Does China Have “Forced Heirship” Law?

Description

In the area of cross-border estate planning practice, the term “forced heirship” is a concept that shall be given due heed.

As a family lawyer in China working on both divorce and estate planning, I would like to introduce forced heirship rules and its implications under Chinese laws.

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I. What is Forced Heirship

Forced heirship is a regime restricting testamentary freedom by an individual in disposing of their estates upon their deaths. Without forced heirship rules, a person can legally bequeath or devise his or her entire estates (comprising of any and all movable and immovable assets) to any beneficiary he wishes to benefit. On the contrary, with forced heirship law, the testator or will-maker cannot freely dispose of his or her entire estates because mandatory law requires that certain portion of the estates shall be preserved for certain heirs, and such “certain heirs” are called “forced heirs”.

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It is widely true that many countries and regions have forced heirship laws across the world, and since they are mandatory rules, wills that are made not in compliance with such rules are supposed to be nullified.

Forced heirship actually is not a familiar concept to China family lawyer or inheritance attorney. At least, this is not a conspicuous term in China inheritance laws and judiciary practice.

II. Does China Have Forced Heirship?

Well, strictly speaking, China doesn’t have the typical type of forced heirship, there is no law mandatorily reserving any specific portion of estate for any specific heirs.

On the other hand, similar to some jurisdictions, China does have the law requiring compulsory reservation of necessary portion of the estate for heirs that are dependent on the deceased, those who lacks labor capability and doesn’t have a source for life. But no other law or rules explain in details the application of this rule in judicial practice. In the academic world, scholars argue about whether China should adopt the typical forced heirship in China. After all, such compulsory reservation for dependents differs in nature from forced heirship laws.

That means under China inheritance or succession laws, a testator enjoys a great degree of freedom in bequeathing his or her estates to whoever they wish to.

But you cannot go too far. China is still a relatively conservative society attaching great importance to traditional family values in order to revive cultural confidence in Chinese people’s own culture. In the

past, we have seen China courts nullifying in whole or in part wills in which estates are left to mistress without providing for their legal spouses. The rationale underpinning such court decisions is that those wills are in violation of public policies and good customs (so called "*Gong Xu Liang Su*").

III. Implications of Foreign Forced Heirship Law on Inheritance of Estates in China

We learn foreign forced heirship because it has implications on our legal practice of cross-border inheritance of estates in China.

Let us look at a hypo case: a testator makes a will in a jurisdiction with forced heirship law, such as France, Japan or Spain, and this will covers a property or corporate shares in China. When the testator dies outside China, the inheritance of this China property will be dealt with under China succession law. Since there is a will, the first step is to determine whether this will is valid. According to China rules on conflicts of laws (or private international laws) in regard of inheritance, the validity of the will is likely to be determined according to the law in the country of the testator's domicile or habitual residence, in our hypo case, be it France, Japan or Spain.

The question is whether China court will take into account the forced heirship law in determining the validity of the Will before it. It is very likely that China courts may overlook the forced heirship laws in making its decision simply because they don't know such knowledge unless they are directed to the point. This is something only an experienced attorney with rich cross-border practice expertise can do.

We have learned that in different jurisdictions (such as in Germany), the impact of forced heirship law on a will is different in that some jurisdictions won't directly avoid wills that run against such laws and some others will.

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IV. Conclusion

While China doesn't have typical forced heirship laws, it doesn't mean we don't have to think about forced heirship in our cross-border inheritance and estate administration practice. Instead, foreign forced heirship law may have critical impact on how China courts shall decide on the inheritance of China estates by foreign heirs or beneficiaries.

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