Right of Residence and Cross-border Estate Planning for Properties in China

Description

Right of residence? Something you may have not heard of before in China. It is no wonder since this new legal concept is just recently created in China Civil Code, which has yet to take effect on January 1, 2021.



Your Home Owned by Others

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I. What is Right of Residence?

First, right of residence is a right in real properties, and to be more specific, a right created in residential properties only.

Article 366 of China Civil Code, one of the provisions regarding usufructuary rights, defines the right of residence as follows:

> ??????? ??

> Article 366 An owner of right of residence is, pursuant to the terms of contract, entitled to a usufructuary right of possessing and using the residential properties of others for purpose of satisfying the need of residence in life.
> *Quotation of Original Provision in Chinese and English Translation*

As a legal concept, the definition of right of residence comprises the following key elements for purpose of accurate understanding thereof:

(1) it is a property right, a usufructuary right, not purely a contractual or obligatory right, even though it is created out of a contract. It entitles the holder of the right to possess and use a physical property, in this case, a home; it is worthy of a note that this right of residence can only be created upon residential properties, not commercial properties.

(2) it is a right created in the property owned by others. You don't have right of residence to your own properties since there is no need for this. If you own a property yourself, you have the absolute right to reside in it;

(3) it is a right created by law to satisfy the basic life need of residence, not for profits, not for business purpose. In practice, it is most likely to be created for family members or someone that has a close personal relationship to the owner of the property such as a personal caretaker for elderly people.

II. How to Set up Right of Residence

Article 367 of China Civil Code provides for the way to set up a right of residence:

> To set up the right of residence, the parties shall conclude a written contract therefor, which contract shall usually comprise the following terms and conditions:
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> (1) the names and domiciles of the parties;
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> (2) address of the residential property;
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> (3) conditions and requirements of residing;
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> (4) time limit of residence;
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> (5) method of resolution of disputes

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Besides a written contract, more importantly, to legally create a valid right of residence, the parties must register the right of residence with registration authority. A right of residence shall only take effect upon registration. The requirement of registration sets the right of residence apart from the right a tenant enjoys under a lease contract. A lease contract is not required for registration for it to be effective. Once the right of residence is duly registered, it is there, firmly established, except that it is legally deregistered. In this regard, it is unlike a lease contract that can always be easily disputed and possibly terminated without good reasons.

Pursuant to Article 368, a right of residence shall be created gratuitously, connoting that this right is applicable most likely in family setting. However this same Article has proviso allowing the parties to the right of residence to be created for a fee. This is another feature distinguishing right of residence from general right of tenancy.

That is not all. What is more interesting and intriguing to us as a family and estate planning attorney is that Article 371 of China Civil Code says that right of residence can be created by a will/testament, potentially a powerful planning tool when it comes to arrangement of residential properties in China.

III. Right of Residence as a Planning Tool

We practice cross-border family laws covering both divorces and estate planning. For people who have residential properties in China, this new legal tool of residence right can be immensely helpful.

As you may know, China Trust Law offers little help in family estate planning esp when it comes to

assets like real estates. This new legal regime is no perfect alternative to a fully functional family trust, it does solve some practical problems that otherwise are not solvable before.

The key lies with the separation of the ownership of property and the right to possess and use it, similar to the separation of legal title and equitable title under common law system.

(1) In the Case of Divorce

Very often, divorcing couple fight fiercely for home properties. While one party may agree to cede ownership/title of their community property home in exchange for certain period of residence, it is not possible in the past since the conceding party has no security over his or her residence in such properties worrying that he or she will be evicted or otherwise forced out. Now with this right of residence, the conceding party can be confident that he or she will be able to live in the properties for the bargained period of time. For example, in the negotiation for divorce, one spouse may require the other party to create a right of residence for him or her as a condition on giving up title in the community property home.

(2) In the case of Estate Planning

Let us say a client has a property in China in which he lives with his second wife or girlfriend but in the same time has children from his prior marriage. He doesn't want to leave the property to his second wife or girlfriend but would like to leave the property for his widow wife to live in for the rest of her life. In the past, once the title of the property is transferred to his children from prior marriage, nothing under China laws can give him peace of mind regarding his surviving wife's basic need for a roof over her head.

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In common law system, incidental to its trust and property laws, they have "life interest" regime that can offer the surviving widow a secure place for her life. Unfortunately, this doesn't work in China.

With the right of residence as carved by China Civil Code, now the client can provide in his will that the property is devised to his children on the condition that the children set up the right of residence in favor of his surviving wife.

There are other circumstances where this right of residence can have a role in the estate planning in regard of residential properties.

IV. Further Clarity Expected from China Supreme Court

It shall be well noted that China Civil Code has not yet come into effect till beginning of the next year of 2021.

There will surely come supporting regulation in regard of registration of such rights of residences to put the system into practice. There will surely come judicial interpretation from China Supreme Court on how the courts shall deal with such new legal concepts and rules.

I know you have many questions about this new thing, so do I. You can always send me your questions and comments via emails.

Date Created
August 2020

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