

Guardianship Issues over Incapacitated Ward under China Laws

Description

We are approached by a potential client inquiring about an interesting situation: he and his mom are both living in Hong Kong, but his mom was actually incapacitated for some time and virtually bedridden; now his mom has a property in down town Shanghai, French Concession Area, worth millions of dollars; he wants to sell the property to support the family and his mom's medical bills; his mom doesn't have a bank account in China.

His question is: how he, as a son, can sell the property and get the money out.

I. His Problems of Selling Property in China

As you may know from other posts on this blog, in order to sell a property in China (either Shanghai, Beijing, Shenzhen or Guangzhou or other cities), the owner (or his or her agent who is properly authorized to act on his or her behalf) shall:

- (1) at least have a bank account in China for receiving the payments from buyers; and
- (2) deal with various parties to the sale such as realtors, buyers, banks, real estate registration authority, and tax authority.

Now the mom cannot act on her own, and she has not prepared a proper power of attorney to him to authorize him to act on her behalf for purpose of selling the property in Shanghai, China.

So what is the option now left for him in order to complete the sale?

Legally speaking, there is only one possible option for him: establishing himself as the guardian for his incapacitated mom and then sell the property as legal guardian instead of authorized agent or representative.

II. Guardianship under Current China Laws

Next question is how he could establish himself as the legal guardian for his mom and then act in that capacity in selling the property in China.

With regard to general guardianship legal framework in China, please refer to another blog here: <https://www.sinoblawg.com/guardianship-for-the-elderly-under-china-law/> .

In this case, the client has another twist to tackle: he and his mom live in Hong Kong where the legal system is totally different from that in the mainland of China. He shall have to resort to Hong Kong authority or court for appointing him as the legal guardian for his mom, and then take the Hong Kong authority's or court's decision to China mainland for recognition and enforcement (unfortunately there seems no bilateral arrangement on recognition and enforcement of guardianship between mainland and Hong Kong).

The guardianship issue with Hong Kong exists between China and other countries as well.

Assuming he can establish himself as the legal guardian over his mom, he may still find himself in a difficult situation in the mainland of China. Due to the vagueness of China current law over guardianship, a guardian's powers over disposing of the ward's properties are not clearly delineated. So with the certificate of guardianship, he may still be challenged by counterparties as to whether he can legally and validly dispose of property.

China banking system may refuse to open a bank account in the name of the guardian in his guardianship capacity for benefits of the ward or his mom, though some banks in China have allowed to open accounts for minors.

Of course, we are not saying that it is a dead end, and in some cases, we may be able to argue in favor of our clients, but it is guaranteed that is a tough mission.

III. Plan, Plan and Plan

In the world of estate planning, the key word is "plan", just as equally important as "location" in the case of purchase real properties.

Planning means you think ahead of things instead of dealing with surprises and emergencies where you or your family members may have really hard time.

When you or your family member has substantial assets in China and you are seriously sick, then you need to put in place a valid power of attorney to your family member or professional attorneys to take care of your assets in China.

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Author

admin