Deal with the property in China after you get divorced in your home country

Description

There are always interesting issues coming up along the way I entertain inquiries from this law blog. It is worth to write them down just for people who may be looking for similar information and help.

Today, I got an email from a client in USA regarding an inheritance of a real property in Shanghai. The client's father had just died recently in 2013, leaving a property in Shanghai. From the client's account of the story, I noticed that the property, an apartment, was once bought when her father was married to her mother. The parents however divorced in the States back in 2010. But the American court handling the divorce did not rule in regard of the apartment in Shanghai on the ground that the court did not have jurisdiction over the real property, which is indeed correct.

What intrigues me is whether and how the mother can claim her share of interest, if any, in the property now?

With so many foreigners owning real estate in China and a high rate of divorcing in the west, I believe it happens quite frequently that a property in China is involved in the divorce fight at the foreign courts. But as a universal principle of real estate law in the world, the jurisdiction over disputes in regard of ownership of real estate shall vest with the courts in the place of the real estate. In other words, though the foreign couples may seek to divorce in the courts at home, they cannot have the properties in China settled in the foreign courts.

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So how shall the property be dealt with now? What shall be given attention to?

By the way, bear in mind, I am talking about real properties (land, apartments and houses) that are registered in the name of one spouse only. For real properties registered in the names of both spouses, they may just sell the properties and share the sale proceeds, which is quite simple.

I. what laws are applicable to such cases

As always, for such foreign-related cases, the first thing to think is what laws are applicable in such cases. There are two layers about the question.

Firstly, in respect of property-centered relationships between spouses, what laws shall be applicable? In the past judicial practice in China, there is a mistaken understanding of this question where courts will apply Chinese laws whenever a real property in China is involved. With the effectiveness of China Law on Applicable Laws in Civil Foreign-related Relationships, the mistake is now realized and rectified. Under this Law on Applicable Laws, a special provision governing property-centered relationships between spouses which provides that the parties can choose the applicable laws by agreement and in absence of agreement, the laws in their mutual habitual residence or the laws of their common nationality. In other words, the laws regulating property relationships between spouses won't have to be the law in the place of the real estate/property.

Secondly, in respect of ownership/title of the real property, the applicable laws must be the laws in the place of real properties.

It is important to understand the nuance between the two layers of the question. The legal implication stemming from it is that the real property that is deemed as community under family law or marriage law may be considered as separate property of the spouse whose name is appearing on title deed, under property laws.

II. Why do I need a litigation to split the community property in China?

As indicated in the last paragraph of Section "I" above, the real property (apartments or houses or lands) registered in the name of one spouse, though deemed as community property belonging to both spouses, may be sold to others without the knowledge of the other spouse. This can happen because under Chinese property law, the person registered as owner on the title deed is regarded as legal owner of the property and therefore has the power to dispose of the property. People dealing with the registered owner is protected by laws when relying on the registry of the property owner.

Given that legal effect, the spouse whose name is not registered as owner on the title deed is definitely put in a disadvantageous position where his or her legal interests in the community property is at risk at any time esp when the relationship between the couple is getting sour.

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So it won't be unusual to see cases here in China in which one spouse sues to add his or her name onto the title deed of the real property before divorce in order to prevent the other party from selling the property before or during the divorcing proceeding. Once the name is added onto the title deed, the disposal of the property shall have to be done with consent of all registered owners.

III. Need I apply to Chinese court to recognize the divorce judgment entered by US court?

As a principle in Chinese laws, community properties are not partitionable before divorce. In other words, a spouse can only sue to partition and divide the community properties upon divorce and after divorce. But when the divorce judgment is rendered by a foreign court, an inevitable question is whether the foreign divorce judgment is valid in China. In practice, foreign court judgments are not effective within China due to the principle of judicial sovereignty.

On the other hand, many years ago, China Supreme Court issued a guideline regarding applying to Chinese courts for recognizing foreign divorce judgments. This guideline is still effective. So one shall ask if it is necessary and possible to apply to Chinese courts for recognizing the foreign divorce judgment.

But unfortunately, China Supreme Court has made it clear in a separate notice back in 2000 that Chinese courts will not entertain application for recognition of foreign divorce judgments in which both spouses are foreigners or no Chinese citizen is involved.

But that is not the dead end. I have noticed that the courts in Shanghai have dealt with quite a few cases where foreigners sued to divide community properties in China after they had divorced in their home countries. In these cases, the Shanghai courts have not asked the parties to apply for recognition of foreign court judgments in the first place but have simply taken the foreign judgments as evidences to prove the divorce. While this still leaves room for debate, it seems that this is the route to

go for foreign divorced couples seeking to divide their community properties in China.

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