

what if your spouse buys a house for his or her lover/mistress?

A foreign woman recently approached me for advice on her situation: she came to Shanghai with his husband who was an executive of international company. She recently found out her husband is having an affair with a Chinese girl. What is more, she also discovered that her husband had spent a big sum of money on purchasing a luxury apartment the title of which is registered under the name of the girl. She was particularly concerned that whether she would legally have a way to take back the apartment.

This is quite a tricky case as it involves complex determination of application of law to the case.

If such a case involves only Chinese citizens and Chinese laws are applicable, it is quite simple. Since in China, in absence of an agreement providing for separate ownership of property acquired during marriage, any and all properties acquired or gained or earned after marriage is seen as community property, co-owned by the spouses without reference to shares. Also under China Marriage Law, spouses shall have equal say in any significant decision-making about disposing of marital property. It is literally interpreted in practice that mutual consent of the spouses shall exist in order to give legal effect to any disposition of marital property. Therefore, if a husband, without the agreement of his wife, purchases a house for someone else, the wife shall have the legal right to ask the court to determine and declare that that house should be the community property of the couple, not the property of the registered one (the mistress).

Now before me is a foreign-related case. Generally, the first thing is to determine the law that shall apply in this case. With the adoption and effectiveness of the Law of the People's Republic of China on Choice of Law to Foreign-related Civil Relations, it seems an easy job. Article 36 provides that, in respect of property rights of real estate, the law of the location of the real estate shall apply. However it is not that simple.

From the perspective of substantive law, one initiating a lawsuit in China shall have to have a legal ground. A Chinese wife in such a position is entitled to take action in court because her

Contact the Author Jason Tian at his email: jason.tian78@outlook.com or mobile phone:

+8613816548421 | 1

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husband's acts have violated her legal rights of equal power in disposing marital property and the possession of the house by the mistress is an infringement of her interests in the house. A foreign wife shall also prove before court that she has the same legal ground. For that purpose, the wife shall have to show that between her and her spouse, the community property rule shall govern. Now the problem is which country's law shall be applied to determine whether community property rule should be applied between the couple. Should we still apply the law of the location of the house or other laws?

I am of the opinion that the law of the location of the real estate should not be taken for granted to determine an issue that is not "in respect of property rights of real estate". Article 24 of the Law of the People's Republic of China on Choice of Law to Foreign-related Civil Relations provides: in respect of property relation between spouses, the parties may upon agreement choose applicable law as the law of the place of regular residence of one party, the law of the state of natinality of one party, or the law of the location of major property. Absent such an agreement, the law of the place of their mutual regular residence shall apply, failing which, the law of the state to which they both are citizens.

To simplify the issue, the victimized spouse shall have a good case if she or he can prove that the property relation between them is that of community property.