

Validity Determination of Husband and Wife Loyalty Agreement from the Perspective of *Civil Code*

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Abstract

With the promulgation of the *Civil Code*, the duty of loyalty is stipulated as a legal obligation. However, there is no provision for the marital loyalty agreement in the marriage and family part of the *Civil Code* of China. The validity of the marital loyalty agreement is still controversial in academia, and the problem of different judgments in the same case remains unsolved in practice. Through argumentation, this paper regards the marital loyalty agreement as an atypical contract, the essence of which is the agreement between husband and wife to concretize the legal loyalty obligation based on the autonomy of will. In the process of validity identification, some difficult problems such as vague boundaries of loyalty obligations and the distinction of true meaning expression are put forward and solved. In this paper, typical cases and theories are summarized, and suggestions are put forward for the areas where China's legislation is not perfect, aiming at promoting social stability and safeguarding the legitimate rights and interests of marriage parties by loyalty agreement.

Keywords

Civil Code, husband and wife loyalty agreement, validity determination.

1. Introduction

With the continuous development of the market economy, the diversification of social concepts, closer personnel exchanges, and the soaring divorce rate in China, more couples sign marital loyalty agreements before or after marriage. Husband and wife loyalty agreement refers to an agreement concluded by husband and wife, which stipulates that one party will bear certain responsibilities if it violates loyalty obligations. Since its existence, the validity of marital loyalty agreements has aroused social concern and extensive discussion in academia. At present, there are two main results in China's judicial practice: effective and invalid. However, there are disputes about the judgment standards of judicial organs, which seriously affect the authority of judicial trials.

The entry into force of the *Civil Code* provides a new perspective for the study of marital loyalty agreements and brings a new breakthrough to solve the problem of the effectiveness of marital loyalty agreements. First of all, the second paragraph of Article 1043 (Paragraph 2 of Article 1043 of the *Civil Code*: "Husband and wife should be loyal to each other, respect each other and care for each other; Families should respect the old and love the young, help each other and maintain equal, harmonious and civilized marriage and family relations.") in the *Civil Code* has stipulated that "husband and wife should be faithful to each other, respect each other and care for each other", and the behavior mode of husband and wife is stipulated. The obligation of mutual loyalty of husband and wife has been sublimated from moral content to legal obligation. Secondly, the Supreme People's Court made it clear in the book *Understanding and Application of Marriage and Family Succession in People's Republic of China (PRC) Civil Code* that the parties should voluntarily perform the loyalty agreement between husband and wife in good faith. The

law does not prohibit the husband and wife from signing such agreements, but it does not give such agreements compulsory execution. Therefore, whether in theoretical research or judicial practice, the problem of determining the validity of marital loyalty agreements still exists. This paper analyzes the validity of the loyalty agreement between husband and wife through the changes in the relevant provisions of the *Civil Code*, which can avoid different judgments in the same case to the greatest extent, improve the happiness of marriage and family, and maintain social stability.

2. A Typical Case Analysis on The Validity Determination of Marital Loyalty Agreement

2.1. Introduction of typical cases

Case number	Brief introduction of the case	Referee result	Jurisprudence logic
(2020) Jiangxi Province 02 Final case of civil litigation No.295	The plaintiff Cheng 1 wrote a letter of guarantee to the defendant. Zhang appealed that according to the contents of the letter of guarantee signed by Cheng 1, Cheng 1 derailed and continued to maintain improper contact with others, so he should leave with nothing.	The court found the agreement valid and fully recognized the agreement on property disposal in the loyalty agreement.	The content of this guarantee does not violate the prohibition provisions of the law, nor does it harm the interests of others and the public. The legal effect of this guarantee is recognized.
Guangdong Province Zhongshan Intermediate People's Court (2016) Guangdong 20 Retrial civil judgment No.15	Yang and Chen signed a <i>Guarantee Agreement</i> during their marriage, stipulating that whether any party's extramarital affairs lead to divorce, the property at home will be owned by the other party, and the children will be raised by the other party. Yang found that Chen was derailed and filed a divorce lawsuit.	The <i>Guarantee Agreement</i> is valid. The court supported Chen's appeal.	The <i>Guarantee Agreement</i> is essentially a loyalty agreement between husband and wife. Both Yang and Chen are persons with full capacity for civil conduct. Signing the <i>Guarantee Agreement</i> is the true intention of both parties. This is a civil legal act. The <i>Guarantee Agreement</i> has legal effect.
(2021) Beijing 03 Final case of civil litigation No.8334	Wang and Shen signed a <i>Real Estate Agreement</i> , the main content of which is: during the existence of the relationship between husband and wife, the real estate will be shared by each person. If one party betrays, he will leave with nothing. The focus of the dispute in this case is whether the <i>Property Agreement</i> is valid.	The <i>Property Agreement</i> has no legal effect.	During the existence of the relationship between husband and wife, the content of "if either party betrays, he will leave with nothing" exists in the form of a contract, but it actually regulates the relationship between husband and wife, which is no longer within the adjustment scope of the contract, and does not support the effectiveness of the <i>Real Estate Agreement</i> .
(2020) No.2740, Guizhou Province 0222 Primary cases in civil litigation	In 2015, Hu signed a prenuptial loyalty agreement with the plaintiff Zhao. The content of the agreement is that if Hu betrays Zhao, all the property of Hu belongs to Zhao.	The loyalty agreement is invalid. The court rejected the plaintiff Zhao's claim.	The duty of loyalty between husband and wife belongs to the moral field, which should be adjusted by morality, and the law will not give the loyalty agreement the force of enforcement.

2.2. Summary of controversial focus

According to the case analysis, the court that recognizes the validity of the loyalty agreement generally refers to the application of the *Civil Code* contract or recognizes that the agreement has legal effect on the premise of not violating laws, regulations public order, and good customs. The court that ruled that the agreement was invalid mainly believed that the loyalty obligation of husband and wife was a moral obligation and was not regulated by law. Signing a loyalty agreement between husband and wife limits the freedom of marriage; Although the loyalty agreement exists in the form of a contract, its provisions belong to the identity relationship and cannot be adjusted by contract compilation. To sum up, because the legal nature and application of the loyalty agreement are not unified in courts all over the country, the validity of the loyalty agreement between husband and wife is different in judicial decisions. This study proposes that the reasons for the court to judge the validity of the loyalty agreement between husband and wife are reasonable because of the different judgment standards. This phenomenon should be paid more attention to and actively solved after the promulgation of the *Civil Code*.

3. Problems in the Validity Determination of Marital Loyalty Agreement

3.1. The difference in the nature of the marital loyalty agreement

Combined with the above case analysis, the court of case 2(4) held that the loyalty agreement between husband and wife was a civil legal act and the agreement had legal effect; In case 3, the court defined the marital loyalty agreement as an identity relationship agreement, and the marital loyalty agreement was invalid. It can be seen that the nature of the marital loyalty agreement has not formed a unified view in the judicial session, and it greatly affects the effectiveness of the marital loyalty agreement.

In academia, there are three main views on the nature of the marital loyalty agreement: first, scholars who support the "property agreement theory" believe that "if one party violates the loyalty obligation of husband and wife, the other party must bear the consequences of the change of property relationship and pay economic compensation, which does not involve the change of identity relationship [3]." Second, some scholars believed that the loyalty agreement belonged to the identity relationship agreement, and the judgment of identity relationship directly represented the degree of legal recognition of people's freedom of "identity autonomy [4]." At the same time, the purpose of a loyalty agreement is to protect the stability of a marriage relationship, not for property transactions, and this identity relationship agreement is compiled with reference to the applicable contract according to logical analysis [1]. Thirdly, some scholars believe that the loyalty agreement between husband and wife does not belong to the concept of legal category, but only the written moral obligation, which belongs to moral behavior.

3.2. The boundaries of loyalty obligations are blurred

Article 1043 of the *Civil Code* has classified the duty of loyalty of husband and wife as a legal obligation, which is an important part of a marriage relationship and is of great significance to maintaining marriage stability and divorce. At present, Chinese legislation on marriage and family is still insufficient. Although the duty of loyalty has been stipulated as a legal obligation, the current legislation does not clearly stipulate the connotation of the duty of loyalty of husband and wife. If divorce is caused by the four legal reasons stipulated by Article 1091 (Article 1091 of the *Civil Code*: "In case of divorce under any of the following circumstances, the innocent party has the right to claim damages: (1) Bigamy. (2) Living with others. (3) committing domestic violence. (4) maltreating or abandoning family members.") of the *Civil Code*, the innocent party has the right to claim damages. These four legal reasons are regarded as serious violations of the duty of loyalty, China has not stipulated other acts of infidelity.

There are different views on the meaning of husband and wife's duty of loyalty in academia. Most scholars held a narrow sense that the duty of loyalty of husband and wife is also called the duty of chastity [6], referring to loyalty in sexual life, not for extramarital sex. Some scholars analyzed the duty of loyalty from a broad perspective and proposed that besides extramarital sex, it also included not abandoning a spouse maliciously and not damaging or sacrificing a spouse's interests for the benefit of a third person. [5] In addition, some scholars believe that neither narrow theory nor broad theory can cover the situation of violating the duty of loyalty in real life, and "emotional infidelity" should also be taken into consideration. There is no clear stipulation on the existing different theories, which leads to serious differences in the court's determination of the validity of loyalty agreement in judicial judgment.

3.3. Distinction of the true willing expression

In the current civil legislation, the expression of willingness is the core of civil legal acts, and the authenticity of the expression of willingness is the key factor affecting the effectiveness of civil legal acts. The husband and wife loyalty agreement is different from ordinary civil legal acts, and it has a strong identity attribute, so it will be more difficult to judge the authenticity of the intention expression when signing the husband and wife loyalty agreement.

First of all, in marriage and family life, couples often mix emotional factors when concluding agreements. The motive of concluding the agreement is not to pursue pure economic interests, and sometimes a decision is made only for the sake of marital harmony. In practice, in some cases, some parties expressed that they entered into a loyalty agreement to ease the other party's mood, which is a temporary measure. They did not really want to sign the agreement with the other party, which is a playful expression, with the intention of denying that the loyalty agreement they entered into was a true expression. Secondly, when a dispute occurs, the parties often claim that the loyalty agreement was concluded under the fraud or coercion of the other party, not out of their true intentions. For example, in the case of Ye suing Chen (Referring to (2019) Guizhou Province 0102 Primary cases in civil litigation No.9959.), before the defendant signed the letter of guarantee, the plaintiff often went to the defendant's workplace to make mischief, but the workplace leader repeatedly mediated without results. The plaintiff often threatened the defendant's parents with the intention of making the defendant lose his job and go to jail and told relatives and friends everywhere to create adverse effects on the defendant. The plaintiff prepared the guarantee in advance and forced the defendant to sign it. The defendant signed it to appease the plaintiff's mood.

It can be summarized that the background of the conclusion of a loyalty agreement is more complicated than that of an economic contract, and it should be adjusted according to the actual situation of marriage and family.

4. The Solution to the Problem

4.1. Characterizing the marital loyalty agreement as an atypical contract

The current study has different views on the three perspectives mentioned above about the nature of marital loyalty agreements. The view that the marital loyalty agreement is regarded as a property agreement does not take into account the identity attribute of the marital loyalty agreement. The main body of the marital loyalty agreement has a special identity, and both parties can only be married couples, and the content of the agreement may also involve personal issues such as the ownership of child custody. In terms of the second point of view, although personal attributes are emphasized, from the specific content, the content of marital loyalty agreement often involves the change of property relationship and the payment of economic compensation, and this property transaction cannot be simply ignored and characterized as an identity agreement. With respect to the third point of view, this study holds

that the essence of the marital loyalty agreement is a violation of the loyalty obligation. The *Civil Code* of China has defined the loyalty obligation as a legal obligation, and unilaterally judged the marital loyalty agreement as a moral act, ignoring the legal nature of the agreement and denying the possibility of its application to law.

Both husband and wife sign the loyalty agreement on an equal and voluntary basis, and stipulate that the cheating party shall bear the responsibility, which conforms to the principles of equality, voluntariness, and fairness, has the characteristics of changing or terminating a certain relationship, and has certain contractual characteristics. Moreover, the loyalty agreement voluntarily signed by husband and wife is in line with the spirit stipulated in the Marriage Law, and both parties agree to restrain their behavior through the loyalty agreement and stipulate the liability for breach of contract. However, the loyalty agreement has both personal and property relations, and this mixed nature is difficult to completely classify into the traditional contract type. According to Article 467 of the *Civil Code* (Article 467 of the *Civil Code*: "For contracts that are not expressly stipulated in this law or other laws, the provisions of the General Rules of this Part shall apply, and the provisions of the most similar contracts in this Part or other laws may be referred to."), the loyalty agreement between husband and wife can be regarded as an atypical contract. As there is no law to specify the matters and contents, the provisions of the General Rules of Contract shall apply. Husband and wife loyalty agreement conform to the characteristics of an atypical contract, such as adaptability, innovation, lag of supplementary law, and promotion of autonomy of will. As a result, this kind of atypical contract involves the dual attributes of person and property.

4.2. Refining the connotation of loyalty obligation

Because the specific connotation of loyalty obligation is not clear in the current law, there are different views on the definition of its scope. Therefore, the scope of loyalty obligation should be reasonably defined under the framework of the current marriage and family legislation. This paper believes that the narrow sense mentioned above is too traditional and cannot fully adapt to the situation of social development. With the development of society and the progress of science and technology, such non-traditional behaviors as naked chatting or large-scale physical contact with the opposite sex outside marriage have also occurred one after another. Although these behaviors are different from traditional sexual behaviors, they all contain the expression of sexual meaning, which also destroys the trust between husband and wife. "Emotional infidelity" should also be excluded from the boundaries of loyalty obligations. Spiritual loyalty is the restraint and control of the spiritual level of the parties, which is undoubtedly contrary to the modern spirit of the rule of law. The law regulates human behavior rather than human thoughts, and cannot and should not interfere with and control people's spiritual likes and dislikes.

This study supports the above-mentioned broad theory of loyalty obligation, which includes malicious abandonment of a spouse and damage or sacrifice of a spouse's interests for the benefit of a third person. The relationship between husband and wife is based on the principle of mutual support and companionship. Malicious abandonment of a spouse will not only cause emotional harm but also lead to economic and other sufferings of the abandoned party. This behavior is also inconsistent with the principle of fairness and the legislative spirit of our country. According to Article 1092 of the *Civil Code* (Article 1092 of the *Civil Code*: "If a wife conceals, transfers, sells, destroys or squanders the joint property of husband and wife, or forges the joint debt of husband and wife in an attempt to seize the property of the other party, she may be given less or no share in the divorce."), the law prohibits harming the interests of spouses and provides for the division of property for the injured party to compensate the injured party. If one of the spouses damages or sacrifices the interests of the spouse many times, it will do great harm to the feelings of the husband and wife and destroy the marriage order.

To sum up, the connotation of loyalty obligation should include traditional sexual behavior, naked chat, excessive intimate physical contact and other behaviors with obvious information, malicious abandonment of spouse, and behaviors that damage or sacrifice the interests of spouse for the benefit of a third person.

4.3. Definition of the scope of defects in expression of willingness

The defects of the willing expression of the marital loyalty agreement mainly include joking expression, fraud, coercion, and so on.

Joking expression, also known as a unilateral false expression of intention, is regarded as a special kind of "true intention reservation". The actor makes an expression of intention that is inconsistent with his heart because of bragging, teasing, joking, and other reasons, but expects the other person to understand his true intention and avoid misunderstanding. In ordinary cases, when the actor has reason to expect the other party to understand that there is a difference between his true willingness and his expressed willingness, whether the other party believes it or not, it is generally regarded as invalid. Because family life is different from transactions, the judge needs to make a comprehensive judgment based on the purpose, motivation, situation, form, and content of the agreement between husband and wife. From the perspective of a rational third party, whether the seriousness of the intention has produced a trustworthy interest worthy of protection. It should be emphasized that if the agreement is concluded in writing or witnessed, and its content does not exceed the performance capacity of both parties. If the agreement has been performed, the expression shall be deemed as a true and effective expression of will.

Fraud contains two aspects, on the one hand, it tells false information, and on the other hand, it conceals true information. Then, when judging whether there is fraud in the loyalty agreement between husband and wife, it is necessary to examine the motivation and aim of the act of informing or concealing whether it violates the spirit of marriage and family legislation. For example, one party knowingly violates the loyalty obligation of the other party, conceals the known situation, and deliberately signs a loyalty agreement with the other party, in order to obtain property compensation when the other party violates the loyalty obligation. This behavior does not violate the legislative concept of the marriage law and conforms to the principle of the protection of the innocent party, which should be regarded as effective. As for coercion, the imputability of coercion in a marriage relationship should be weakened compared with that in a contract relationship, and the tolerance of negative interaction should be improved because the relationship between husband and wife is different from that of strangers. Therefore, unless the above-mentioned acts cause real and definite personal and property damage, such as beating, slander, restriction of personal freedom, etc., it is generally not appropriate to assume that they will have an impact on the effectiveness of the marital agreement [2].

5. Conclusion

Loyalty agreement between husband and wife is an inevitable product of husband and wife to maintain family stability and protect personal interests in modern society, which deserves attention and support. In judicial practice, the judge has no unified theoretical support in the specific practice of its effectiveness. From the perspective of the *Civil Code*, it provides another possibility for the legal application of the loyalty agreement. According to Article 467 of the Contract Series of the *Civil Code*, the loyalty agreement between husband and wife is defined as an atypical contract, and the provisions of the contract series are applicable according to its nature. Loyalty agreement between husband and wife is the the embodiment of the change of ideas caused by the development of the times in the marriage system. It is important to allow both husband and wife to protect their legal rights. This paper hopes that the national

legislature can make specific provisions on the validity of the loyalty agreement between husband and wife, make similar judgments on similar cases, and improve judicial credibility.

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