Divorce and Legal Separation in China?

Description

Today, I happened to see a piece of news on a website saying a woman suddenly showed up, after disappearance from her family for more than 20 years, claiming her right to the estate of her late husband that died recently.



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Apparently, the news showed a tinge of awe on the fact that the law allowed such a thing to happen in today's China. Indeed, it strikes people's conscience to see Chinese laws permitting a person to benefit from his or her spouse's estate after the said person has abandoned the late spouse for so long.

Wait a minute, that is not the only awe-arousing point: the court applied the so-called community property matrimonial regime in China in determining the scope of the estate, and concluded that half of the assets owned by the late spouse was owned by the popping-up spouse. In other words, the resurfacing spouse not only took away half of the assets titled in the late spouse, but also took part in inheriting the remaining estate on par with other heirs, subject to adjustments that may be made by the court.

From our vast experience in working in cross-border family law arena, we have learned that many other jurisdictions have special rules governing the separation of spouses before divorce is granted, and that such separation can sometime have legal impact on the entitlement of one spouse to the estate of the other. For instance, as a special administered region of China, Hong Kong has a separate ordinance on Separation and Maintenance Orders.

So why do I bring up this story?

I. Be Advised that China Doesn't Have Similar Marital Separation Law

Though personally, I am in favor of adopting separation law in China to avoid the shocking outcome as described in the news above. But current China laws don't similar formal separation law in place.

Traditionally and to date, China has recognized separation as a legal ground for proving the irretrievable breakdown of relationship of the divorcing couple where the couple have separated for more than two years due to unhappy relationship. Beyond that, there is no any other specific rule regulating separation and its legal implications.

On the other hand, lack of requirement of separation for certain period before divorce means that it is relatively easy to divorce in China. Generally speaking, a married person can sue to divorce his or her spouse anytime following registration of their marriage.

II. **Establishing Your Estate Plan for China Assets following Your Separation**

If you are living in a country or region with separation law and you happen to have assets in China, then it is highly advisable for you to put in place an estate plan for your China assets, making sure your disfavored spouse won't be able to lay his or her hand on your estate which could be possible under Chinese laws.

For example, as pointed out in prior posts, when it comes to intestate inheritance of real estate in China , the applicable law governing inheritance and distribution is generally the Chinese law whereby a spouse, valid at law, is surely guaranteed the right of inheritance to estate left by the other spouse.

If you have assets in China and you are in a separation marital status with your spouse in your home country, you may wish to do some basic estate planning to ensure that your estate won't end up in the hand of your separated and often estranged spouse. So write a will for your China assets, and if you have corporate assets in China, then you may wish to do some corporate restructuring to pave the way for setting up offshore family trust outside China mainland to manage China business.

III. When China Courts Apply Foreign Matrimonial Laws

We have touched on the issue of China courts applying foreign matrimonial laws in cross-border divorce cases when it comes to the issue of determining certain assets in China as owned separately or jointly by the divorcing couple.

As we have found out that separations, esp judicial or legal separations ordered by courts in some jurisdictions, have an impact on the matrimonial property relationship between spouses. For example, following separations, community property rules may no longer apply to assets acquired by either spouse after separation.

However, China Law on Choice of Laws in Foreign Related Civil Legal Relationships doesn't shed any lights on whether Chinese courts should consider such special matrimonial property regime of foreign matrimonial property laws, thus a risk to many cross-border divorce parties.

We will discuss this point later on in other posts in more details.

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