

Transfer of Your Share in Tenancy-in-Common Property in China and Preemptive Right

Description

Co-ownership of real estates is pretty common in many jurisdictions. To the best of my knowledge about foreign properties laws, most jurisdictions have basically [two types of co-ownership of real estate properties: joint tenancy and tenancy in common](#).



We have discussed some of the problems concerning tenancy-in-common properties in China in the past: [what can you do about your tenancy-in-common properties in China](#). But that is not the full picture about this special type of property co-ownership under Chinese laws.

I. Real Case Scenario and Practical Issue

Here is a real case we have worked before where a tenancy-in-common co-ownership is formed as a result of inheritance by 5 children of a garden villa property in downtown Shanghai. It is worth mentioning that besides the five children there is another non-blood person getting the title in the course of the property inheritance. In the end, each of the five children has a 10% ownership and that other non-family member person owns 50%.

The 50% owner has been living in the property in her life to date and has no intention to leave or move out of the property before her final days. On the other hand, the other five owners who are not living in China and wish to cash in on the property, and [take the money out of China](#).

Somehow among the five siblings, not everyone is really much concerned about this property and some may readily give away their shares in the property to other siblings. They finally agree to have one sibling to take up all their 50% interests in the property. The rationale behind is simple: it will be much easier to manage and maintain and finally dispose of their interests.

To achieve that goal, among the five siblings, four will transfer their respective 10% ownership interests to the fifth sibling, and eventually this fifth sibling will sell their half ownership interests in the property.

This requires two steps of transfer before they can finally cash in on their interests in the **China property**.

II. First-Step Transfer Among Siblings

Such transfer between and among existing co-owners is not much discussed on this blog in the past.

(1) How to Effect the Transfer

The siblings can choose to transfer their shares by way of a sale or a gift. A sale here doesn't necessarily entail real payment of market value of their 10% ownership interests, it is just a sale on paper only. But the parties shall enter into a sale contract and go through the standard procedures as in the case of a real sale transaction.

Alternatively, the siblings can do gifts between them. A gift contract shall be signed therefor and be presented to real estate registration authority for getting the transfer done.

Since they are all outside of China, they should authorize people here in Shanghai to help them carry out the deals. Such power of attorney shall be notarized, apostilled and legalized at China consulate in their home countries. Besides, the gift contract shall itself be executed in the siblings home countries and be notarized and apostilled and legalized before it can be used in China for the intended transfer. After all, gifting requires more stringent formalities to take effect.

The costs and taxes are different with respect to the two ways of transferring co-ownership interests in a property in China. The tax rules are complicated in this regard, we won't going too far to discuss the tax implications here. However this is often the deciding factor in making the choice of how to effect the desired transfer.

(2) Pre-emptive Right to Purchase by Other Co-owners

As a matter of China laws, the transfer of a share in a tenancy-in-common property by its owner is subject to the exercise of pre-emptive right by other co-owners. **Here it shall be noted that only transfer to outsiders is restricted by the pre-emptive rights. In other words, if the transfer is made between existing co-owners, the pre-emptive right rule won't be triggered**, unless the co-owners have agreed otherwise on this pre-emption issue.

As a proviso to the general rule of pre-emptive right discussed here, a co-owner can however transfer his or her share to his or her beneficiaries designated in his or her wills upon death, without activating the general rule.

Except for those circumstances where the general pre-emption rule is set aside, other transfers including one to co-owner's own family members will be restricted by such general rule.

III. Second Step Transfer

Once the other four siblings all transfer their 10% shares to the fifth sibling concentrating 50% holding in one hand, it is simpler and easier for this sibling to sell their interests.

The major issue faced by the selling sibling is still the pre-emptive right of the other non-family member co-owner.

First, on the books, the seller shall follow the procedures of notifying the other co-owner of his contemplated sale and the relevant transaction terms, and that other co-owner shall have the right to exercise his or her pre-emptive right to purchase the ownership interests being sold. If the other co-owner doesn't wish to buy, then the selling sibling may proceed with his deal with the third party. But when the selling co-owner and his third party buyer effect title transfer at real estate registration authority, it is a pre-requisite condition that it is clearly proven to the authority that the other co-owner has waived its preemptive right to purchase. In practice, this is often done by asking the other co-owner to show up before the authority and acknowledge his or her waiver. Unfortunately, due to family feud or other reasons, the co-owners may not be on good terms. If the other co-owner who has waived the preemptive right doesn't cooperate to come along to the real estate authority, there seems no other effective way to prove the waiver to the real estate authority.

We have gone to a real estate authority of a district government in Shanghai and argued why not accept a notarization of the notification process in which the other co-owners fail to respond in regard of exercise of their preemptive rights, but the real estate authority brief rebutted that they had never been instructed to accept such proof of waiver of preemptive rights. In their words, if the other co-owners cannot show up in person, the selling co-owner may have to resort to courts for a final solution.

Date Created

November 2020

Author

admin