

## Case Study: Take Back Assets Gifted to a Mistress? How?

### Description

This is an interesting case that deserves a post itself, shedding further lights on the issue whether a spouse (often wives) is legally entitled to take back properties or cash that is transferred to a third party mistress. We used to write a post about this on this blog 10 years: [what if your spouse buys a property for his or her lover in China?](#)



I hope you are not in a position like any of these three.

### I. Facts of the Case

Mr. A passed away in early 2020, and his wife, Ms. B, discovered that Mr. A had transferred a total of ¥3,455,000 to the same account several times between 2016 and 2019, and later discovered that the third person who received the money, Ms. C, was Mr. A's pre-marital girlfriend. Mr. A and Ms. C fell in love and the latter became pregnant unmarried, but they were forced to break up due to the opposition of Mr. A's parents and Ms. C had to abort the pregnancy and as a result, permanently lost the ability to conceive a baby. Later, Mr. A and Ms. C married separately, but Ms. C was forced to divorce due to her inability to have children, and Mr. A offered to pay Ms. C monetary compensation out of guilt.

Ms. B argued that Mr. A, during the marriage, gave their community property to others without wife's consent, which seriously infringed on her legal rights and interests, and the gift should be invalid, so she sued the court to request the recipient to return all the donated money. On the other hand, Ms. C argued that Mr. A's gift was a compensation for morality, and the money belonged to Mr. A's premarital property, not the community property of Mr. A and Ms. B. Therefore, her receipt of money did not infringe on Ms. B's legitimate rights and interests.

### II. Shanghai Local Court Decision

The Shanghai Pudong New District People's Court accepted this gift contract dispute, and after hearing, the court held that the defendant Ms. C's reason for receiving the money was admissible,

taking into account the historical background in the 1970s, the social environment and the fact that the defendant did not have any more children. However, a valid reason for receiving the money did not mean that Mr. A could dispose of the community property without the plaintiff's consent. Therefore, the key to whether the defendant is required to return the donated money is *whether the said money was part of the community property of Mr. A and Ms. B*. Although Mr. A's transfer occurred during the marriage, the money, as an indefinite object, cannot be judged as pre-marital or post-marital property simply by the time of transfer. According to the court's investigation, Mr. A's pre-marital property accumulated from the time he started his business to the time he married the plaintiff Ms. B was much higher than the amount of the gift of money. Taking into account the length of time periods of doing business before and after marriage, the amount of accumulated property is roughly the same, the court exercises discretion to find and determine that the money involved is 50% of the pre-marital property and 50% of the community property, Mr. A's pre-marital personal property gift to the defendant Ms. C's behavior is legal and valid, but the disposal of the community property is invalid, and should be revoked. Finally, the court ordered Ms. C to return ?1,727,500 of the gifted money to Ms. B.

### III. Legal Comments

#### (1) Probable Outcome under Chinese Laws

As you may have noticed on this blog, we only talk about cross-border legal issues here. In such cross-border legal issues, the first problem before a China court is which law is the applicable law.

In this case described above, it is a domestic case without any foreign element, so Chinese laws were applied in this case. We just want you to know how such a legal issue is addressed in China court system.

The decision made by Shanghai local court and its legal reasoning represent the orthodox mainstream views in China judicial practice with very few exceptions, i.e., neither spouse shall dispose of their community properties (mainly those assets acquired after marriage in absence of a nuptial agreement stipulating otherwise) without prior consent of the other spouse. This is the core of Chinese matrimonial property laws. While this community property rule is the direct legal basis for nullifying such gift or gratuitous transfer, the legal doctrine of **good customs and public policies** (*Gong Xu Liang Su*) may play an even greater role. This doctrine intends to protect and promote predominant traditional values and public orders in China society. Adultery in China has always been disapproved by the public at large.

Assuming you are caught in such a legal situation where your husband working in China has cheated on you and transferred a substantial amount of money to his mistress, you wish to recover those fund, then what are you options?

#### (2) If You Are Habitually Living in China

By "habitually live in China", we refer to the fact that you have live in China for more than one year with China being your center of life (pretty vague a concept, but that is what the law says). In this case that you and your husband both habitually live in China, then China court will surely apply Chinese laws in resolving the legal questions.

So you can sue in China court with pretty much confidence that you will win and take back the assets

that have been gifted to that god-damned third party mistress.

### *(3) If You Are Not Habitually Living in China*

In this case, we mean that you may be living in your home country instead of China, and you visit your husband a few times a year, thus you don't have the mutual habitual residence with your husband in China.

Apparently, you need to think about where to sue your husband in recovering the funds. You may want to have the ease of take legal action in your home country, but most likely that will be a dead end wasting your time and money, because the American court decision doesn't have any meaningful chance of being enforced in China.

So it is definitely advisable to sue the husband and the third party mistress together in China court, in the course of court proceeding, you may take the liberty to freeze the bank deposits or property transformed from the gift, which will increase your success of actually repossessing what are yours.

However, that is not the only question before you. You shall still look carefully at the applicable law issue because Chinese marital property laws may not be the law China court will apply in your case.

Under [China law on choice of applicable laws in foreign-related civil relationships](#), China court will look further at whether you and your husband are citizens of the same country. If you are, then the matrimonial property law of your country will be applied. Then you shall need to find out where you stand under your home country laws.

If necessary, you may need the help from divorce lawyers from both China and your home country working together hand in hand for you.

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