

# On the Civil Remedies of the Defrauded Person in Fraudulent Maintenance

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## Abstract

**Fraudulent maintenance dispute is not a single legal dispute, there are many different complex situations, in the biological parents, children, the fraudulent party and even between third parties there are difficult to clarify the legal relationship. In real life, this kind of phenomenon is more and more but not properly dealt with, the current fraudulent maintenance disputes related legal provisions are not perfect, the actual trial may also appear in many conflicts and problems, making the rights of the fraudulent party is difficult to get effective relief. The root of the problem is in dealing with such disputes, has not been clear about the nature of fraudulent maintenance legal relationship. In the comparison of the four doctrines, fraudulent maintenance can be defined as a tort, the infringement of the rights and interests of the object is clear for the general right of personality and the right to know, the fraudulent party's loss is summarized in three categories. The paper concludes with specific proposals for civil remedies for the defrauded party in fraudulent maintenance.**

## Keywords

**Fraudulent Maintenance; Tortious Injury; Personality Rights; Moral Freedom.**

## 1. Introduction

With the change in social attitudes and the diversification of relations between men and women, the phenomenon of "raising a child for another" has become more and more common in practice, with the defrauded party raising a child that is not his or her own without his or her knowledge, which causes the defrauded party great losses. Generally speaking, "fraudulent fostering" refers to situations in which a woman, out of intent or gross negligence, conceals or deceives a man so that the man mistakenly believes that the child he is fostering is the result of a union between the two of them and assumes the obligation to foster the child, while the fraudulent party (including the biological father) avoids the obligation to foster the child under the law.

## 2. Jurisprudential Analysis of Fraudulent Maintenance

### 2.1. Clarification of the Legal Attributes of Fraudulent Maintenance

The legal relationship of fraudulent maintenance first appeared in the 1980s and 1990s, when the Supreme Court replied to the Sichuan Provincial High Court's reply (1991 "Reply of the Supreme People's Court to the question of whether the man who was deceived into bringing up a child who was not his own during the period of the husband and wife's relationship can recover maintenance from the woman after divorce".) Only clear on the husband and wife after divorce alimony return problem, not clear fraudulent maintenance belongs to what kind of legal attributes. The earliest scholar to study "fraudulent maintenance" in China was Professor Yang Lixin, who introduced the relevant doctrines at home and abroad, i.e., the Negative and

Affirmative doctrines, (The Negative doctrines hold that, due to difficulties in calculating and dividing property, the man does not have the right to claim alimony during the period of marital relationship, while he can request the return of alimony paid after the divorce. The affirmative view recognizes the fraudulent party's right to claim the full amount of maintenance. The affirmative view recognizes the right of the defrauded party to request the return of all alimony, but the basis of the request for the return of alimony varies from country to country in terms of legislation). And pointed out the affirmative statement in the different legislative examples, such as Japan, Switzerland, Germany and other countries held by the unjust enrichment theory and China Taiwan's causeless management theory, and on this basis, the preliminary proposed his tort liability theory[1]. Since then, domestic research on this issue has tended toward the tort liability theory, and the part of moral damages has gradually come into judicial practice. The reason why most scholars rejected the negative theory, is that it denies the fraudulent party to the marriage during the maintenance of the return request, cut off the fraudulent party's right to claim, it is difficult to solve the fraudulent maintenance disputes arising from the cohabitation relationship. Affirmation of the main four doctrines, the current academic community has also appeared in the right to claim unjust enrichment auxiliary theory, divorce damages, and other different sayings, reflecting the complexity of fraudulent maintenance relationship, but in the legal attributes of fraudulent maintenance, some of the doctrines there are difficult to justify the aspects of the four doctrines will be elaborated and evaluated below:

### **2.1.1. Doctrine of Unjust Enrichment**

The doctrine of unjust enrichment asserts that the established fact that the fraudulent party has benefited and the defrauded party has suffered a loss has no legal basis and that the injured party, who has incurred the costs of upbringing, therefore has a claim for restitution of the unjust enrichment from the party who has benefited. It seems to be the fraudulent party and the fraudulent party between the gains and losses properly calculated, but it ignores the legal relationship, the fraudulent party not only suffered property losses, but also in the spirit of the great damage suffered. In our country, the parent-child relationship is naturally occurring by the law by default, did not provide for the rule of presumption of legitimacy, the defrauded party found that the child is not the biological child, it has paid the feelings and efforts are difficult to calculate.

### **2.1.2. Doctrine of Uncaused Management**

The doctrine of causeless administration holds that the defrauded party, who has no statutory or contractual obligation to perform the duties incumbent on the fraudulent party, is a causeless administrator who may claim reimbursement of the administration costs from the beneficiaries. On the surface, the fraudulent party managed the fraudulent party's obligations within the scope of the maintenance and education affairs, it seems to be able to generalize the objective elements, but the fraudulent party to raise the child, because it believes that this is a legal obligation to support, there is no "to avoid the loss of the interests of others" subjective elements, so the argument has obvious disadvantages. The argument has obvious drawbacks.

### **2.1.3. Doctrine of Invalidity of Acts**

The doctrine of nullity holds that the defrauded party's act of raising the child was not done out of true will and that it is a null and void civil act, and therefore the defrauded party may be claimed to return all of the maintenance expenses it has incurred. For "acts done against the true will", the current regulations regard them as "revocable civil legal acts", It can be seen that the legislative basis of the invalid behavior is not solid. If according to the civil code article 153-154 that behavior is invalid, there are obvious shortcomings, child support is a legal obligation, there is no agreement between the parties, neither agreement, then why behavior is invalid? In addition, it cannot compensate for the moral losses of the defrauded party and does not adequately safeguard the defrauded party's legitimate rights and interests.

#### 2.1.4. Doctrine of Tortious Behavior

Can also be called tort damages liability, it is clear that the fraudulent party to carry out the act of tort, that the fraudulent party in the case of knowing that the child and the fraudulent party without paternity, concealment of the facts or deception of the fraudulent party, resulting in the fraudulent party to spend the cost of support, pouring affection, suffered a double loss of property and feelings, so the fraudulent party should bear the corresponding responsibility for tort damages. At present, whether it is the academic community or the court decision, the mainstream position. But in terms of the fraud, the academic community on the object of the infringement is still not clear, only mainly points to the fraudulent party's property rights and personal rights, although there are a lot of logic is not fluent, but the said that the legitimate rights and interests of the fraudulent party can indeed be more comprehensive maintenance.

#### 2.1.5. Contingent Attributes of Fraudulent Maintenance: Torts

According to the above analysis, fraudulent maintenance in the composition, and causeless management, invalidity and unjust enrichment. In order to protect the legitimate rights and interests of the defrauded party, the relationship between the parties should be fully considered from the tort path. Although fraudulent support meets the appearance of tort, but the word "fraud", commonly used in the field of contract law, less in the field of tort law, which is closely related to the subjective requirements of the "fraud", because "fraud" This carries the expression of malicious intent, in the fraudulent support relationship, "fraud" so that the fraudulent party to lose mental freedom, and then the expenditure of alimony and emotional, resulting in not only the loss of a property interest, but also led to a large number of emotional expenses, we start from the "fraud" the nature of the behavior. "Fraud" from the nature of the behavior, can be treated as a tort. If we limit the situation to a marital and family relationship, where the defrauded party, as the legal parent of a child born out of wedlock, has the right to know the true identity of the child, and this right is violated by the perpetrator of the fraud, we can derive a general correlation between the act of fraud and the impairment of the defrauded party's right to (moral) liberty [2].

### 2.2. Analysis of Underlying Interests in Fraudulent Support Damages

The above points out that fraudulent maintenance behavior is indeed a tort, the essence of the nature of the non-trivial, but in the behavior of the violation of the object of the right, the author and other scholars have different views. In the rule of law society, the law should protect every civil subject in the independent, true will to make the corresponding behavior, and fraud in essence leads to the civil subject of this spiritual freedom is restricted or even deprived. Although there is no relevant provisions of the current law, but this kind of legal interest is certainly worth the current law in other forms of protection. For example, in fraudulent support, the fraudulent party may have violated the victim's personality rights or general personality interests[3]. At present, the academic community on the fraudulent party to violate the fraudulent party what kind of rights and interests and no uniform statement, mainly related to the right of reputation, parental rights and other related rights and interests, this paper on these related rights and interests are still doubtful, so it is specifically analyzed as follows:

#### 2.2.1. Property Right

The prevailing view in the academic community is that the loss of maintenance is essentially an infringement by the fraudulent party of the other party's right to property. This is not the case, the defrauded party out of "voluntarily", wrongly disposed of their own property, the fraudulent party here is not a violation of the right to dispose of property, but rather its disposition of property in the spirit of freedom. In addition, it is necessary to clarify the distinction between property damage and the violation of property rights, which may result not only in property damage, but also in severe moral damage suffered by the person concerned in

the case of a specific property violation. Of the two parties to the flow of benefits we are discussing, we should not directly categorize the loss of alimony as a violation of the fraudulent party's property rights against the defrauded party, but rather view it as a property-based expense resulting from the fraudulent violation of the defrauded party's general personality rights. Therefore, it is not appropriate to treat property rights directly as the object of the fraudulent maintenance violation.

### 2.2.2. Personality Right

For one thing, the right to reputation is a social evaluation of the value of a particular person's personality[4]. The mode of behavior that infringes on the right to reputation is specific, such as insulting or defaming another person, resulting in the consequences of lowering his or her social evaluation. It is only when the perpetrator actively commits the relevant acts of insult or defamation that the defrauded party may actually suffer tangible damage to its reputation. This type of dispute does not meet the requirements of infringement of the right to reputation.

Second, general personality rights[5]. In the author's view, the "right to personal freedom" in the field of private law should include a certain degree of mental freedom, which is manifested in the "freedom from thought control" and "freedom of expression of will". Accordingly, in fraudulent fostering, the biological father (mother) conceal the truth or intentionally do not inform the defrauded party of the real situation, so that in the wrong will to pay emotional, and may even suffer a major mental blow, this is the defrauded party's mental freedom "binding", so that the loss of whether to raise the illegitimate child of the selectivity. And human dignity as a spiritual personality rights, embodies the human spirit needs, but the human spirit state is vague, subjective, in the protection of human dignity, we should start from the behavior, fraudulent maintenance disputes, there is no kind of "insult", "infringement" behavior, more reflective of the fraudulent party. "Behavior, more in the fraudulent party to learn the truth of an internal pain, if this is regarded as a damage to human dignity, the causal relationship is ignored. As for other personality interests, heirloom has always been the Chinese people attach great importance to the tradition, so for the fraudulent party, to be able to give birth to a child belonging to their own lineage is very significant, which is one of the rights and interests of the person as a human being, but with the expression of the "freedom of the spirit" similar to the above, in the relationship between the fraudulent party of the fraudulent party to violate the object of the fraudulent party is more The object of the violation by the fraudster of the defrauded party in this relationship is more likely to be other personality interests based on the freedom or dignity of the human person.

Thirdly, the right to know is the freedom of citizens to know and request information of interest to them, which is a more comprehensive right[6]. In a fraudulent support relationship, if the dependent is an illegitimate child, it is necessary for the obligor to actively inform the relevant information, and the support behaviors made with the knowledge of the relevant information are naturally not considered to be infringement. With reference to the contract, securities law and other relevant norms, we can learn, the right to know in a certain aspect of the protection of the interests of trust on behalf of the fraudulent party's concealment, deception, belongs to the fraudulent party's right to know the infringement. And this right to know, just as the aforementioned "spiritual freedom" of the specific carrier.

Fourth, the right to procreate is the natural rights of mankind innate, but the act of procreation, not only by natural control, will be affected by morality and legal policy and other factors, the right to procreate is violated or not, often has a strong contingency. Fraudulent fostering may lead to the loss of the fraudulent party's eugenic right to choose and the resulting mental anguish, belonging to the fraudulent party indirectly affects the realization of its reproductive rights, whether such influence reaches the degree of "infringement", also has a strong contingency, the parties to the need to fully prove. In addition, the nature and content of the

"right to procreate" itself is unclear, making it difficult to truly apply it to fraudulent maintenance legal relationships.

### 2.2.3. Identity Rights

First, parental authority is manifested in the education and protection of minor children by their parents, which is based on blood relations; the relationship between the fraudster and the dependent is a true parent-child relationship, and the violation of parental authority is manifested in the restriction or deprivation of the parents' qualifications and ability to raise their biological children, while the defrauded party belongs to the party fulfilling the obligation of raising children, and his or her parental authority is not infringed upon.

Second, spousal rights are a status right enjoyed equally and exclusively by both spouses to require the other to live together, be faithful, and help[7]. This article focuses on the issue of "support" and emphasizes the relationship between the defrauded party and the dependent rather than the relationship between husband and wife. The question of whether a party has violated spousal rights should be understood in terms of divorce damages, and fraudulent maintenance does not specifically address that question.

Thirdly, kinship rights, together with spousal rights and parental rights, constitute kinship identity rights. Spousal right, parental right has specialized, kinship right in the kinship identity right system more bottom, that is, the right of kinship as the adjustment of spousal relationship, the parent-child relationship of minor children outside of the kinship identity right[8]. In a fraudulent support scenario, the right of kinship occurs between that dependent and the parents and children of the defrauding party and the defrauded party, which is a relationship of rights and obligations between the dependent and those close relatives, and is not directly related to the fraudulent behavior that we say we are discussing.

### 2.2.4. Summary

Through the analysis of the relevant rights and interests, it is clear that the fraudulent party is violating the mental freedom of others, and under the current law, we refer to such violated rights and interests as the general right to personality and the right to information. In this context, the fraudulent party's losses can be further categorized into the following three aspects: first, the part of the alimony, which is the fraudulent violation of the fraudulent party's personality rights resulting in the loss of property; secondly, the victim can claim damages for the part of the emotional expenditures; and thirdly, the fraudulent party due to the fraudulent party's deception, concealment, as a direct result of the damage to the personal freedom of the fraudulent party as well as the right to information.

## 3. Civil Remedies for Defrauded Persons

Fraudulent maintenance may occur in the following cases: first, when the child is born after sexual relations with a third person during cohabitation; second, when the child is born in marriage after sexual relations with another person before marriage; and third, when the child is born in marriage after sexual relations with a third person. Usually seen as the third situation, due to the third person's fault caused by the misidentification of the child should not be included in the situation. In this article, the author does not take the existence of marriage as a prerequisite for the occurrence of fraudulent maintenance legal relationship. In the general scenario, the fraudulent party jointly bear the corresponding responsibility, as for the special scenarios between the husband and wife of a fraud and the two sides did not divorce, if the two adopt the agreed property system, the fraudulent party can be borne directly; if the two did not agree on how to divide the property, according to the lawsuit, the compulsory division of the corresponding common property, and then the fraudulent party to be adequate relief. The losses of the defrauded party have been summarized into three categories, and the assumption

of tort liability is usually reflected in pecuniary compensation as well as compensation for moral damages in a pecuniary manner.

### 3.1. Compensation for Loss of Maintenance

As noted above, in fraudulent maintenance disputes, the defrauded party's legal obligation to maintain a child born out of wedlock results in a substantial depletion of property, including not only maintenance already expended, but also hidden expenditures that are difficult to calculate. Generally speaking, the biological parents should compensate the defrauded party for the loss of maintenance expenses, and the return of hidden expenses is not mandatory. Because the child support is a long-term process, it is difficult to calculate on the property expenses, and the trial, the part of the evidence is more difficult to prove that there are many disputes. Therefore, the first should be negotiated by the parties concerned, or by the court, mediation organization mediation, the formation of both sides can accept the amount of negotiation is fruitless or mediation fails to be decided by the court. The court should have a clear method of calculation and reasonable calculation standards for all property expenses. In terms of alimony, according to Articles 42 and 49 (The Supreme People's Court's Interpretation (I) on the Application of the Civil Code of the People's Republic of China to the Marriage and Family Part). It is necessary to make a comprehensive determination based on the length of the period of support, the actual local standard of living, and the fraudulent party's affordability. Specifically, if there is a fixed income, a certain percentage of the income may be paid; if there is no fixed income, a certain percentage may be calculated based on the total income of the year or the average income of the same industry; it is more appropriate to set the above percentage at 20-30%, and the percentage may be appropriately raised or lowered if special circumstances occur. In addition, the fraudulent party in compensation for maintenance, not less than 80% of the actual expenditure of the fraudulent party, for this consideration, the loss of maintenance, can also use "per capita consumer spending" to calculate. Lastly, in order to fully compensate the defrauded person for his or her losses, even his or her increased chances of earning should be taken into account by calculating the portion of alimony other than the capital investment, such as interest and the reasonable appreciation of the property.

### 3.2. Compensation for Moral Damages

In the tort dispute with the general personality right and the right to know as the object, the result of the infringement is reflected in the loss of the mental interests of the defrauded party, and the fraudulent party shall bear the responsibility of mental damage compensation[9]. In the spiritual loss, we also need to pay attention to the fraudulent party to raise children out of wedlock for many years of emotional loss, although this part of the loss is the fraudulent person "voluntarily" to pay, and this part of the loss of the case varies from person to person, but we can not ignore most of the fraudulent party because of the years of child rearing to pay for the blood and the spirit of the child after learning the truth, but the fraudulent party is not a good idea, but the fraudulent party is not a good idea. The major blow suffered by the majority of the fraudulent party to learn the truth. In practice, due to fraud and raising children out of wedlock, the fraudulent party will suffer a major mental blow, in this point can be widely recognized by the community, the judge generally also recognized by the fraudulent party's mental damage, but in this part of the loss, should also make clear a few factors affecting: one is to raise children out of wedlock the length of time; the second is to be defrauded by the fraudulent party and the dependent parent-child love (prove the fraudulent party to the) Illegitimate child did pay emotional, such as from the dependent's affirmation, neighbors and friends of the testimony, etc.); Third, the fraudulent party after learning the true state of mind. It is only after taking all these factors into consideration that the fraudster can be found liable for the appropriate moral damages. According to the relevant laws(eg:Article 1 and Article 10 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Determination of Liability for Mental

Damages in Civil Torts. 2022 May 1 came into force the Decision of the Supreme People's Court on the Revision of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law to the Trial of Cases Involving Personal Injury Compensation, which unifies the standard of compensation for urban and rural residents). Requests for compensation for moral damage to the fraudulent party shall be decided on the basis of the degree of fault, the specific circumstances of the means, occasion, and mode of conduct of the infringement, the consequences caused, the profitability of the infringer, the infringer's financial ability to assume responsibility, and the average standard of living in the location of the court under appeal. The spouse who commits fraud may also be held liable for damages for divorce, in accordance with his or her fault, by applying the Marriage and Family Code and its interpretations.

### 3.3. Treatment of Identity Relations

Dealing with the identity relationship in fraudulent maintenance disputes is not only beneficial to the promotion of family harmony and social harmony, but also helps to strengthen the care and protection of minors. Fraudulent maintenance legal disputes, the dependent child is often ignored, in fact, the non-biological child for the fact of fraud does not know, but it also need to bear the negative impact of the parent-child relationship changes in dealing with the identity relationship, can not ignore the will of the dependent, and should focus on the protection of the best interests of minors. With the development of the times, China's law recognizes the equal status of children born out of wedlock and those born in wedlock, and thus in the process of dealing with the "wrong parent-child relationship", should be treated in a uniform manner, and should not discriminate against children born out of wedlock. First, in cases where the identity of the biological father (mother) can be established, after the denial of paternity (Article 1073 of the Civil Code and Article 39 of Interpretation 1 of the Civil Code - Marriage and Family Section), and the claiming of illegitimate children (for which there is no legislative provision yet), The parties return to the correct legal relationship. Secondly, in cases where the identity of the biological father (mother) is unknown, the legal relationship between the dependent and the fraudulent party may be established by reference to the adoption system. Fraudulent maintenance of the fraudulent party and the defrauded party there is no agreement between the defrauded party, the defrauded party's expression of meaning is incomplete, but whether it is found that the act based on a material misinterpretation (or fraudulent) and revocable or based on the violation of public order and morals (or malicious collusion) and invalid, are denied since the beginning of the act of maintenance, it does not make sense. It is more amenable to interpretation if it is categorized as an act of fact. The fraudulent party to the dependent of the facts of long-term support, the formation of the fact that the relationship between the two, if no biological father, then for the protection of minors, can be established between the two adoption, continue to maintain the current state of fact, the dependent after adulthood shall also bear the support obligations to the adoptive parent, which is more conducive to the stability of the social order. Third, in the biological father (mother) does not have the ability to guardianship, can take into account the willingness of the parties to raise, economic level, etc., choose one of the party to raise. Where the defrauded party continues to raise the child, reference may be made to the adoption system; where the biological father (mother) raises the child, because he or she is incapable of guardianship, the child is raised by another person qualified for guardianship according to the order of precedence, and other status relationships are adjusted accordingly, with the parent-child relationship serving as the axis.

### 3.4. Treatment of Other Property Relations

The maintenance of children born out of wedlock mainly lies in the expenditure on living expenses, education expenses, medical expenses and other expenses, but in practice, in addition

to the general loss of maintenance and moral damages, the defrauded party may also suffer other material losses, that is, the "hidden expenses" of the defrauded party as mentioned above. For example, based on the wrong paternity and gift behavior, should be revocable, this gift behavior is made in violation of the true meaning of the situation, the grantor based on fraud and a material misunderstanding, should be a revocable civil legal action; and in the adult children's upbringing, can be requested from the adult children to return the part of the undue advantage (such as the adult maintenance). For other property losses, the nature of the loss and the need for reimbursement should be specifically analyzed.

#### 4. Conclusion

Fraudulent maintenance disputes, the fraudulent party usually with intentional concealment or even malicious deception of the subjective psychology of others, fraudulent maintenance behavior is clear for the nature of the tort, more conducive to fill the losses suffered by the fraudulent party. Judicial practice, should be based on general tort liability theory, in the civil code under the perspective of civil remedies. Because the defrauded party in the case of unawareness, long-term support for illegitimate children, it is not only the personality right is damaged, but also produced property and mental damage, this paper around the fraudulent support disputes arising from the compensation problem, puts forward the specific compensation method and calculation standard, the relevant personal relationship of the problem to be dealt with, and further to solve the biological parent, illegitimate children as well as the fraudulent person as far as possible, the awkward situation between As far as possible, the interests of the illegitimate child are taken into account to provide a healthy environment for his or her growth. In the allocation of responsibility, this paper believes that the biological mother, as the mother of the child, should adopt the standard of reasonable prudent person, regardless of its intent (knowingly) or negligence, are liable; and the biological father, must distinguish between its behavior is in good faith or not in good faith (the biological father knowingly or not). Specifically, because our country's parent-child relationship also applies to children born out of wedlock, regardless of whether the biological parents and children in the legal state of marriage, are required to bear the responsibility of guardianship, to fulfill the legal obligations, so regardless of the subjective state of the biological parents, are required to bear the obligation to return the alimony, and in the tort of damages, the biological father and mother of the common concealment (deception), to bear joint and several liability, the biological father does not know Or the biological father is unknown, by the biological mother alone to bear the responsibility for compensation.

Finally, fraudulent parenting involves a variety of theoretical knowledge, and in practice involves the consideration of multiple factors, and it is foreseeable that the legal issues involved will become more and more complex. In the legal relief of the fraudulent party, should take into account the legal theory and reasoning, comprehensive consideration of the subjective malice of the fraudulent party, the time span of the infringement of rights and the fraudulent party suffered the severity and continuity of the mental damage, in the relief of the legitimate rights and interests of the fraudulent party, should also be properly dealt with between the parties to the family relationship, and advocate a harmonious and orderly social and family relations.

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