

Discussion on the practical problems of property division between marriage and the gift of real estate

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Abstract: When the two parties in a marriage divorce, it is inevitable to deal with the division of property. The reason for the divorce between the two parties is obviously that the relationship has broken down, so in most cases, they have a positive claim to property. However, the reality is often complicated. Litigation under the condition that both parties cannot negotiate amicably will involve the division of divorce property in civil legal issues. The issue of the gift of real estate is also a complex issue, especially in the context of marriage, the nature of which is more difficult to discern. It is stipulated in the Chinese Civil Code that if the real estate is not actually transferred, the donor can request the cancellation of the gift, so whether the previous agreement on real estate and property still have practical significance, it is worth studying in detail to solve the problems in real life. This paper focuses on the discussion of the actual problems of property division and real estate gift between marriages in China, and combines the laws of the United States and the United Kingdom to conduct research on international related issues.

1. Principles of Divorce Property Division in China and Agreement on Separation of Property

In China, the division and liquidation of common property at the time of divorce are generally handled by agreement between the two parties.

In the actual court judgment, the following specific circumstances are generally considered to make a judgment on property division. First, consider the circumstances of caring for your children. Regarding the maintenance of minor children, in the case of under two years old, it is generally appropriate for the mother to directly support them. However, if the mother suffers from serious illness or has supporting conditions and fails to fulfill the supporting obligations, the father can apply to the court for child custody. If the child has reached the age of two and is under the age of eighteen, and both parties request custody at the same time, comprehensively consider whether one party is still fertile, whether the child lives with him for a longer time, whether there are other children, and whether they are related. Compared with the other party's health, the children are judged according to factors such as their life advantages. After a judgment or negotiation on the issue of child custody is made, the party with child custody will generally be given slightly more property to support the children, but the other party will also pay child support. Second, we must focus on taking care of the no-fault party. If the divorce is mainly due to the fault of one party, then the property of the innocent party should be compensated as a matter of course. Faults include: domestic violence, abuse of family members, bigamy cohabitation or adultery, etc. The specific circumstances need to be analyzed in conjunction with relevant cases.

It is worth noting that only the joint property of the husband and wife is divided at the time of divorce, and if it is personal property, there is no division. The common property of husband and wife, including all wages and labor remuneration obtained during the marriage, legally inherited property, as well as the income of various intellectual property rights and rent, etc., are all common property. Not included are disability compensation, gifts only to individuals, etc. Because of this, many families have prenuptial agreements on property, which are individually owned. In this case, it should be noted that it cannot be opposed to a bona fide third party, that is, if the third party does

not know the agreement on property between the husband and wife, and asks for debts and compensation, he can still ask the other spouse for financial repayment.

2. Discussion on the practical significance of real estate agreement between marriages in China

The Supreme People's Court's Judicial Interpretation on Marriage and Family Section of the Civil Code (1) Article 32 stipulates: Before marriage or during the marriage relationship, the parties agree to donate or jointly own the property owned by one party to the other party. If the gift is revoked and the other party requests an order to continue to perform, the people's court may handle it in accordance with the provisions of Article 658 of the Civil Code. [1]

Article 658 of the Civil Code stipulates that the donor may revoke the gift before the right to the gifted property is transferred. A notarized gift contract may not be revoked in accordance with the law. The provisions of the preceding paragraph do not apply to gift contracts with the nature of public welfare and moral obligations such as disaster relief, poverty alleviation, and assistance to the disabled. That is to say, the real estate agreement we are discussing can ask the donor to return it before the name of the real estate certificate is changed or the gift is notarized. After the title has been changed on the title deed, the giver may not request the return of the property for any reason. After the gift is notarized, if the recipient has the following three circumstances, the donor may request to withdraw the gift: (1) Seriously infringes upon the legitimate rights and interests of the donor or the donor's close relatives; (2) Has support for the donor (3) Failure to perform the obligations stipulated in the gift contract. The donor's right of revocation shall be exercised within one year from the date when he knows or should have known the reason for the revocation. [2]

We can see that the real estate property that has not been transferred can be revoked if the gift contract is not notarized. That is, there is no transfer, but to be revoked, that is, the condition of not having a notarized gift contract must be met, so it cannot be revoked at will. If it has been notarized, it can also be revoked, but only if the above three conditions are met. So obviously, the answer to the proposition is no, and it cannot be revoked at will. Since Article 658 of the Civil Code is to be applied to the judicial interpretation of the real estate agreement for property between marriages, it is obvious that the conclusion that it cannot be revoked at will also applies to the real estate agreement between marriages. To sum up, we can find that no matter whether the gift occurs between marriage or not, it needs to meet the conditions before it can be revoked, and it cannot be revoked at will. The condition is that the gift can be revoked without notarization or after notarization meets the three requirements stipulated in Article 658 of the Civil Code.

This paper argues that the property agreement of real estate based on the marriage and family compilation of the Civil Code has practical significance. First of all, property issues in marriage are different in nature from ordinary property issues. They have the nature of a family, so they need to be separately regulated. Second, the content of the real estate agreement stipulated in the Marriage and Family Section of the Civil Code is not only about the gift and transfer of real estate, but also the division of common real estate, as well as all forms of housing, so it must be written independently.

2.1 The nature of the gift of real estate between marriages is unique

There are generally four theories about the nature of the gift of property between marriages. First, give away. The Supreme People's Court held that whether a husband and wife agree that their personal property is owned by the other party alone or jointly owned by both parties, it is an act of gift. The second theory of special gift based on marriage. The gift between husband and wife is still a gift in essence, which is essentially different from the matrimonial property system agreement, but this kind of gift is based on the parties' expectations for marriage and common life, and has the characteristics of long-term cooperation, reciprocity and sharing. . Third, the property system contract theory. That is to say, the grant of real estate between husband and wife is essentially a marital property contract, which is based on the identity relationship, and often has the purpose of maintaining feelings or living with each other permanently. Fourth, marital property system contract

and gift classification theory. This theory believes that different directions of property giving should be distinguished, so as to make different characterizations; if the husband and wife agree to change the personal property of one party to be jointly owned by both parties, it is a marital property system contract; The property is owned by the other party alone, it is a gift between husband and wife. Then this paper argues that my country uses the nature of ordinary gifts, but the gifts between marriages are unique, that is, they also have the nature of "gifts based on marriage". [3]

Although the Supreme People's Court of my country believes that the common gift theory is applicable to our country's laws, in actual trials, it is often combined with the expression "gift based on marriage", that is, the behavior of gift based on marriage. For example, in one case, husband A first transferred the pre-nuptial property to wife B alone, but later discovered that wife B had an extramarital affair, so he appealed for divorce and the gift was revoked. The court held that: "(the recipient) B has seriously violated A , and Hui claimed the statutory right of revocation in accordance with Article 658 of the Civil Code , and this court supports it." The court identified the extramarital affairs of one spouse as The behavior of "severely infringing upon the donor or the donor's close relatives" is obviously excessive, and this is exactly how the statement "gift based on marriage" is reflected in actual cases.

2.2 The content of the real estate agreement stipulated in the Marriage and Family Section of the Civil Code is not only the content of the gift and transfer of real estate

Article 1065 of the Civil Code stipulates that both men and women may agree that the property acquired during the marriage relationship and the property before marriage shall be owned by each other, jointly owned or partially owned separately or partially owned jointly. The agreement shall be made in writing. If there is no agreement or the agreement is unclear, the provisions of Articles 1062 and 1063 of this Law shall apply. (That is, the provisions on joint property and personal property of husband and wife) The agreement between husband and wife on the property acquired during the marriage relationship and the property before marriage is legally binding on both parties. The husband and wife agree that the property acquired during the marriage relationship shall be owned by each other, and the debts borne by the husband or the wife to the outside world, if the counterparty knows the agreement, shall be paid off with the personal property of the husband or the wife.

Observing the content stipulated in the law, it is not difficult to find that the law on real estate property is very detailed, because the disputes over real estate and property in our daily life are very complicated, and there must be more than just transfer and gift. Therefore, we can know that the property agreement for real estate made in accordance with the Marriage and Family Book of the Civil Code has practical significance and is necessary because it also stipulates other specific conditions about real estate and property.

It should be noted that there are four forms of pre-marital property and property acquired after marriage, which are individually owned, jointly owned or partially owned by each other and partially owned jointly . Obviously, there must be more than one form of ownership (gift) by the other party. Therefore, I need to re-emphasize the point of this article, that is, the scope and content of the property agreement on real estate made in accordance with the Marriage and Family Book of the Civil Code are better than those in the provisions of Article 658 of the Civil Code concerning gifts and gifts. The provisions on giving are more detailed and directional. It defines that this provision applies to marriage and family, and covers far more than the act of giving. We cannot deny the actual meaning of the original legal provisions on the basis of a sentence in the judicial interpretation that requires reference to other legal provisions. This also requires that when we study judicial interpretations, we must analyze them in conjunction with the legal provisions, and carefully study the nouns and sentences in them.

2.3 Case analysis and commentary on real estate regulations in the Civil Code of the People's Republic of China

Due to the uniqueness of real estate gifts between marriages, we can compare and analyze different cases that occurred between families, between marriages and inheritance.

Case 1: The house was revoked by the parents after the donated house, and it was difficult to obtain legal support for the transfer without notarization (family case)

Mr. Li and Ms. Zhang are husband and wife, and Xiao Li is the son of the two. Mr. Li, Ms. Zhang and Xiao Li signed an "agreement", which stipulated that Mr. Li and Ms. Zhang agreed to give a house to their son Xiao Li. After the "Agreement" was signed, Mr. Li and Ms. Zhang still lived in the house, and the two parties did not go to the housing management department to go through the transfer procedures. A few years later, Xiao Li asked his parents to assist him in going through the transfer procedures and handing over the house to him, but Mr. Li and Ms. Zhang refused on the grounds that Xiao Li did not fulfill their maintenance obligations, indicating that they would no longer fulfill their gift obligations. Afterwards, Xiao Li sued his parents, Mr. Li and Ms. Zhang, to the court, asking them to fulfill their gift obligations.

In this case, the two parties signed the gift contract without taking the form of notarization, nor did they go through the transfer procedures after signing the gift contract. Therefore, Mr. Li and Ms. Zhang have the right to request the revocation of the gift. And according to the law, Xiao Li has no right to ask his parents to fulfill the contents of the gift contract, so the court did not support Xiao Li's claim after hearing.

Case 2: One party backs out after the parents donate the house, and the common property has no right to unilaterally dispose of it (cases between family marriages)

Mr. Lin and Ms. Qian are husband and wife, and Xiaolin is the son of the two. Mr. Lin, Ms. Qian and Xiaolin signed a "Gift Contract", which stipulated that: Mr. Lin and Ms. Qian agreed to donate a property to Xiaolin, but the house would be lived by Mr. Lin and Ms. Qian until after their death. Three years later, Xiaolin asked his parents to go to the housing management department to assist in the transfer procedures. His father, Mr. Lin, said that he did not agree to transfer the house to Xiaolin because of the current difficulties; while his mother, Ms. Qian, agreed to transfer the house to Xiaolin. Due to the disagreement between his parents, Xiaolin sued his parents, Mr. Lin and Ms. Qian, to the court, asking them to jointly fulfill the obligations of the gift contract.

There is a noteworthy point in this case, that is, the real estate that both parents are going to give to Xiaolin is the joint property of both parents after marriage. Because of this, it is not feasible to have only one party agree and the other party does not, and the full consent of both parties is required to continue the performance of the gift. Therefore, the court rejected Xiaolin's claim, requiring the house to maintain the status quo and not to give it to Xiaolin first, unless both Xiaolin's parents reach an agreement. [4]

Case 3: After the donor dies, the recipient may not be able to obtain the ownership of the house. If the parents die and ask the brother to assist in the transfer, the same heir has the right to claim cancellation (cases involving inheritance between families)

Mr. Han and Ms. Song are husband and wife, and the husband and wife have three sons. Mr. Han and Ms. Song signed the "Gift Agreement" with the younger son, stipulating that since the younger son took more care of the two of them, the two agreed to donate a property to the younger son before his death, and others had no right to raise objections. After the "Gift Agreement" was signed, the youngest son did not request the transfer of the house to his own name in time, considering that his parents were still alive, in order to take into account the feelings of the two elderly people. Later, Mr. Han and Ms. Song passed away one after another. Two years later, the younger son asked other heirs to fulfill the "Gift Agreement" and cooperated with him to go to the housing management department to go through the house transfer procedures. However, the two brothers claimed that the two did not know the status of the "Gift Agreement" and said that the house was owned by the parents. All three brothers have the right to inherit the legacy left, and they do not agree to transfer the house to younger son's name. Therefore, the younger son sued the two brothers to the court and asked them to fulfill the gift contract and cooperate with the house transfer procedures.

Then in this case, since the donor has passed away, and the other two children of the donor do not understand the situation of the so-called "gift agreement", and the donor did not go through the real estate transfer procedures when he was alive, And the signed agreement has not been notarized. Then, when other heirs request to exercise the right of inheritance in accordance with the law, other

persons shall not compulsorily require the performance of the gift agreement signed by their parents. Therefore, the younger son's claim was dismissed by the court. [5]

Then, based on the above three cases, combined with the current legal provisions, we can draw the following enlightenment: the agreement on the gift of real estate must be notarized, otherwise it will have no legal effect; the gift of real estate should require the other party to transfer the ownership in time, if the real estate has not been transferred. , it is generally possible to request the revocation of the gift; the gift of real estate between marriages to a third person, including family children, requires the consent of both husband and wife at the same time. If one person does not agree, the gift agreement cannot be performed; Homeownership may not be acquired; in the absence of agreement, general inheritance rights precede the recipient's right to claim the gift.

3. Practical issues related to property division in western countries

3.1 The U.S. Divorce Property Division System

According to the provisions of the Uniform Matrimonial Property Act of the United States, after the marriage takes effect, all property of one spouse before the marriage remains personal property, and the divorce will not be divided. However, the regulations on marital property vary from state to state. [6] Despite the existence of the U.S. Uniform Matrimonial Property Law, marriage law still belongs to the category of state legislation, that is to say, there are fifty different marriage laws in fifty states in the United States. Forty-one states, including New York, now have separate property systems, while nine states in the western United States, including California and Texas, have common property systems.

The separate property system in the United States means that the property acquired by both husband and wife before and after marriage is owned by themselves, and they have completely independent rights to possess, use, benefit and dispose of all property. The common property system of nine states represented by California in the west is a property system in which husband and wife enjoy equal possession, use, benefit and disposal of jointly owned property. Although these nine states have recognized the common property system, they still reflect the characteristics of Western countries to protect private property, and their provisions on personal property are broader than those in China. For example, gifts received by one of the spouses during the marriage are his own, unless the giving party indicates that the gift is to both spouses. In China, it is the complete opposite. Gifts received by one party during the existence of a marriage in China, unless the donor indicates that it is a gift to one of the husband and wife, belong to the joint property of the husband and wife. Under normal circumstances, in the nine states in the western United States that recognize the common system of marital property, the expressions stipulated in the state marriage laws are basically "property obtained by one spouse through labor or employment during the existence of the marriage relationship". Under this expression, The property acquired by one party through gift or inheritance is owned by the individual.

In the United States, the procedures and factors that need to be considered when dividing property are different in each state. Take New York State as an example: First of all, it is necessary to distinguish which property and debt are of a personal nature. It does not matter whether the assets purchased during the marriage are in the name of the individual or both parties, which is consistent with China. Only marital property and debts are subject to division or distribution by the court. Second, the court will value marital property and debts. In the end, the court will make an equitable distribution of marital assets. Usually, judges will consider a variety of factors when dividing property, such as the income and property of both parties during the marriage and at the beginning of the divorce proceedings; the length of the marriage, the age and health of both parties; inheritance rights and pensions after divorce The loss of the property; the property of one spouse registered in the name of the other party or the property of both parties; the situation of current assets and non-current assets in the marital property; the possible economic status of the husband and wife in the future, etc.

3.2 British divorce property division system

As we all know, the full name of the United Kingdom is "United Kingdom of Great Britain and Northern Ireland", which consists of four parts: England, Scotland, Wales and Northern Ireland. England and Wales implement the same laws, while Scotland and Northern Ireland implement their own independent laws.

This article analyzes England and Wales, the main body of the United Kingdom. The basic principle of matrimonial property in England and Wales is that all property acquired during the marriage is jointly owned by the husband and wife, whether it is labor income, inheritance or gift. When dividing property in a divorce, the judge will divide the community property based on a number of practical factors. According to section 25 of the Matrimonial Causes Act, when dividing property, the court shall consider the following principles: the income, earning capacity, property and other financial resources that both spouses have or may have in the foreseeable future ; Financial needs, obligations and responsibilities foreseen or likely to be in the future ; the standard of living of the family prior to the breakdown of the marriage ; the age and duration of the marriage ; any physical or mental disability of the spouses ; Contributions or contributions made in the foreseeable future ; the parties' respective conduct, which the court disregards if the conduct is unfair ; the value to the couples of any benefits lost by the spouses as a result of the divorce. [8]

It is worth mentioning that the property agreement before marriage in the UK does not have legal effect. Unless the judge believes that the agreement is in line with legal norms and is fair to both parties, it will agree to implement it. This is to prevent the use of marriage to seek improper benefits. . And even if it is an agreement on property within the marriage, if some property is stipulated in the marriage to be owned by oneself, in principle, it does not have legal effect, because the law does not expressly stipulate it. Similarly, it is possible to be recognized only when the judge believes that it is fair and reliable, which also prevents the existence of false divorces to a certain extent.

4. Conclusion

In general, due to the differences of national conditions and traditional ideas, the legal provisions on the division of property and gift in divorce are different in different countries. The United States pays more attention to the protection of private property, while the United Kingdom is very protective of the concept of community property, China has adopted a more ECLECTIC legal provisions. In different countries and regions, according to the provisions of National Laws to the division of property between marriage and the actual issue of gift to be discussed in detail.

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