and verbal abuse of the child. Thus, the court changed the child's custody from the father to the mother within a week after the mother filed a custody petition and a personal protection order for the child against the father. In *Li v. Luo*, [238] the court awarded the mother custody of the children and imposed restrictions to the father's visitation based on the father's long history of alcohol abuse and domestic violence. The trial court found that the father beat the mother and the children whenever he was intoxicated and that the father not only caused the children physical and emotional harm but

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[233] FMTC 20.

[234] Child Custody and Support Opinions, art. 4.

[235] The SPC reiterated the policy in recent years; *see*, Dibaci Quanguo Mingshi Shangshi Shengpan Gongzuo Huiyi (Mingshi Bufen) Jiyao (第八次全国法院民事商事审判工作会议（民事部分）纪要) [the Eighth National Conference on Courts' Adjudication in Civil and Commercial Matters (Civil Matters) Memorandum] November 30, 2016, https://www.chinacourt.org/article/detail/2016/11/id/2361616.shtml; *see also* DV Guidelines, *supra* note 158, at arts. 63, 65.

[236] Marriage Law, art 38; *see also* DV Guidelines, *supra* note 158, at arts. 67-69.

[237] DVTC 1.

[238] DVTC 4.

also might pass his violent behavior on to the children. Thus, the court ruled that in the best interest of the children, the father should not have custody of the children and his visitation should be restricted.

2. Mediation in Custody Disputes

Mediation has become a widely accepted alternative to the adversarial legal process in emotionally charged child custody proceedings around the world.[239] The SPC encourages Chinese judges to make best efforts to assess each case's unique circumstances, diffuse conflicts and resolve custody disputes through mediation.[240] *Guo v. Jiao* [241] is a good example of Chinese judicial mediation in family conflicts. Guo and Jiao were divorced in 2012. The parties had agreed that Jiao, the father, should have custody of the parties' daughter (born in 2009) and Guo, the mother, shall have visitation. The parties also agreed to waive Guo's child support obligation. In a year after the divorce, Guo petitioned for change of child custody. She alleged that Jiao interfered with visitation and failed to care for the child. The trial court interviewed the child, who was four years old at the time of the interview. The child indicated that she wished to live with her mother. The trial court then changed the child's custody to Guo. Jiao appealed. At the appeal, the appellate court interviewed the child again and found that the child lacked the maturity to form or express reasoned preferences. The appellate court also found both parents were capable and loving parents. Thus, the appellate court arranged a joint parenting session for Guo, Jiao, the grandparents, the parties' current spouses, and the child in the court's garden. During the parenting session, the judges mediated a settlement in which the parties agreed that the child shall continue residing with her father and the mother shall have liberal visitation. In its written decision, the appellate court urged the parties to cooperate regarding visitation and child support as provided in the parties' agreement and to provide the child with "a harmonious, loving atmosphere and a good living and learning environment so as to ensure the child's healthy growth." [242]

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[239] Joyce, *supra* note 83.

[240] FMTC 5.

[241] FMTC 3; *see also*, Zhao Li & Ding Yu (赵莉 丁钰), *Lihun Anjian Zhong Sheji Weichengnian Zinü* (离婚案件中涉及未成年子女抚养权归属存在的问题及对策—以南京市六家基层法院四年(2011-2014 年) 离婚纠纷案件判决书为样本) [*Issues and Solutions in Divorce Cases Concerning Minor Children Custody – Use Divorce Disputes Judgments of Six Nanjing City Basic Level Courts in Four Years (2011-2014) as Specimens*], Zhonghua Nuzi Xueyuan Xuebao (中华女子学院学报) [China Women's University Journal] Vol.1, 24-34 (2016) (found that children were interviewed by the court in 63% of the 167 cases surveyed and that in most cases custody was awarded according to the child's wishes and preferences), http://www.cssn.cn/fx/fx_msfx/201610/t20161004_3223888.shtml.

[242] FMTC 3.

The SPC praised the appellate court's effort to mediate an amical resolution of an acrimonious child custody conflict and encouraged the courts to help parents devise visitation schedules based on specific circumstances in each individual case.

The appropriateness of mediation in cases involving domestic abuse has been hotly debated by practitioners and scholars.[243] The SPC has provided well-crafted guidelines for mediations in cases involving domestic violence.[244] However, a determinate framework does not necessarily simplify the knotty task in determining whether and how mediation should be conducted in each case. *Yang v. Wang*[245] illustrates the dilemmas that a court must untangle in a custody case, where a child's welfare was endangered by violence, poverty, and family conflicts. Yang, the mother, and Wang, the father, were married and had a daughter, Tingting. Tingting lived with Wang after her parents' divorce. Wang later married Wu and had a son with Wu. Wang, a migrant worker, was absent from home all year round, while Wu stayed home to care for the children. Wu was the children's sole caregiver due to Wang's extended absence. Wu often beat Tingting. Wu admitted that she beat Tingting when Tingting did not pay attention to her homework or was eating her meals too slowly. On one occasion, Wu hit Tingting with a coat hanger and repeatedly banged Tingting's head against the wall by holding her ears. Tingting's teacher noticed Tingting's injuries from the beating and reported the incident to the police. At the time Tingting was eight years old. According to the media reports, Tingting sustained serious injuries from the beating. Photos of Tingting's injuries were widely circulated online.[246] As soon as she learned about the incident through the media, Tingting's mother, Yang, filed for custody and pressed criminal charges against Wu with the help of a local legal aid center. The trial judge held several mediation sessions with Yang, Wang, Wu, Tingting and other family members. During the mediation, Tingting expressed her wish to continue living with Wu and Wang, and Wang and Wu promised to treat Tingting well. The judge found Wu's remorse sincere. Moreover, the court found that Yang was remarried with two children under the age of three and that she was unemployed and supported by her current husband. The court

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[243] *See*, Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425 (2011); *see also* Joyce, *supra* note 83; He & Ng, *Pragmatic Discourse* , *supra* note 11 (2013).

[244] DV Guidelines, *supra* note 158, arts. 70-78.

[245] FMTC 25.

[246] Lan Tianbin (蓝天彬), *Jiangsu Zai Bao "Jimu Nuettong": Yangzhou Basui Nütong Bei Daodao Naochuxie, Jingfang Jieru* (江苏再曝"继母虐童"：扬州 8 岁女童被打到脑出血，警方介入) [From Jiangsu Expose Again "Step-Mother Abuse Child": An Eight-Year-Old Girl in Yangzhou Was Beaten Suffering Brain Hemorrhage], http://m.thepaper.cn/renmin_prom.jsp?contid=1342971&from=renmin.

concluded that Yang would not be able to care for Tingting. Through the court's mediation, all parties involved agreed that Tingting should continue living with Wu and Wang. The SPC praised the trial court for its success in convincing Yang to withdraw her criminal charges against Wu and diffusing the conflicts. In this case, Tingting's mother, Yang, was indigent with two more young children and Tinging's father, Wang, was a struggling migrant worker with an abusive wife. Clearly, neither of them could provide Tingting with adequate care. Nor could they afford to litigate a full-blown custody case. Under these circumstances, mediation seemed to be the only viable means to resolve Tingting's case. At the same time, mediation might have undervalued the seriousness of the abuse and put Tingting at the risk of future abuse. Tingting was an eight-year-old girl, who had suffered severe abuse, and it is unlikely that she had the maturity required to form a sound decision on whether she should stay in an abusive home or go with her mother, with whom she had little contact. For decades, cases like *Yang v. Wang* have sparked heated debates and extensive research. Our search for more fair and better conflict resolution mechanisms to eliminate violence, restore harmony, reestablish dignity, and reconnect the relationships between parents and their children continues.[247]

3. Visitation

Custodial parents' improper interference with child visitation, ranging from parental kidnapping to occasional denial of visitation, has forever plagued the world. With the rest of the world, Chinese courts have been struggling with thorny issues of custodial parents' interference with noncustodial parents' visitation or access rights and searching for effective visitation enforcement mechanisms.[248]

In *Han v. Yang*,[249] the parties' divorce judgment provides that Han may have weekly overnight visitation with the parties' daughter and that

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[247] Brenneur, *supra* note 85, at 9.

[248] For Chinese judges' discussions on problems in visitation enforcement and proposed solutions, *see* Wang Jian (王 剑), *Tanwang Quan Ji Qi Qiangzhi Zhixing Ruogan Wenti Chutan* (探望权及其强制执行若干问题初探) [*Preliminary Discussions of Several Issues on Visitation Right and Its Enforcement*], Shangdong Sheng Wulian Xian Renming Fayuan (山东省五莲县人民法院) [Shangdong Province Wulian County People's Court], Li Maofu (李茂富), *Lun Tanshiquan Anjian Zhixing Nan De Yuanying Ji Duice* (论探视权案件执行难的原因及对策) [*On the Causes of the Difficulties in Visitation Right Enforcement Cases and Countermeasures*], Jiangxi Sheng Lepin Shi Renming Fayuan Wang (江西乐平市人民法院网) [Jiangxi Province Lepin City People's Court Website]; Zhang Haitao & Zhao Rongrong (章海涛 赵容容), *Qiantan Tanshiquan De Qiangzhi Zhixing* (浅谈探望权的强制执行) [*A Brief Discussion of Visitation Right Enforcement*], Zhongguo Fayuan Wang (中国法院网) [Chinese Courts Website], https://www.chinacourt.org/article/detail/2016/04/id/1839427.shtml.

[249] FMTC 29.

Yang must facilitate the visitation. Yang failed to comply with the visitation order. Han then sought to enforce visitation. Yang alleged that Han was unable to ensure the child's safety because of her religion and her work schedule. He asked the court to reduce visitation to bi-weekly and to suspend Han's visitation in the event Han is late in her child support payments. The court found that Yang's actions are frivolous and directed Yang to comply with the visitation order. Neither the lower courts or the SPC specified any mechanism to compel Yang's compliance. Nevertheless, the SPC emphasized the importance of fostering the non-custodial parent's relationship with the child and enforcing visitation.

Jurisdictions are split on whether child support and visitation rights are independent or may be conditioned upon each other.[250] Some jurisdictions view the obligations of support and visitation as exclusive issues,[251] and the others allow termination of support or denial of visitation as a measure to coerce compliance.[252] Commenting on the *He v. Jiang*,[253] the SPC made it clear that a non-custodial parent's access or visitation rights should not be conditioned upon child support payment. In *He v. Jiang*, He and Jiang were divorced in 2010. The parties had one child by marriage. He, the father, owed child support arrears and declined to pay certain medical expenses for the child. Jiang refused to allow He to visit the child before He paid the arrears and medical expenses in full. He sought enforcement of visitation. The trial court ordered visitation for He and the child and directed

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[250] For discussions of interdependent issues of child support and visitation, see, Carolyn Eaton Taylor, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059 (1984); Alison Kitch, *Conditioning Child Support Payments on, Visitation Access: A Proposal*, 5 INT'L J.L. & FAM. 318 (1991); John E.B. Myers, *"I Won't Pay Child Support, but I Insist on Visitation." Should Visitation and Child Support Be Linked?* 45 MCGEORGE L. REV. 695 (2014).

[251] *See*, *e.g.*, Minn. Stat. Ann. § 518.612); K.S.A. § 23-2717; Tex. Fam. Code Ann. § 153.001; Fla. Stat. Ann. § 61.13 (4)(a); *Appert v. Appert*, 80 N.C. App. 27, 39–40, at 341 S.E.2d 342, 349 (1986) (visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and that one is not, and may not be made, contingent upon the other); *Sampson v. Johnson*, 846 A.2d 278, 287 (D.C. 2004) (a father's visitation rights cannot be conditioned upon compliance with a support order); *Carter v. Carter*, 198 W. Va. 171, 177, 479 S.E.2d 681, 687 (1996) (the right of a non-custodial parent, to visit that child may not ordinarily be made dependent upon the payment of child support by that parent); *Lalonde v. Lalonde*, 2005 CanLII 16637 (ON SC), http://canlii.ca/t/1kt84 (the issue of the father's outstanding child support payment is not tied to his access rights).

[252] *See*, *e.g.*, N.Y. DOM. REL. LAW § 241 (McKinney) (Custodial parent's wrongful interference with, or withholding of, the noncustodial parent's visitation rights would justify suspension of alimony or child support); *Rohr v. Rohr*, 709 P.2d 382, 383 (Utah 1985) (when the noncustodial parent's refusal to pay child support is contumacious, or willful and intentional, and not due to inability to pay, visitation rights may be reduced or denied, if the welfare of the child so requires).

[253] FMTC 21.

Jiang to facilitate the visitation as a healthy, close relationship between a non-custodial parent, and the child is paramount to a child's best interest. The SPC held that custodial parents may not interfere with visitation for any financial reasons because fostering a non-custodial parent's relationship with his/her child is in the child's best interest.

E. *Child Support*

Chinese law requires that family members undertake the crucial tasks of financially supporting each other. Parents, as well as stepparents, grandparents, and adult siblings have a duty to support, protect, discipline, and educate minor children in the family.[254]

1. Child-Centered Child Support Law

Under the Marriage Law child support is an obligation owed to a child. Therefore, the minor child, not the custodial parent, has the standing to bring legal actions against the non-custodial parent for child support in Chinese courts. Since a minor child is not legally competent to bring his/her own suite, child support proceedings are usually brought by the child with the custodial parent acting as his/her legal representative.[255]

Parents' ability to contract their respective child support obligation is limited for the same reason. A child's ability to bring his/her own action against either parent for support may not be restricted by the parents' child support agreement. [256] The child support amount agreed on by the parents may be increased by a court to meet the child's reasonable needs.[257] A non-custodial parent's child support obligation may not be waived by agreement if such waiver is detrimental to the child's wellbeing. At the same time, a custodial parent is not allowed to profit through any child support agreement. [258]

Fu (minor) v. Fux[259] illustrates China's child-centered child support law. Liu and Fu were married and have a child of marriage born in 2011. When Liu and Fu separated, they executed a separation agreement in May 2012. The parties' separation agreement provided that the child would reside with the mother, Liu, and the father, Fu, would pay child support. The parties also agreed that Fu must pay a penalty in the event he fails to pay child support. Fu stopped paying child support in November 2011. The child, represented by his mother Liu, sought child support arrears and penalty for Fu's breach of the separation agreement. The court awarded the child

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[254] Marriage Law, arts. 21, 28, 29.

[255] *See*, *e.g.*, FMTC 4; FMTC 6; FMTC 9; FMTC 10; FMTC 16; FMTC 18.

[256] Marriage Law, art. 37.

[257] Child Custody and Support Opinions, art. 18.

[258] FMTC 4.

[259] FMTC 4.

support arrearage but not the penalty. The court found that Fu's child support obligation was statutory not contractual, and thus his failure to pay child support does not constitute a basis for penalty for breach of contract. The court held that parents' agreement on a child support amount is enforceable as long as the agreed amount does not violate any law or the child's best interest. On the other hand, an agreement to penalize the non-custodial parent for nonpayment of child support only profits the custodial parent and therefore is not binding. The SPC emphasized that custodial parents should not be allowed to profit from child support by fining the noncustodial parent for late payments or nonpayment of child support.

2. Child Support Standard

Child support includes a child's reasonable living, medical, and educational expenses.[260] Chinese courts do not use a precise formula for child support calculation based only on the parents' respective income and amount of parenting time. In determining child support, Chinese courts must consider a child's reasonable needs, the parents' respective financial ability, and the cost of living in the region where the child resides. If a parent's income can be ascertained, his/her child support amount may be set as 20-30% of his/her monthly or yearly income for one child and up to 50% for two children.[261]

Fu (minor) v. Fu[262] is an example of how courts determine child support in a low-income family. The parents were separated since the child's birth but had no plan for a divorce. Both parents were farmers without regular income. The trial court awarded child support based on the average standard of living in the region. The SPC further clarified that the specific child support amount in each case must be based on fair consideration of the child's actual financial needs of clothing, food, residence, transportation, education, and health care as well as the parents' income, expenses, other financial obligations, social-economic status, and ability to meet their respective child support obligation.

In *Ma (minor) v. Ma*, [263] the court was asked to increase the noncustodial parent's child support to pay for a middle-class child's extraordinary education and medical expenses. The parents had agreed that the father should pay RMB 1,500 per month for child support for the parties' daughter. Later, the mother paid RMB 13,422 in the child's medical expenses and RMB 11,105 in the child's educational expenses. On behalf of the child, the mother sought reimbursement of the child's medical and educational expenses and an increase of child support. The court held that

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[260] *See* Marriage Law, art. 37; Marriage Law Interpretations (I), art. 21.

[261] The Child Custody and Support Opinions, art. 7.

[262] FMTC 16.

[263] FMTC 6.

in addition to monthly basic child support which includes a child's ordinary living, educational, medical and other expenses, a child's extraordinary educational and medical expenses must be shared by the parents as well. The court found that the medical treatment for the child's eyes was necessary and the child's chess lessons were reasonable because both parents supported the child's interest and training in chess prior to the divorce.

Thus, the father was ordered to reimburse the mother one half of the child's out-of-pocket medical and educational expenses. Considering the child's reasonable needs, the court also increased the father's child support amount from RMB 1,500 per month to RMB 2,500 per month.[264] Commenting on *Ma (minor) v. Ma*, the SPC affirmed that child support amount should be based on the child's reasonable needs and the child's best interest as well as the parents' respective financial ability and overall fairness of their support obligation. While recognizing the financial needs of children in wealthy and middle-class families, the SPC further cautioned the lower courts not to award excessive child support, which would finance "extravagant" life-styles for the child and the custodial parent.[265]

In *Yu (minor) v. Yu*,[266] the court increased the child support amount based on the increased cost of living in the region based on where the child resided and the child's actual needs. At the time of the divorce in 2008, the father made a lump sum payment of RMB 23,000 as advanced child support to satisfy his support obligation. The court found that the father's payment of RMB 23,000 would equal to approximately RMB 62.5 per month until the child turns eighteen while the average monthly living cost per person is RMB 419 per month in the region where the child resides. Clearly, the father's child support payment was insufficient to maintain the child's standard of living at the regional average. In addition, the child was admitted to a magnet school for gifted children, and the tuition for the school was RMB 3,600 per year. Considering the cost of living in the region and the child's educational needs, the court held that the father's child support amount should be increased to RMB 1,000 per month. The SPC declared that Chinese courts should apply the principal of "the best interest of a child," which is widely followed around the world and consistent with Chinese traditional value of caring for children and the elderly in determining issues related to child support. The SPC instructed that child support orders and agreements may be adjusted if the best interest of the child warrants a modification.

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[264] FMTC 6.

[265] FMTC 6.

[266] FMTC 10.

The SPC encourages courts to mediate and achieve amicable resolutions in child support cases. In *Chen (minor) v. Chen*,[267] the child's parents were divorced in 2008. After the divorce, the child resided with the mother and the father paid RMB 3,000 a year for child support. After the mother died in 2009 the child went to live with the maternal grandparents. The father stopped paying child support after the mother passed away. In 2014, the child started high school and brought an action for child support arrears and an increase of child support. Through the court's mediation, the father agreed to pay RMB 7,000 per year until the child graduated from high school, and an additional RMB 28,000 for the child's college education when the child began college. The SPC commended the *Chen* court for its exemplary handling of the case. First, in considering the financial circumstances of the child, the court waived court fees and made it possible for the child to bring the suit. Second, the court focused on mediation instead of adjudication and facilitated an amicable resolution. Third, the court helped repair the child and the father's relationship and encouraged a positive, loving relationship between the child, the father, and the child's maternal grandparents. The court asked the father to be grateful to the child's maternal grandparents for their efforts to care for and provide for the child, and at the same time the court asked the child to forgive her father and to consider her father's financial burden of raising two younger children from his second marriage. The court's follow-up investigations showed the child is doing well academically and socially, and all parties are satisfied with the outcome of the case. [268]

3. College Education Expenses

Chinese parents are expected to contribute to their children's college expenses and weddings. However, the Marriage Law does not explicitly require any parent to pay educational expenses for an adult child. Under the Marriage Law a parent's child support obligation terminates when the child turns eighteen unless the child has not completed high school or is unable to live independently due to disability or any other reason not under the child's control.[269] Because of the conflict between custom and the law, Chinese courts are often asked to decide whether an adult child is entitled to financial support from the parents to pay for reasonable educational and living expenses while attending college. In *Li Pailin, Li Ning v. Li Tao*, an adult child and his mother brought an action together against the child's father for college education expenses. [270] Li Ning and Li Tao divorced in 2008, when their son, Li Pailin was fourteen years old. The parties' divorce

[267] FMTC 18.

[268] FMTC 18.

[269] Marriage Law, art. 21; Marriage Law Interpretations (I), art. 20.

[270] FMTC 34.

settlement agreement provided that Li Ning would have custody of Li Pailin and that Li Tao would be fully responsible for Li Pailin's college and wedding expenses in exchange of paying no child support before the child started college. In September 2012, Li Pailin started college, however Li Tao refused to pay for Li Pailin's college expenses despite Li Ning and Li Pailing's repeated requests. The court ordered Li Tao to pay Li Pailin's college tuition and living expenses. The SPC affirmed that divorced parents' agreement to pay for a child's college expenses are enforceable as such agreements conform with the expectation that parents should pay for a child's college education, although this is a social norm and does not violate any law or public policy. However, the SPC did not clarify whether a parent can be compelled to pay college expenses absent of such agreement.

4. Support for Non-Marital Children

The Marriage Law provides that non-marital children shall have the same rights as children of marriage and are entitled to financial support from their biological parents.[271] In the case entitled "Sister-in-law sue Older Brother-in-law for Child Support,"[272] the mother was married to her child's biological father's brother. One time the child's biological father lured the mother to an unoccupied apartment and had sex with her. The mother informed the biological father when she found out she was pregnant with the child. The biological father asked her to continue the pregnancy. After the child was born, the biological father denied paternity and refused to pay for the mother and the child's medical expenses and the fine (as the child is the mother's second child) or provide any financial support. The mother sued the biological father for financial support. The court ordered a paternity test and established the biological father's paternity. The trial court held, and the SPC affirmed, that a child's biological parents have an obligation to provide financial support for the child regardless of the parents' marital status. The mother was awarded custody of the child and the biological father was ordered to pay child support and all expenses related to the child's birth. It is unclear whether the biological father was given any custodial rights.

In *He (minor) v. Zhou*,[273] He's parents were married in a customary wedding ceremony in 2006 but did not register the marriage legally. He was born in 2007. He's mother, Zhou left He and her father when He was about three years old. Zhou later remarried. After He's father located Zhou, He sued Zhou for eighteen years of child support. Zhou alleged that she is a migrant work and had no money to pay child support. The trial court ordered Zhou to pay RMB 1,800 per year for child support, commencing on

[271] Marriage Law, art. 25.

[272] FMTC 38.

[273] FMTC 45.

December 31, 2015, until 2025. The SPC reiterated that parents' child support obligation is a mandate by law as well as by Chinese tradition and cannot be avoided for any reason, including the parent's lack of financial resource or the status of the parents' marriage.

Zhang v. Jiang involves the thorny issues related to a child born of a wife's extra-marital affair.[274] Zhang and Jiang were married in 2004. During the marriage, Jiang gave birth to a son in 2008. In 2014, Zhang did a paternity test and found that he was not the son's biological father. Zhang filed for divorce and sought reimbursement of child support and compensatory damages for emotional injury from Jiang.[275] Jiang was ordered to reimburse Zhang for child support and pay Zhang an extraordinary sum of RMB 30,000 as compensatory damages for emotional harm inflicted on Zhang by her affair and concealment of the child's paternity. The SPC opined that the Marriage Law requires husband and wife to remain faithful to each other[276] as adultery causes very serious emotional injuries, which must be compensated.[277] The SPC explained that Zhang suffered emotional damage upon learning the child was not his biological child and thus the court supported his request for emotional damages. The SPC further explained that Zhang has no legal obligation to support the child as he was not the biological father of the child; hence, Zhang was entitled to reimbursement for the financial support that he had provided for the child.[278] In similar cases, U.S. courts have been more inclined to impose equitable estoppel to protect the status of a child in an already recognized and operative parent-child relationship,[279] "which is in the child's best interests to protect."[280] In contrast, neither the SPC's commentary nor the lower courts' decisions on *Zhang v. Jiang* indicate any consideration of the child's interest. The courts did not ask: How would the six-year-old boy handle the sudden termination of his relationship with Zhang? How would the child's life be negatively affected by the large sum of child support reimbursement that his mother now has to pay? Apparently, the state's interest in maintaining the "moral order" trumped a child's best interest in this case.

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[274] FMTC 36.

[275] FMTC 45.

[276] Marriage Law, art. 4.

[277] Marriage Law, art. 46; Marriage Law Interpretations (I), art. 28

[278] FMTC 45.

[279] *Fung v. Fung*, 238 A.D.2d 375, 375–76, 655 N.Y.S.2d 657, 658–59 (1997).

[280] *Shu Jun Zhu v. Bin Pan*, No. 188, 2017 WL 1356085, at *1 (N.Y. Sup. Ct. 2017); *see also Fung v. Fung*, (citing *Matter of Ettore I. v. Angela D.*, 127 A.D.2d 6, 14, 513 N.Y.S.2d 733); *Golser v. Golser*, 115 A.D.2d 695, 698, 496 N.Y.S.2d 521.

5. Stepchildren

While adhering to the bright-line rule that the support obligations for non-marital children lie on biological parents regardless of the parents' marital status, the Marriage Law imposes child support obligations on step-parents.[281] Han was a mentally disabled adult under the care and custody of Liu, his mother since his parents' divorce. In August 2013, Liu married Zhang, and Han lived with his mother and her husband. On February 26, 2014, without Liu's knowledge, Zhang put Han on a train to Beijing. Han wondered around Beijing until Liu found him on March 13, 2014. Liu divorced Zhang in April 2014. In January 2015, Han, through his mother as his guardian, sued Zhang for abandonment and damages. The trial court found that Zhang, as Han's step-father, was Han's *de facto* guardian and thus had the duty to care for and support Han, and that Zhang's action constituted neglect and abandonment. Commenting on *Han v. Zhang*, the SPC affirmed that step-parents' have a support obligation to disabled adult step-children. [282]

6. Child Support Enforcement and Collection

Child support enforcement is a complex issue that deeply affects not only the welfare of children and their parents but also a country's social welfare system. With an increasing number of separated families, child support collection cases have started to fill Chinese courts' dockets. Consequently, Chinese courts have toughened on child support collections. In *Sun v. Peng*, the SPC directed that the courts may use China's recently established credit reporting system (*xingyong tixi*) to enforce child support liabilities.[283] Sun and Peng were divorced in 2013 in Beijing. Peng was ordered to pay child support, but he never complied with the order. In 2015, Sun brought an enforcement proceeding against Peng for child support arrearage. When the judge called Peng to notify him of the enforcement proceeding, Peng pretended that he was his brother and told the judge that his whereabouts were unknown. Peng did not show up for the enforcement hearing. At the hearing, the judge called Peng again and put Peng on the speaker when Peng took the call. Both Sun and the child identified Peng by his voice immediately. The judge warned Peng of the consequences of his failure to pay child support, including being put on the List of Dishonest Persons subject to Enforcement[284] and criminal charges. Peng ignored the

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[281] Marriage Law, art. 27.

[282] FMTC 14.

[283] FMTC 9.

[284] The List of Dishonest Persons Subject to Enforcement is a reporting system stabled in 2013 pursuant to Zuigao Renmin Fayuan Guanyu Gongbu Shixin Beizhixingren Mingdan Xinxi De Ruogan Guiding (最高人民法院关于公布失信被执行人名单信息的若干规定) [Several Provisions of the Supreme People's Court on Issuance of List of Dishonest Persons Subject to Enforcement] (promulgated July 1, 2013, amended Jan. 16,

judge's warning. The judge then put Peng on the List of Dishonest Persons and garnished payments from Peng's bank accounts until Peng eventually purged the support arrearage. Success in child support collections by placing parents who owe child support on the List of Dishonest Persons have been widely reported.[285]

F. *Spousal Maintenance*

The Marriage Law provides marital spousal support (*fuyang*) during the marriage.[286] If one spouse fails to perform the duty of *fuyang*, the dependent spouse may demand financial support.[287] Marital spousal maintenance obligation generally terminates upon dissolution of marriage.[288]

In the case of *Huang v. Zhang*,[289] Huang and Zhang had been married since 1989 but lived separately for many years. Huang was very ill and suffered depression. She had been on medical leave from work since 2009. Huang and her ninety-year-old mother lived off a meager rental income and disability payments from Huang's employer. Zhang filed for divorce several times. However, the court denied his divorce request every time. Huang was no longer able to support herself financially and brought the action for spousal support from Zhang. The court found that Huang was indeed in financial hardship and awarded Huang monthly spousal maintenance of RMB 1,000 based on the couple's respective financial resource and the couple's adult son's support obligation to Huang. Commenting on *Huang v. Zhang*, the SPC stipulated that spousal

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2017) 2017 SUP. PEOPLE'S CT. GAZ. 6 (The purpose of the "List" is to carry out "credit punishment." Judgment debtors on the List of Dishonest Persons Subject to Enforcement are prohibited from engaging a wide range of financial activities, from buying first-class train tickets to applying for loans. The List is circulated among government authorities, agencies, financial institutions and published online); *see also the Supreme People's Court of the People's Republic of China White Paper on the Judicial Transparency by People's Courts*, (Mar. 14, 2017), http://english.court.gov.cn/2017-03/14/content_28552039_6.htm.

[285] *See, e.g.*, Ye Tao and Wang Haifeng (聂涛 王海峰), *Anhui Jieshou: Shengfu Jüfu Fuyangfei Chuchu Shouxian Jifukuan* (安徽界首：生父拒付抚养费 处处受限急付款) [*Anhui Jieshou: Biological Father Who Had Refused to Pay Child Support Rushed to Pay Due to Constant Restrictions*], Renmin Fayuan Xinwen Chuanmei Zongshe (人民法院新闻传媒总社) [The People's Court Press And Media Office], http://jszx.court.gov.cn/main/ExecuteNewsletter/89603.jhtml, and Du Fanfei (杜凡非), *Jüjue Zhifu Fuyangfei De Ta, Zhudong Lai Fayuan Huan! Qian! Le!* (拒绝支付抚养费的他, 主动来法院还! 钱! 了!) [*He Who had Refused to Pay Child Support Voluntarily Came to the Court to Pay Money!*], http://jszx.court.gov.cn/1100/ExecuteNews/120607.jhtml.

[286] Marriage Law, art. 20.

[287] *Id*.

[288] *Id.*

[289] FMTC 37.

maintenance during the marriage is both a moral obligation and legal obligation.

The Marriage Law permits limited spouse support (*jingji bangzhu*) for a dependent spouse with extraordinary financial hardship at the time of divorce.[290] Such post-divorce spousal support (*jingji bangzhu*) is warranted "*only* when a party is homeless, or at the risk of becoming homeless, or unable to support him/herself at the poverty level of the region where he/she resides at the time of divorce."[291] The SPC opined that "[u]pon the divorce, in the event one party truly has difficulty in supporting him/herself, pursuant to Article 33 of the Marriage Law, [292] the other party shall provide appropriate financial assistance (*jingji bangzhu*). If one party is young and able to work but has temporary financial hardship, the other party could provide short-term or one-time *jingji bangzhu* assistance. If one party is old, ill, disabled, or unable to work and has no income after a long marriage, the other party should make appropriate living arrangements for him/her. During the period that any jingji bangzhu is being paid, if the recipient remarries, the payor may terminate jingji bangzhu. After the initial *jingji bangzhu* has been fully paid, a recipient's request for continuing *jingji bangzhu* usually shall not be granted."[293]

Jingji bangzhu must be distinguished from "spousal support," "maintenance" or "alimony." Under state laws in the U.S., "spousal support," "maintenance" or "alimony" is to ensure that a dependent spouse will be able to maintain the lifestyle that he/she had enjoyed during the marriage. "Spousal support," "maintenance" or "alimony" is also used to limit any unfair economic effects of a divorce, particularly in cases where a dependent spouse had made non-monetary contribution to a long marriage as a parent and spouse. In contrast to "spousal support," "maintenance" or "alimony," *jingji bangzhu* is not intended to address any financial consequences of the dissolution of the parties' marital partnership. Any economic effects of a divorce, such as compensation to a spouse's non-monetary contribution to the marriage, are addressed through property division pursuant to Articles 39 and 40 of the Marriage Law. [294] The sole purpose of *jingji bangzhu* is to prevent a dependent spouse from falling into extreme poverty immediately after the divorce. Chinese legislators asserted that excessive alimony would encourage parasitic behavior and that *jingji*

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[290] Marriage Law, art. 42.

[291] Marriage Law Interpretations (I), art. 27.

[292] Now Article 42 of Marriage Law as amended in 2001.

[293] *Zuigao Renmin Fayuan Guanyu Guanche Zhixing Mingshi Zhengce Falu Ruogan Wenti de Yijian* (最高人民法院关于贯彻执行民事政策法律若干问题的意见) [The SPC Opinions on the Application and Enforcement of Certain Policies and Laws in Civil Matters (1984)], art. 14.

[294] Marriage Law Explanatory Report, Chapter 4, arts. 29, 30, 42.

bangzhu obligation prescribed in Article 42 is not a legal obligation, rather a virtue derived from Chinese tradition and an extension "to one's "moral obligation" to a former spouse with extreme financial hardship.[295] Notably, the SPC did not publish any FMTC on post-divorce spousal support.

V. CONCLUSION

Despite the remnant of undue political influence, tension between the formalized legal process and informal practices, and conflicts between imported legal concepts and customary norms, there has been positive progress in China's family law reform. The FMTCs are clear evidence that greater tolerance of social practices has been embedded both in the written family law and in its application in Chinese courts.[296] The FMTCs also show Chinese courts' willingness to push back legal nationalist and Maoist ideology, in their pragmatic approach in tackling day-to-day issues arising from ordinary Chinese people's family life. China has advanced significantly in constructing a family law system that is more adept in dealing with burgeoning court dockets and increasing complexity in family disputes while accommodating both new social norms and centuries-old traditions. Overall, greater freedoms have been achieved in Chinese's people's family life through China's family law reform.

The recent court reform aims to transform China's family matter adjudication into a highly specialized, mediation-centered process that emphasizes conciliation. Although branded as a socialist reform with Chinese characteristics,[297] the new family matter adjudication system has instituted some legal norms and procedures modeled after the problem-solving family court system. The problem-solving family court system promotes positive, conciliatory resolution of family conflicts.

There are, however, two disconcerting developments in China's family law reform. This system is expensive and complex, requiring enormous state resources and countless highly-trained legal and nonlegal professionals to operate. More importantly, the problem-solving court system enables expansion of judicial power and the state's invasion to private life. Although Chinese family litigants trust judges to solve their problems, it is hard to imagine that they would welcome any other state actors, such as court-appointed mental health professionals, to their personal and family life. I fear that this imported problem-solving family court model will create more problems than it solves.

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[295] Marriage Law Explanatory Report, Chapter 4, art. 42.

[296] Palmer, *supra* note 19, at 675-95 (2007).

[297] Du, *supra* note 93, at 1; *see also* Woo, *supra* note 21 (observing the on-going battle between a CCP-led nationalism and Chinese people's demand for judicial efficiency, consistency and professionalism in China's court reforms).

The twentieth-century gender equality revolution transformed the laws of marriage, divorce, and parenthood. The revolutionized family law is largely built on an upper-middle and middle-class paradigm of marriage, family, and divorce, which has created a disconnect between the law and the social, cultural, and economic reality of working-class families. [298] China's family law reform seems to follow the same path, catering mainly to the financial needs and ideology of its growing middle-class. Thus, this Article concludes on a cautionary note. Any law or policy that fails to take into account the vast differences which exist in Chinese families today should be reconsidered.

[298] *See, e.g.*, Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 80 (2016) (analyzing how the fathers' rights movement of middle-class white men shaped family law in the second half of the 20th century); Denise Donnelly & David Finkelhor, *Who Has Joint Custody? Class Differences in the Determination of Custody Arrangements*, 42 FAMILY RELATIONS 57 (1993) (revealing that joint post-divorce custody arrangement is a choice befitting upper middle-class parents but not the others); Daniel R. Meyer et. al., *The Growth in Shared Custody in the United States: Patterns and Implications*, 55 FAM. CT. REV. 500, 507 (2017) (showing that despite of the legislated preference of shared custody, the growth of share custody is primarily within affluent families) and Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2484 (1994) (the paradigmatic model of marriage and divorce marginalize black women).

APPENDIX

Table 1: Percentage of Family and Marriage Cases Settled through Judicial Mediation (2005-2016)

	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Number of Family and Marriage Cases Settled through Mediation[299]	61151	64877	67259	71318	73924	71569	67374	64102	59813	55173	52688	50719
Number of Family and Marriage Cases Accepted[300]	16333	16621	15484	15262	15185	14718	13741	13410	12864	11957	11391	11148
Percentage of Cases Settled by Mediation	37%	39%	43%	47%	49%	49%	49%	48%	46%	46%	46%	45%

[299] Reminfayuan Shenli Hunyin Jiating, Jicheng Yishen Anjian Anjian Tiaojie Jianshu (人民法院审理婚姻家庭，继承一审案件案件调解件数) [Number of Marriage Family and Succession Cases of the First Instance Mediated], Zhonghuarmgongheguo Guojia Tongjiju Guojia Shuju (中华人民共和国国家统计局国家数据） [National Bureau of Statistics of the People's Republic of China National Data], http://data.stats.gov.cn/easyquery.htm?cn=C01&zb=A0S0Q03&sj=2016 .

[300] Reminfayuan Shenli Hunyin Jiating, Jicheng Yishen Anjian Shouan Jianshu (人民法院审理婚姻家庭，继承一审案件收案件数) [Number of Marriage Family and Succession Cases of the First Instance Accepted], Zhonghuarmgongheguo Guojia Tongjiju Guojia Shuju (中华人民共和国国家统计局国家数据） [National Bureau of Statistics of the People's Republic of China National Data] [hereinafter Number of Family and Marriage Cases Accepted], http://data.stats.gov.cn/easyquery.htm?cn=C01&zb=A0S0Q03&sj=2016.

Table 2: Percentage of Family and Marriage Cases Adjudicated (2005-2016)

	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005
Number of Family and Marriage Cases Adjudicated[301]	6008	5663	4762	4103	3725	3811	3738	3877	4048	3963	3898	3902
Number of Family and Marriage Cases Accepted [302]	1633	1662	1548	1526	1518	1471	1374	1341	1286	1195	1139	1114
Percentage of Cases Adjudicated	37%	34%	31%	27%	25%	26%	27%	29%	31%	33%	34%	35%

[301] Reminfayuan Shenli Hunyin Jiating, Jicheng Yishen Anjian Shouan Jianshu (人民法院审理婚姻家庭，继承一审案件案件判决件数) [Number of Marriage Family and Succession Cases of the First Instance Adjudicated], Zhonghuarmgongheguo Guojia Tongjiju Guojia Shuju (中华人民共和国国家统计局国家数据） [National Bureau of Statistics of the People's Republic of China National Data], http://data.stats.gov.cn/easyquery.htm?cn=C01&zb=A0S0Q03&sj=2016.

[302] Number of Family and Marriage Cases Accepted *supra* note 300.