

The Validity of the Commitment of "Divorce without Property Rights" in the Jurisprudential Perspective

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Abstract: As a kind of marriage and family relationship maintenance mode, marital loyalty agreement has gradually become a new marriage and family mode, which strengthens the fulfillment of husband and wife's loyalty obligation. The promise of "Divorce without property rights" is the concrete manifestation of the husband and wife's loyalty obligation in the marriage law, which is similar to a kind of sworn right, but lacks the legal obligation validity guarantee. Therefore, there are differences and disputes in the identification of the effect of "Divorce without property rights". How to accurately position and judge the effectiveness of the promise of "Divorce without property rights" is the key to properly solve the problem of divorce property disputes in China. In the civil law circle, the discussion on the effect of the commitment to Divorce without property rights mainly focuses on the basic concepts of civil law, such as expression of intention, contract and contract, and the content of the discussion is mostly partial to the theory of department law. How jurisprudence is involved in the study of the effect of "Divorce without property rights" commitment and how to optimize the legal analysis of this legal phenomenon is another dimension to solve this problem. Jurisprudence can provide argumentation ideas for civil judgment. Jurisprudence takes the resources in the field of general jurisprudence as a reason or argument to support the views of judicial judges, which can enhance the reasoning effect of judicial judgment. Regarding the attitude towards the effectiveness of the "Divorce without property rights" commitment, there is not much difference between jurisprudence and civil law, and it is only effective, invalid or depending on the situation. What jurisprudence needs to do is to clarify the connotation and legal basis of the promise of "Divorce without property rights", optimize the legal analysis of the promise of "Divorce without property rights", and put forward theoretical viewpoints that are in line with the legal principle and sense, so as to provide new judgment ideas and sufficient reasoning value for the judiciary.

1. The formation of the issue.

In recent years, the divorce rate in our country is rising, and the number of divorce property disputes is increasing. During the 40 years of reform and opening up, the marriage and family pattern in China has gradually changed, and a new pattern has emerged. The most important manifestation is that the young generation's concept of marriage has changed, and they hope to

pursue "self-centered" freedom of love and marriage to a greater extent, and lack loyalty and responsibility in marriage relations. The "self-centered" concept of marriage and love increases the risk of emotional breakdown and divorce, leading to a rapid rise in the divorce rate in our country, which in turn leads to the public's desire and trust in marriage. According to the survey data, a considerable number of people lack trust in the conjugal loyalty obligation in the marriage relationship, leading to more couples choose to adopt the "conjugal loyalty agreement" model to effectively maintain the marriage and family relationship and protect their property rights and interests. The promise of "Divorce without property rights" is the concrete manifestation of the husband and wife's loyalty obligation in the Marriage Law, which guarantees the continuation of the loyal feelings of both sides of the marriage, and then helps to build a stable and harmonious marriage and family relationship. The marital property agreement seems to be a selective property system, that is, the marriage parties have to choose between "general joint system", "limited joint system" and "separate property system".^[1]Therefore, the marital property agreement follows the principle of private autonomy.^[2] However, according to the provisions of the Civil Code (Marriage and Family), the conjugal loyalty obligation is more like a sworn right, and the commitment to Divorce without property rights does not have the effect of legal obligation, so there are serious differences and disputes on its validity.^[3] How to accurately position and make accurate judgment on the effectiveness of the commitment is the key to properly solve the problem of divorce property disputes in our country. If we need to recognize the "Divorce without property rights" commitment as having legal force, what is the legal basis for it?

At present, there are three opinions in the civil law circle about the effect of the "Divorce without property rights". The first is that the promise of "Divorce without property rights" has legal effect. The promise of "Divorce without property rights" is effective, and the promise of "Divorce without property rights" is regarded as a contract contract in civil law, which must be performed according to the spirit of "freedom of contract", so the division of divorce property should be performed in accordance with the promise. The second argument is that a promise to "Divorce without property rights" should not have the force of law. This view holds that although the marriage contract has clearly stipulated the division of property between the two parties in divorce, this civil contract is not exactly the same as the ordinary civil contract, it is a part of the division of divorce property, and does not have a separate actionable, cannot be used as a separate subject of action, must be combined with divorce proceedings. Therefore, the concept of "protection and balance of the interests of the weak" in the marriage law must be followed, and the agreement of "Divorce without property rights" does not have the validity of civil contract, and the husband and wife property should be divided according to the basic principles and concepts of the Marriage Law. The third view is that the promise of "Divorce without property rights" is partly valid and partly invalid. The validity of the "Divorce without property rights" agreement may need to consider the actual situation of the marriage parties during the marriage, during the divorce process and after the divorce, and comprehensively determine the scope of validity after weighing the interests of all parties.

On the one hand, regarding the marital property agreement, we can identify from the Angle of fairness of the marital property agreement. The subject of modern marriage and family law should not be to choose one end between individual value and group value, but to explore the balance between the two, not only to consider the "personal independence of family members, free affirmative relations", but also to "reasonably inherit the traditional family system of loyalty, dedication, obligation and other family ethical requirements."^[4]The typical marriage and family in our country generally carry out family life through the model of "one party obtains material and the other party takes care of the family", which is itself a marriage model structure emphasizing substantive equality.^[5]"Civil Code (Marriage and Family)" also attaches importance to and

emphasizes fair distribution, and now to break through this pattern, is to comprehensively measure between contract freedom and contract justice.^[6] We should consider the role of the parties in the family life in the marital property agreement and whether the application of the freedom of contract will have an adverse effect on the erosion and destruction of the justice of the contract. If it has a damaging effect, it is not in line with the basic principles of justice in our civil law. On the other hand, we start from the relationship between the marriage law and the property law to demonstrate the validity of the agreement. Whether the agreement between husband and wife set under the framework of marriage law is a contract, if it is an ordinary contract, the contract is valid, but the property law requires that there must be corresponding elements of the change of real right to be effective, movable property is delivered as a prerequisite, and real property is registered as a prerequisite.^[7] Because the property law applies relatively strict conditions in the process of property change, the marital property agreement of "Divorce without property rights" obviously cannot reach the degree required by the property law. Therefore, in this case, the effect of marital consent in marriage law and the effect of real right change in property law will inevitably involve the legal conflict between the freedom of contract and the essential elements of real right change.

2. Jurisprudence on the validity of the promise to divorce without property rights.

The research pattern of Chinese law can be summarized as legal doctrine, social science law and political and legal law. The formulation, implementation and amendment of laws in our country all have the tradition of political and legal jurisprudence. First of all, in the view of the political and legal tradition, the details of civil law doctrine may not be the key to the problem, and maintaining social stability is the value of the rule of law that judicial decisions should pay more attention to. In the judicial field, the leaders of the court are members of the Social Stability Committee, who shoulder the important obligation and responsibility of "maintaining social stability and harmony". Therefore, when the judiciary uses the theory of politics and law to analyze the effectiveness of the agreement, the political and social stability (including the guarantee of the promised party's right to survive after divorce) is the key factor to solve the effectiveness of the "husband and wife loyalty agreement". Secondly, when we analyze legal issues from the perspective of jurisprudence, we must understand what research methods and contents jurisprudence includes. Jurisprudence in the traditional sense includes philosophy of law, methodology of law and sociology of law (the study of legal problems or legal phenomena with the method of social science). For example, the methodology of law has the value of providing more judgment ideas and methods for the judicator in the validity determination of "Divorce without property rights". For another example, when civil law scholars discuss the effect of "Divorce without property rights", they do not leave the interpretation of legal provisions, they clearly use the interpretation of text, system interpretation and other legal methods. Therefore, the department of law scholars and judicial personnel are not completely divorced from jurisprudence, but they do not realize that they understand jurisprudence only as philosophy of law.

The current department law is mainly the study of legal doctrine, that is, the methodology of law. Legal methodology is a general legal theory, it does not belong to any department of legal theory, it is not exclusive to civil law, criminal law and so on.^[8] Therefore, if we want to incorporate legal methodology into the scope of jurisprudence research, we must make it can be used throughout all departments of law, and not adhere to the limitations of a certain department of law theory, and become the highest choice of jurisprudence in the true Austin sense. The civil jurist has only used it occasionally in a single method, and has not consciously applied the research methods of jurisprudence more. There are two ways of thinking here. The first is the way of thinking. Our jurisprudence methodology is summarized and refined through the constant observation of our

department law. The second is normative efforts. In terms of methods and processes, we can construct a normative legal methodology through philosophical thinking, linguistic thinking, rhetorical thinking, and narrative thinking, and then provide them with some inspiration in the fields that they are not aware of and have not experienced.

From the Angle of jurisprudence to discuss the problem of Divorce without property rights, first of all, the legal concept of "Divorce without property rights" is actually ambiguous, what is called "Divorce without property rights"? What is the connotation and extension of Divorce without property rights? In law, there is no clear definition of the concept of "Divorce without property rights", and there are differences in judicial practice. Second, about the effect of Divorce without property rights. In law and judicial practice, there is no consensus on what is effective and what is not. From the perspective of jurisprudence research, jurisprudence can provide a set of technical and theoretical support for the survival of civil law doctrine. We should clarify the legal concept of "Divorce without property rights" from the technical level, and further clarify the connotation and external research of Divorce without property rights. Although the Civil Code (Marriage and Family) provides for the duty of fidelity between husband and wife, the judicial interpretation of the Supreme People's Court has made clear instructions on the determination of its effect: if the divorce case brought to the court merely because of the violation of the duty of loyalty between husband and wife is not accepted, the lawsuit has been rejected.^[9] In fact, in the legislative and judicial level, the conjugal duty of fidelity is regarded as a kind of sworn right, which is not effectively protected in law. There are loopholes in the Civil Code (Marriage and Family Compilation) between solving the problem of "Divorce without property rights" and protecting the realization system of husband and wife's duty of loyalty. At the legal level, determining the legal concept of Divorce without property rights can help the husband and wife loyalty agreement take effect through legal procedures, so that there are established rules in dealing with the problem of "Divorce without property rights", and the "Divorce without property rights" agreement should be honored if the law is violated.

The identification of the scope of validity of the commitment of "Divorce without property rights" should be divided into types and degrees. In judicial practice, there is no unified scheme to determine the validity of the marriage loyalty agreement signed to prevent infidelity in marriage, some courts consider it valid, and some courts consider it invalid. In addition, there have been theoretical differences and arguments about the validity of marital loyalty agreement in the legal circle. First of all, we should analyze the purpose or significance of signing a marriage loyalty agreement. According to the provisions of Article 4 of the original Marriage Law, the marital loyalty agreement is actually oriented to the obligation that the husband and wife should be faithful to each other in the marriage relationship, which is in line with the moral orientation of the mainstream values of marriage and family in China.^[10] This duty of fidelity is called conjugal loyalty. Some scholars regard it as a sworn moral obligation rather than a legal duty of marital loyalty. There are two types of commitment to Divorce without property rights, the first type is to sign a Divorce without property rights agreement before marriage. The purpose of the prenuptial agreement is to maintain the faithful relationship between the two parties in the future, and it is a kind of expectation of marital loyalty. The second type is the agreement signed during the marriage relationship. This type of agreement is often because the relationship between husband and wife has undergone subtle changes, for example, one party within the marriage has been derailed and is known to the other party, but because the family life relationship can still be or do not want to give up the family relationship and do not want to divorce, in order to ensure that they will not happen again and sign a "Divorce without property rights" agreement. Comparing the two types, the second type should have a higher degree of meaning representation than the first type.

The reproduction capacity and the right to survival after divorce are the key issues that should be

paid attention to when analyzing the effectiveness of the commitment. We do not consider whether there is a moral fault (violation of loyalty agreement between husband and wife or domestic violence), economic fault (gambling debt), criminal fault (illegal crime) and other circumstances, but from the perspective of protecting the survival rights of both men and women after divorce to consider the effectiveness of "Divorce without property rights" commitment. It is considered that the validity of the promise should be weakened to protect the promise party's right to social survival after divorce, while the validity of the promise will seriously damage the survival rights of the promise party. At the time of marriage, one of the spouses promised to Divorce without property rights in the event of divorce, which may have been made out of love, the moral observance of marital fidelity, or their own financial ability to generate income. In the above circumstances, it is easy for the promising party to ignore that the agreement is likely to seriously threaten its own survival and development rights after divorce. From a sociological perspective, the most important reason for divorce between men and women is the breakdown of the family relationship, which may be due to disillusionment between the two parties, infidelity within the marriage or family financial problems. Apart from the moral and ethical factors such as love or marital loyalty, from the perspective of individual survival, the effect of the promise of Divorce without property rights should give way to the survival right of the divorcing parties. When the promising party makes the commitment to Divorce without property rights, it is highly likely that it believes that it will not divorce or will not restrict its personal survival right due to the fulfillment of the commitment of "Divorce without property rights" after divorce. When the court tries the divorce property dispute case, most of the parties who question or refute the validity of the promise are because the individual does not have the ability to create a comparable family property. Therefore, when determining the scope of validity of the agreement, we should consider the extent of its impact on the survival right of the promised party.

The people's courts have the responsibility and obligation to maintain social stability and harmony. The leaders of our courts not only shoulder the heavy responsibility of maintaining judicial fairness and justice and coordinating the work of the courts, but also are members of the leading group of social stability work and need to be responsible for the stability and harmony of the society in the region. If the "Divorce without property rights" promised party agrees to divorce without careful consideration, but does not have the ability to reproduce after divorce, complaints are high, and entering society is likely to become an unstable factor. For example, the "Divorce without property rights" after the divorce because of the Divorce without property rights and living hardship, to the court to apply for property redistribution, when the court rejected its lawsuit request or ignore, it is likely to directly lead to petitions, complaints, and even may cause intentional harm to others, theft of other people's property and a series of social problems. Therefore, the validity of the commitment to Divorce without property rights is related to social stability in the political field. In this dimension of thinking, the right to equity and the right to survival of those who have been "evicted" have become the contents that should be considered in order to achieve political and social stability. In the case of divorce property disputes, the court ruled that the agreement is valid, and the person who is "Divorce without property rights" loses his property, which is easy to make him lose the expectation of reproduction, so that he has a pessimistic mood, and begins to harass and steal the neighborhood, affecting social stability. In this example, we say that fairness must enable the "evicted" to have the expectation and ability of reproduction, and ultimately boils down to the purpose of achieving political effect or social stability.

In this example, we say that fairness must enable the "evicted" to have the expectation and ability of reproduction, and ultimately boils down to the purpose of achieving political effect or social stability. In social life, people's thoughts and concepts are complicated, and there are differences in the ways and angles of people's thinking, which leads to great differences in our value

judgments on the same issue. At this time, the excessively complicated reasoning content will also directly lead to the weakening of the social credibility of the judgment documents. Because the characteristic of our thoughts is that thoughts are always concepts, and new concepts state new ideas, when we continue to reason, we must use more language, use more statements. When we use more and more language and statements, we will show the sticky expression of the judgment. Stickiness is to constantly attract some new words to connect with it, and new statements to connect with it produce new ideas, which are likely to directly lead to the dilemma of reasoning. On the basis of the comprehensive credibility of judicial judgment documents and the evaluation of the public, we think that the judicial judgment documents concerning the effectiveness of "Divorce without property rights" should be fully reasoned, but we should also pay attention to "enough is enough".

3. Jurisprudence provides the judge with the judgment thought.

In order to solve the problem of the effectiveness of the commitment of "Divorce without property rights", the department law should not only be fully reasoned from the legal point of view, but also carefully consider the acceptance degree of people's thinking. Because for our ordinary people, the public order and good customs, the true expression of meaning, and the concrete analysis of specific situations can be summarized as such a statement as "My word is my word". In the concept of people who are not born in law, the effect of "Divorce without property rights" contains two meanings: the first is to make a promise of "Divorce without property rights", and the second is to keep one's word. If these two requirements are satisfied, the agreement of "Divorce without property rights" should be effective. Translated into the legal language of our department law, it becomes a set of legal language such as "commitment, true expression of meaning and establishment of civil acts". If a departmental law wants to have a popular support base, it needs to French-language and translate into legal texts direct matters that are more acceptable to the public. In fact, judges with a little theoretical and practical experience can quickly translate legal language into something that is easily understood by the general public. Although the judge can throw away the legal language and directly tell the popular meaning to the people, so that they can directly accept it and avoid or reduce the impact of judicial decisions on their perceptual thinking, the drawback of this approach is that it is not enough to inspire the people. Jurisprudence, on the other hand, is relatively more complex. It hopes that the research on this issue can be more extensive and theoretical, and it can explore the fields ignored or difficult to involve by the general public. Therefore, jurisprudence is to put the deep-seated content in the ideological field of ordinary people into our jurisprudence.

Although the "Divorce without property rights" agreement is a civil contract in form, but the "Contract Law" excludes the adjustment of the agreement with the marital status relationship, so the "Divorce without property rights" agreement does not belong to the scope of the contract law.^[11] However, as a common civil legal act of husband and wife, the agreement of "Divorce without property rights without a net body" belongs to the civil contract and should still be regulated and adjusted by the Civil Code of our country. At the civil law level, we judge the validity of the "Divorce without property rights" agreement mainly considering the following aspects. First, the validity of the subject, the agreement must meet the validity of the subject conditions, that is, both husband and wife should have the corresponding capacity for civil conduct. Second, the validity of time, the time validity of the agreement is limited to the duration of the marriage between the husband and wife. But it's worth noting that both pre-marital agreements and post-nuptial "make-up" agreements can work. Third, the content of the agreement must have the right purpose. The purpose of the husband and wife signing the agreement is to prevent the emotional

injury between husband and wife, to ensure the fulfillment of the loyalty obligation between husband and wife and to promote the stability and harmony of marriage and family.^[12] The agreement should be based on the real intention of the husband and wife and signed in line with the concept of public order and good customs divorce property agreement, any in order to obtain improper property interests and take blackmail, destruction, torture and other ways to force the other party to sign the agreement, the court should determine that the agreement is invalid.

Freedom of contract is an important concept in civil law. It is the concrete embodiment of contract freedom to recognize that the marriage parties have legal effect on the ownership of property after marriage or the distribution of property between the two parties in divorce.^[13] However, there are differences between the conjugal loyalty agreement and the ordinary agreement stipulated in the contract law. The particularity of the conjugal loyalty agreement is that it is based on the qualification of the conjugal status.

On the validity of the conjugal loyalty agreement, contractual freedom should give way to contractual justice under certain conditions. In view of the marital loyalty agreement has the characteristics of marital status qualification, so we can not completely according to the concept of contract freedom to identify the validity of the agreement, but to restrict some contents or conditions in the marital loyalty agreement.^[14] This is mainly due to the following three factors. First of all, the most critical consideration is the power imbalance between the parties to the marriage. Marriage and family life is a collection of multiple forces, multiple relationships and multiple ideas, and the multiple forces that can be considered here have multiple characteristics, including the educational background of the couple, their own and parents' social status, pre-marital wealth and work ability. In marriage and family, it is difficult for us to adopt a unified standard to judge the strength of both husband and wife. Secondly, the husband and wife's right to survival and reproduction. The main consideration here is that the promised party's right to survival and reproduction capacity after divorce, either party in the marriage after "Divorce without property rights", survival rights and reproduction capacity are likely to suffer serious impact. When the right to life and the reproduction capacity of the "Divorce without property rights" party are seriously damaged, we should deny the full validity of the "Divorce without property rights" commitment. Finally, the public's good emotional expectations for social fairness and justice. If the marital loyalty agreement is carried out according to the meaning of contractual freedom, the unfair factors in the marital loyalty agreement cannot be properly dealt with in complex situations. For example, when the husband and wife sign the agreement to Divorce without property rights, it is in line with the freedom of expression of both sides, but after the agreement is signed, one party in the marriage has repeatedly adopted various despicable means to force the other party to divorce, expecting to obtain all the property of the other party through improper means. Such a situation violates the concept of contractual justice, and will seriously hurt the public's good feelings for fairness and justice.

Public order and good customs are the basic criteria that must be considered to determine the validity of the conjugal loyalty agreement.^[15] The husband and wife re-adjust the property after divorce by signing the "Divorce without property rights" agreement before marriage or during marriage, which means that they give up the protection of legal divorce property division system. Under the Divorce without property rights commitment clause, one party in the marriage may lose the protection of personal legal property rights in the divorce, and the other party in the marriage may use the agreement to avoid the problem of joint responsibility between the husband and wife. The principle of public order and good customs provides sufficient standard and basis for adjusting the reasonable property rights and obligations of the husband and wife after divorce under the principle of public order and good customs, that is, the husband and wife loyalty agreement violating the principle of public order and good customs will be judged to be partially or completely

invalid.

When the civil law judges the validity of the marital loyalty agreement, it should take into account the situation that the two parties are forced to sign the contract because of the unequal strength of the marriage. In the judicial decision, the judge must find out whether the true meaning of the husband and wife is restricted when the husband and wife sign the agreement to Divorce without property rights. If the strength of the husband and wife is seriously unequal, and one party of the marriage is forced to sign a Divorce without property rights agreement because of the strength of the other party, it should be judged that the content of the "Divorce without property rights" agreement is invalid. For example, a common type in marital relationships is: Under the traditional Confucian moral and ethical regulations, the woman urgently needs to conclude marriage to eliminate the negative evaluation of her neighbors due to the problem of unmarried pregnancy, and the man takes advantage of the weak mentality of the woman to conclude marriage urgently and proposes to sign an unequal marriage property agreement as a prerequisite for marriage, so as to minimize his property risk and child raising responsibility after divorce. In this case, if the woman gives up working outside the home, she takes more responsibility for her husband and children, so she has no source of income. At the time of divorce, if the man distributes the marital property and solves the problem of the ownership of the child custody according to the agreement signed at that time, the woman will fall into a serious unfavorable litigation position. In the marriage relationship, the power disparity between husband and wife is the key factor to sign the unequal and unfair marriage property distribution agreement. However, there are many factors that constitute the strength of both husband and wife, and the division of the strong and weak status of both men and women needs to be analyzed and judged by the judge according to the specific situation. In determining the validity of a fidelity agreement, the court should consider whether one of the parties to the marriage was forced to enter into an unequal division of marital property agreement by force of circumstances or in a position of inferiority. If he is forced to sign a "Divorce without property rights" agreement, then the agreement is not the true expression of his will. The agreement to Divorce without property rights without the will of the inferior party is a serious violation of the good customs of our civil law, so it should also be recognized as invalid.

4. Conclusions

When we return to the issue of the "Divorce without property rights" commitment, our traditional political and legal model, and the doctrinal model that focuses on the law, they will have different ideas and opinions. When we finally talk about law, whether we are defending legal justice or pursuing political effects, we still want to compete for social legitimacy and give society a reasonable explanation. The fairness and justice, the right to survival and the ability of reproduction in jurisprudence originate from the institutional considerations of social stability maintenance in the tradition of politics and law. Although civil law generally does not think from the perspective of social stability maintenance, the court will also pay attention to the effect of stability maintenance when trying certain cases. For example, in judicial practice, a party to a divorce case may have a statement of "If the divorce is decided, I will die to you", at this time, more consideration should be given to judicial mediation, rather than direct judgment in accordance with the provisions of the law, and the main consideration is the effect of social stability. Civil law scholars can stick to basic doctrinal positions, but they also have to think about whether they can give us political legitimacy. Although legislators are elected by the people, civil law professors are not elected by the people. Why should the people agree with your point of view? Such a debate is a break with doctrine or with what we are accustomed to, and that is the value of jurisprudence. For example, why should we care so much about representations of meaning, doctrinal knowledge, whether we can have some other

judgment and measure, these debates are themselves jurisprudence. We do not need to stick to a specific set of institutions that may be reformed by doctrinarians, but we need to discuss the effectiveness of "Divorce without property rights" from the perspective of what the people really care about, and put the deep content of the ideological field of ordinary people into our jurisprudence.

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