

Family litigation rules with model evidence system as the core

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Abstract: *Because of the particularity of the family case and its different requirements from the ordinary civil procedure, the family case has become a new problem in the field of legal theory and practice. In the absence of special rules of family litigation, the author discusses the possibility of establishing a system of family litigation rules with multiple procedures and complete sets based on demonstration evidence.*

Keywords: *Family Action; Proof; Mediation System*

1. Introduction

At present, our country lacks a special family litigation code, and at the same time, it still lacks concrete provisions on family matters in substantive law. This leads to the judicial practice of many family litigation issues can not achieve the same type of cases have the same judgment. Through the introduction and introduction of the demonstration evidence system, the advantages and disadvantages are analyzed, and then the possible supporting system is found, and the whole family litigation rules are improved.

2. The problems of Family Litigation and the establishment of Model Evidence System

2.1. A review of problems and the introduction of institutions

In recent years, family cases have become an issue of concern to the judicial practice and theory circles. The "Trial Opinions on the Reform of Family Cases" issued by the Supreme Court in 2018 reflects the particularity of family cases from the side. Family cases are characterized by the combination of identity and property, involving all kinds of vulnerable groups, and the intersection of autonomous cases and public welfare cases ^[1]. The demonstration evidence system of family affairs takes demonstration evidence as the core, which requires the litigation system to make a series of necessary adjustments to adapt to the characteristics of family affairs cases and the demonstration evidence system, ADAPTS to the characteristics of lagging legislation, and explores possible directions for solving problems in the future through practice.

To be specific, the demonstration evidence system of family affairs refers to sorting out the family affairs case files, classifying the family affairs litigation disputes with different points, clarifying the dispute facts to be proved in the family affairs litigation cases, combining the particularity of family affairs disputes and the work experience of family affairs trial, concluding various litigation elements involved in family affairs disputes, expanding the evidence types and listing the evidence matters. Then it will be published to the society ^[2], so as to guide the litigation in the society and improve the difficult situation of the parties in providing evidence and proving difficulty. This system is necessary and the best choice under the tension compromise between realistic demand and ideal construction.

2.2. The merits and demerits of the model evidence system

2.2.1. Use the general dialectically with the particular

The exemplary evidence system follows the process of dialectical summary and use from special to general and then to special, which makes its establishment and use quite reasonable. By "predicting" the possible litigation obstacles in the course of litigation in advance through induction, it ensures that the guidance of the factored evidence provided by the court has the basis in the sense of empirical and

data, and also provides rationality for the subsequent activities of the parties according to the guidance. At the same time, this kind of generality and frame also provides formalized requirements for litigation activities. On the one hand, it restricts the play of the particularity of individual cases, on the other hand, it is subject to the filling of the particularity of individual cases and its content -- that is, the litigants' special use of the general rules, and the litigants conduct litigation activities according to the requirements of demonstration evidence based on their actual situation.

2.2.2. Distortion from the perspective of data positivism

According to the model observation of demonstration evidence from generation to use, it is found that it roughly goes through three stages: evidence guidance simulation, evidence collection and application, evidence reliability consideration. But the evidence itself is the material to restore the truth, and it is one of the parts and appearances of the truth. Even if all the evidence is mastered, the truth at that time cannot be completely reproduced. Its value orientation is more directly reflected in the transformation of the concept of evidence in our procedural law from "fact theory" to "material theory". Thus it can be seen that evidence is only a simulation of the truth at that time, and the distortion of the understanding of representation is inevitable: there will inevitably be "distortion" or even error between the evidence facts and the truth of the case^[3]. Therefore, in the process of litigation, as the last person to know the "truth" and to identify the "truth" through the confirmation of inner credibility, the more intermediate links between the judge and the truth, the greater the possibility of distortion. If you take into account all kinds of hidden litigation obstacles that may appear in the middle, the ultimate recovery of the truth is very likely to be less than 60%.

From the above analysis, we can also see why it is reasonable for countries that advocate the value of truth discovery to adopt the doctrine of ex officio discovery -- to cut down the intermediary links so that judges can directly contact the truth, avoid distortion and expose the truth in a roundabout way. However, the demonstration evidence system does not reduce the intermediate link, but adds the model at the beginning of the process, which makes the probability of truth distortion increase. Perhaps the court can make up for the distortion through other litigation activities or rules, but it also consumes more judicial and economic resources. In the author's opinion, this only transfers the burden of distortion from evidence to other aspects.

2.2.3. Lack of integration of overall litigation rules

The disadvantages of the model evidence system can be considered that the court only adopted the model evidence system and did not properly adjust or establish other integrated series of supporting litigation systems that take evidence as the starting point, such as evidence type, evidence demonstration, proof standard and objective evidence responsibility. To be specific, it includes that although the parties can rely on demonstration evidence to collect evidence, it still does not break the shackles of closed evidence on family litigation under the current legal evidence system. The distortion of the model system caused by the lack of the system supporting the direct contact with the admissible evidence under the doctrine of judge's ex officio inquiry; And the partiality of proof standard and responsibility brought by the particularity of family affair. The systematic problems brought by the lack of integration of the whole litigation rules make the demonstration evidence system cannot play its full effect. Therefore, it is necessary to thoroughly establish and reform the demonstration evidence system, to systematically reform and integrate other litigation procedures.

3. The model evidence system is used to reshape the family litigation system

3.1. A breakthrough in the type of evidence

3.1.1. Necessity - authority doctrine is reconstituted in family litigation

From the perspective of legal history, the civil litigation has gone through the stage from the doctrine of exceeding the functions and powers to the applied litigant doctrine at present, thus the judicial reform of our country is limited in the way and scope of the right to obtain evidence from the court^[4]. In our first Civil procedure law, it is clearly stipulated that the court is not limited by the material presented by the parties concerned, and can investigate and recognize relevant evidence according to their functions and powers, and based on this, determine the truth and make a judgment. From the perspective of semantic analysis, the parties only "have the responsibility" to present evidence according to the general litigation principles and the inevitable rationality of ordinary people to safeguard their own rights and interests, while the court, on the contrary, assumes more responsibility

for the investigation of relevant evidence in procedural justice. The responsibility of the two subjects on the evidence and the vision of the country reflected can be seen.

However, the current civil procedure Law has greatly weakened the power of the court. The power of the law, which is constrained by the requirement of "comprehensive and objective" behavior, has changed from collecting and investigating to examining evidence, and the right of collecting and investigating has been transferred to the parties. The restriction and contraction of state power from the perspective of legal history is closely related to the relaxation of state control over resources and economic development from the perspective of economy. Its economic reality is reflected in the superstructure law, which is the litigationism of the representative of market interests. It can be seen that in addition to identity disputes or public interest disputes, most of the current interests are economic property interests as the object, which has the scarcity in the economic sense, so once the dispute occurs, the two parties will naturally fall into the dual confrontation in the court. However, family disputes are a series of disputes of personality identity and even property interests based on special family identity relations, whose core of course involves public interests. Therefore, from the perspective of legal history and economic resources, it is necessary to introduce the doctrine of strong authority again to separate family relations and family disputes from the general rules of procedure.

However, in addition to family property disputes, family litigation involves spiritual demands of personal rights. According to the above economic analysis method, their spiritual demands do not have an either-or situation like the division of real estate interests, that is, there is no "scarcity", so there is a reasonable way to achieve their subjective spiritual demands. As a matter of fact, the current high rate of mediation of family litigation in China is not limited to the fact that some courts deviate from the principle of litigation to force adjustment. The core of its success can be seen from the above analysis. What's more, is there an adversarial property action that can be mediated, as opposed to an adversarial family marriage dispute that can't be mediated?

In addition, from the perspective of legal empirical analysis, the court applies the doctrine of ex officio inquiry to family cases on behalf of the state alone. For example, in the interpretation of the Law of Civil Procedure promulgated in 2015, it is mentioned that on the basis of the original provisions, the cases involving identity relationships are also included in the scope of the court's active investigation; Another example is Article 3 of the 2018 Opinions on Further Deepening the Reform of the Methods and Working Mechanism of Family Trial, which requires strengthening the exploration of the functions and powers of judges in cases. Thus, although there has not been substantive progress in the legislation, the judicial organ has done corresponding exploration in the way of judicial opinion and judicial interpretation to the reorientation of court in family cases to meet the needs of case trial.

3.1.2. Possibility -- evidence judgment system with proof and ability as the core

The establishment of legal evidence type system makes the evidence system of our country present the closed characteristic. Regarding the classification standard of evidence, the academic circle has much criticism: At present, the closed-end civil evidence classification system has been criticized by people because of its inconsistencies and ossification^[5], which leads to many disadvantages of overlapping and unclear levels of various kinds of evidence and so on. Most importantly, it is difficult to deny the advantages of clarity and ease of operation in practice, but the legalization of the type of evidence does not mean the closure of the type of evidence. The advantages of the closed types of evidence are mainly in view of the legal system of my people's lawsuit, the overall judicial level is not high, the professional knowledge and judgment ability of the judge still need to be improved, the overall case-centered situation as a compromise; However, with the improvement of our overall judicial level, the closed and arbitrary provisions of evidence are more "bureaucratic" and "mechanized", which deviates from the inevitable requirement of judges' discretion under the centralism of trial. At the same time, the mechanical enclosed evidence regulation has the suspicion of overmeddle in the function of relevant principle of evidence ability. This kind of closure is equivalent to giving up the opening to the reality dimension in legislation and denying the judgment and legitimacy of the judge's free mind to the evidentiary ability. The gap between legislation, judicature and practice needs to be solved urgently.

As mentioned above, the intervention of the doctrine of authority must be called out in the family litigation. However, the emergence of the doctrine of authority is in order to remove the intermediate link, based on the doctrine of truth discovery, in order to better explore the truth of litigation to solve the problem, it does not rely on the judge's rigid passive judgment problem, but requires the judge to evaluate the situation and actively exert the subjective initiative to make good use of the discretionary power endowed by law. However, the value orientation of litigation inevitably requires the reversal of the current backward evidence type system. Therefore, some scholars call for not only breaking the

"closure" under the legal evidence type system, but adding similar expressions of "and so on" after the evidence regulation. At the same time, it establishes the mechanism corresponding to the principle of proof ability, namely, the evidence judgment system based on the judge's free mental evidence with the principle of proof and proof ability as the core.

3.2. Refactoring of proof criteria

In addition to the problem of evidence, the problem of too high and unreasonable standard of proof under the doctrine of parties can also be applied to different standards of proof according to the different nature of cases by introducing the doctrine of authority. Ex officio intervention enables judges to directly participate in the truth investigation and contact first-hand evidence, and bypass the chain of mediating case evidence between litigants. On the one hand, it provides the basis for the design of litigation system to break the current rigid and uniform high standard threshold, and at the same time, it is conducive to individuation and aiming at lowering part of the standard of proof of fact. These should mainly include lowering the "beyond a reasonable doubt" standard and lowering the "high probability" standard.

First, the standard of "beyond a reasonable doubt" has been lowered.

The standard of "beyond a reasonable doubt" is the highest standard of proof in civil cases. It is applied to the proof of facts about fraud, coercion and oral will and gift in family cases. Take the proof of fraud and coercion in the revocation of marriage as an example, such fact itself excludes the possibility of the other party's self-admission and acceptance, and the burden of proof is entirely borne by the plaintiff. Considering that fraudulent coercion is not only implemented before marriage, but also exists violent torts such as fraudulent coercion and even personal control after marriage, the power contrast between the two sides is extremely unequal. At this time, still require to prove the claim to "beyond reasonable doubt" undoubtedly increases the burden of proof of the parties, is not conducive to the protection of the victim's personal interests, is not conducive to stop and prevent such serious malicious acts. Therefore, the judge can directly cooperate with other organs and organizations to participate in the investigation of facts and family traditions without waiting for the parties to provide evidence or apply for evidence collection, give full play to the judge's good and free heart evidence, and synthesize the whole case evidence and the parties' debate. The author believes that the existence of facts can be recognized by meeting the "high probability" standard, which is also conducive to the substantial balance of litigation forces of both sides.

Second, the standard of "high probability" has been lowered.

The "high probability" criterion is applied to the facts of gambling, drug abuse, domestic violence, bigamy, cohabitation of a spouse, abuse of a family member, and parent-child relationship in family cases. Taking domestic violence, "cheating cohabitation" and other types of cases as an example, the above mentioned has explained the difficulty of proof and evidence chain due to the lack of other key evidence material evidence due to its private characteristics; However, such cases mostly involve the protection of the interests of vulnerable groups such as women and minors in the family. It is true that the plaintiffs bear the objective burden of proof simply because of their lack of proof and ignore the possible infringement facts, which is really against the principle of fairness and justice. At this time, the judge can not only take the initiative to reveal the evidence he has collected, but also help to find out the truth. The other party may also be required to undertake the obligation to explain the case, state the facts completely and truthfully, and provide evidence to refute the plaintiff or prove that there is no fault. At this time, the judge can evaluate the plaintiff's claim by synthesizing the mutually exclusive pair of arguments of the two parties above. Because the evidence is more comprehensive, the judge can evaluate the evidence of the two parties according to the proof standard of "dominant evidence", so as to achieve the balance between litigation justice and substantive justice.

4. Humanistic care under non-zero-sum game

Family cases do not focus on the end of the trial of the case. Both parties are in the same living environment, and the existence of long-lasting dependent personal relationship and property relationship leads to the complexity of the relationship between the two parties, while family litigation is just an epitome of property personal conflict. Therefore, it is not thorough to construct a family trial system with humanistic care and abandon the traditional zero-sum game. The social skills of family court to adjust, repair and cure family relations cannot really achieve the effect of "settling division and

stopping disputes".

However, for the professional family courts that are being established, the repair and treatment of damaged family relations does not rely on family litigation activities, but more rely on non-litigation procedures such as mediation, counseling and treatment services presided over by the family courts. From the perspective of comparative law, the compulsory extra-litigation mediation system was introduced in Germany in the mid-1990s to reduce the burden of civil justice. The promulgation of the EU Directive on Some Issues of Civil and Commercial Mediation in 2008 further promoted the collaborative progress of ADR in Europe. Later, in 2012, Germany officially promulgated the "Procedure Law for Promoting Mediation and Other Extra-Litigation Dispute Settlement Procedures", which emphasized that justice can be "achieved through mediation" in addition to litigation. However, the advanced point of Germany is not that it introduces the mediation system into family disputes, but that it gives play to the integration and coordination function of the civil law system between law and system. The whole litigation system not only provides the legal basis and status for ADR in the whole procedural law, but also connects it well with other systems, making the "arbitrary" mediation system "standardized". Article 278 of the German Civil Procedure Law stipulates the system of conciliation judges, and naming peaceful settlement is an independent function of judges^[6].

In terms of our country, mediation is rich in experience and widely used, and the practice of people's mediation presents the specialization and targeted development of institutions, such as marriage mediation^[7]. However, there are still insufficient theoretical depth exploration, lack of standardization, lack of cohesion with litigation and the formation of specialized and independent mediation team, which have negative effects on the efficiency and effectiveness of mediation. Therefore, we can follow the example of Germany, and introduce special legislation on the construction of mediation team, the institutionalization of mediation behavior, the strong guarantee of mediation result, and the relationship with litigation, so as to solve the awkward state of our mediation once and for all, so that together with litigation, it can be the two major ways to solve disputes, and effectively give play to the non-zero-sum game non-litigation idea of mediation. Focus on the family case to carry out detailed humanistic care, determined to stop disputes, effectively bridge the family fissure.

5. Conclusion

The author found that although the lack of main rules of family litigation caused a big problem in judicial practice. However, by introducing the demonstration evidence system, matching the open litigation evidence system and adjusting litigation proof standards appropriately, many problems caused by the lack of specific legal rules can be solved to a certain extent. However, such adjustment through judicial interpretation and academic interpretation is still not the most effective solution in the long run. The most effective solution is to learn the legal technology and theory of Germany, Japan and other advanced countries, and thoroughly solve many problems and contradictions caused by the absence of relevant rules in family litigation through legislation.

References

- [1] Chen Aiwu.(2017). *On the types and procedural jurisprudence of family cases. Application of Law* (19), 54-60.
- [2] Wang Siwei. (2017). *The family litigation evidence demonstration application studies (master's degree thesis, the overseas Chinese university)*. <https://kns.cnki.net/KCMS/detail/detail.aspx?dbname=CMFD201702&filename=1017849244.nh>
- [3] Geng Baojian.(2008). *Between Law and Fact -- Jurisprudential Analysis of the Process of fact Determination in Judicial Adjudication. Hebei Law Institute* (01), 136-142. doi: 10.16494/j.cnki.1002-3933.2008.01.003.
- [4] Han Bo.(2008). *The limits of tolerance: Exclusion of Illegal Evidence in Fact Finding -- An Analysis centered on civil action. Tsinghua Law Institute* (06),38-53.
- [5] Zhou Chenghong.(2016). *Unit Proof System: Legal Basis Transformation and System Reconstruction—from the perspective of Civil Litigation. Oriental law* (03): 81-95. Doi: 10.19404/j.carolcarrollnkiDFFX.2016.03.008.
- [6] Yang Linping & Long Fei.(2016). *German Family Trial Reform and its enlightenment to China. Application of Law* (04),56-62.
- [7] Lu Jing.(2019). *Practice and Exploration of Professional Training Mode of People's Mediation. Journal of Jiamusi Vocational College* (12),60-61.