

A Discussion of the Community Debt on Husband and Wife in China

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Abstract—The Art.41 of the Marriage Law defines the community debt on husband and wife in “used in common life”, namely the goal-direction principle, which leads to fake divorce of spouses to escape debts. It is hard for creditors to collect evidences, so their interests cannot be protected. The Art.24 of Marital Judicial Interpretation II of the Supreme People’s Court defines it “during the marriage”, also namely presumption principle, which significantly protects the interests of creditors. The Judicial Interpretation of the Supreme People’s Court on Spousal Debt reduces the excessive preference to creditors in the Art.24. However, the supreme people’s court still has misunderstandings on the spousal community debt and shall make the scope of “daily needs of family life” clear. The root reason of the problem is the lack of the community property management system. To improve the community debt on husband and wife, the Law shall be stipulated that the personal property of the debtor’s spouse should not be responsible for the community debt in principle, and the personal debt which is not used for the community life can also be paid off with part of the community property on husband and wife.

Keywords—community debt of husband and wife; separate debt of spouse; community property regime; liability for satisfaction

I. INTRODUCTION

On January 18, 2018, the “Judicial Interpretation of the Supreme People’s Court on Issues Relating to the Application of Law in the Trial of Cases Involving Spousal Debt Disputes”(hereinafter referred to as “Judicial Interpretation of Spousal Debt Trial”) came into force. The newly released “Judicial Interpretation of Spousal Debt Trial” defines the spousal community debt from the aspects of “joint debt by co-signing”, “daily needs of family life”, “burden distribution of proof”, “live together as well as jointly manage the corporation”, and has indeed made some progress. However, on lately judicial practice, many defects are found. In China, there is a strong social atmosphere of “face saving”. In particular, creditors have a higher chance of getting acquainted with debtors in the disputes of private lending. In most cases, the debtor is not even required to write an IOU. Creditors are for the sake of carrying out their personal loyalty; just think how many percentages of the final “joint debt co-signing” will be realized? In addition, the standards of “daily needs of family life”, and the scope of

“live together as well as jointly manage the corporation” as for the indirect basis for recognition of the community debts of couples are still not clearly defined by law. Besides, the information asymmetry in “burden distribution of proof” always exists, and the creditor and the spouse of the debtor may not know the borrowing purpose by the debtor. Therefore, to a certain extent, although the new interpretation strengthens the protection of the interests of the spouse of the debtor in the Art.24 of Marital Judicial Interpretation II, it does not fundamentally solve the two major problems existing in the Art.24. First, the supreme people’s court takes the daily domestic agency as the theoretical basis to determine the community debt of couples, which results in disputes over the contents of the daily domestic agency [1]. Second, the supreme people’s court does not distinguish between community debt and joint debt, “joint debt by co-signing” and the debts incurred by one spouse to meet the daily needs of the family are still joint debts, causing disputes over the scope of liability and property. In fact, spousal community debt should be liquidated by one or both of the common management property and the cause of the debt of one party’s personal property; it is definitely absolute that all the debts are regarded as joint debt. On March 9, 2016, Jiangsu superior people’s court announced the Typical Cases of Marriage and Family Law (VI). It was the first time that the court changed the joint liability of the spouse of the debtor into the limited liability. The supreme people’s court has never combined the management system of the marital community property system. Bases on the daily domestic agency to understand the community debts of the husband and wife, the emphasis are not the community properties but the husband and wife themselves are responsible for these debts. In this paper, I will write the misunderstanding of the supreme people’s court, combined with the real cases in the judicial practice, and continue to explore the new way of solving the problems of spousal community debt, so that I can provide some contribution for the “Marriage and Family Law”.

II. CASE ANALYSIS

A. Introduction of the Case

Zhou and Yin (Female) met each other on a blind date and then became lovers. They got married on July 21, 2015. Yin moved back to her parents’ home on February 14, 2017.

On August 29, 2017, Zhou committed suicide by taking pesticide due to emotional entanglements with Yin, and was sent to the hospital for rescue. On April 25, 2018, when the court heard the divorce dispute between the two people, Zhou claimed that it took him 81,433 Yuan on medical expenses during the hospitalization. In the end, added to transportation expenses, and accommodation expenses as well as nursing expenses, it took a total of more than 100,000 Yuan. Zhou respectively borrowed 20,000 Yuan, 40,000 Yuan and 10,000 Yuan from Zhang, Li and Wang. After leaving hospital, Zhou wrote an IOU for them and admitted his debt. At that time, Yin began to know the loan issues. In May, 2018, Yin received three court summons successively, and all the three creditors asked the court to identify the debts as community debts, and judge that Zhou and Yin should jointly undertake the repayment.

B. Trial

The basic people's court in Qinhuangdao holds that the law protects the lawful borrowing and lending relationships, and the debt should be paid off. Although the defendant Zhou was in the period of hospitalization when he borrowed money from the plaintiff, he signed an IOU for the plaintiffs after leaving the hospital, which could prove the existence of the loan relationship between the two parties. Both sides of husband and wife have the duty to maintain each other, that is, taking care of each other on life, supporting each other in economy, being the backbone in spirit. Defendant Zhou committed suicide by taking pesticide and required hospitalization, Yin should fulfill the duty of supporting Zhou. The lawsuit is a debt incurred by defendant Zhou for treatment, so both sides of husband and wife should pay the debts jointly. In conclusion, according to the provisions of the Art.24 of Marital Judicial Interpretation II, the judgment is that Zhou and Yin jointly repay the loan borrowed from the three plaintiffs.

Yin refused and appealed.

C. Analysis

The dispute focuses on how to determine the medical expenses incurred by the spouse's suicide during the separation — community debt or personal debt. Is this kind of medical treatment cost belonged to the range of domestic agency authority? Similar cases are common in real life — when couples face divorce after the broken relationships, one spouse signs a fake loan contract with a “creditor” to get more property. At present, in judicial practice, it is generally recognized that situation as the spousal community debt. In fact, the “one size fits all” judgment is unreasonable. Yin and Zhou lived apart about 5 months, according to Yin, the marriage had no real substance, Zhou once asked Yin to give him the break up cost in 40000 Yuan, Yin refused his request, so that Zhou didn't agree to divorce with Yin all the time. Although it is true that Zhou is inpatient in the hospital and spends a lot of money on medical treatment, Yin thinks that Zhou and the “creditors” sign loan contract is to ask to break up cost actually. It can be seen from the court that the creditors' description of the payment and the process of writing the IOU are inconsistent. It is obvious that Zhou has

colluded with the creditors viciously to damage the interests of the spouse of the debtor (Yin). What's more, in the case of the Judicial Interpretation of Spousal Debt Trial has put into effect, the basic people's court still regards it as the community debt according to the Art.24, which clearly against the principle that the new law is superior to the old law. As a result of the three cases is similarity that Zhou writes the IOU and constitutes self-confessed. Now I will take the creditor Wang for example to analysis.

First of all, the creditor should bear the burden of proof of the exist loan between creditor and debtor. In the case, Wang can only provide the IOU and bank-card consumption, and there is no proof of payment for medical expenses. Furthermore, Wang and Zhou are friends. The loans are happened during separation between Zhou and Yin. One party of the husband and wife cannot be aware of the legal behavior of the other party. Their marriage foundations are weak, breaking basic emotion and facing divorce. Hence Wang might collude with Zhou by fictitious debt, it is more possibly to let the spouses of the other party bear liabilities, and the existing evidence cannot prove the existence of the debt relations.

Second, even if there is a loan between Wang and Zhou, Yin does not need to assume joint liquidated liability. According to “the Judicial Interpretation of Spousal Debt Trial” newly released, the community debt includes three situations. On the one hand, “joint debt by co-signing” and “subsequent ratification” belong to spousal community debt. On the other hand, the duration of marital relationship + personal name + daily needs of family life. As for the rest, it should be considered as personal debt. This case is not applicable to the aforementioned two circumstances of spousal common debt, and should be identified as personal debt.

- Zhou and Yin didn't sign the “IOU” jointly, and Yin also did not ratify.
- The debt in this case was borrowed by Zhou's mother, Zhou later acknowledged that he borrowed in his personal name, but the loan was not for the needs of daily life in the family, therefore the debt was not belonged to the community debt.

According to legal regulation, domestic daily life needs, namely the content of the right of domestic agency, should normally be the necessary daily consumption of family, it must be the expenditure that maintains a family in normal life. The cost of this medical treatment is result from himself-harm; self-harm does not belong to disease category. Disease is life risk, and should be shared by both sides of spouses, but self-harm is that he hurts himself; it cannot be regarded with common disease. Consequently, self-harm does not belong to “daily needs of family life” apparently.

Finally, in practice, it is generally recognized that the debts incurred by one spouse for intentional infringement of a third party are personal debts, and the another spouse does not assume joint liability for such debts. This case is similar to the precedent. So the cost caused by Zhou's self-harm

should not be the community debt, and Yin should not be responsible for the debt.

There are no similar cases in databases such as “Judgment Document Web” and “No Suits Case Web”. What is special about this case is that, on the one hand, the creditors cannot provide complete evidential chain to prove that the loan to Zhou is used for the treatment of his self-harm; on the other hand, it is inconsistent and incoherent in explaining such issues as when and where the IOUs are signed, and it is suspected of forgery after the fact. Although couples have the obligation to help each other, it is not appropriate if this obligation is based on the obvious inequity and judge the case as a community debt.

The case incisively and vividly reflects the legal loopholes of daily domestic agent system, the supreme people’s court of the “daily needs of family life” is closely related to the daily domestic agent system, because of the lack of the provisions of the scope of daily domestic agent on community debt, there are tremendous obstacles in practice, even it will appear a lot of different sentences in the same phenomenon.

At present, the daily domestic agency system is generally regarded as the foundation of the marital community debt system. The Art.17 of the Marriage Law stipulates that “husband and wife have equal right to dispose joint property”, which indirectly acknowledges that each party of husband and wife has the right to daily domestic agency right. Countries outside the region generally have relatively clear provisions on the daily domestic agency system. The regulations of France, Germany, Switzerland and Japan are quite similar in terms of the scope of daily domestic agency, and the scope of family agency is limited to meet the daily needs of family life [2]. This is a consistent with the provisions of the Art.2 and the Art.3 in the Judicial Interpretation of Spousal Debt Trial in China. The release of a new interpretation for the couple to implement daily domestic agency has larger significance, but it should be defined the scope of the husbands and wives’ daily domestic agency to achieve the daily domestic agent system as the central position in substantive law. So as to it can clarify the liability property and liability for the debts of the joint, and realizes the related legal and orderly liquidation responsibility. In addition, most scholars argue that couples have no longer the power of daily domestic agency right after separation. The external family debt will no longer occur; therefore spousal community debt will no longer be generated. As far as this case is concerned, even if self-harm belongs to the category of daily domestic agency right, this debt occurs during the separation of husband and wife, the husband and wife lack of common life, and mutual daily domestic agency right is eliminated. Consequently, it cannot be identified as joint debt of husband and wife, and it should only belong to the personal debt of Zhou.

As a matter of fact, not only does this case show the drawbacks of not clearly stipulating the scope of daily domestic agency, but also will face a more significant issue: debt repayment. It has been six months since the first divorce settlement; Yin will sue for another divorce in October.

Whether Yin can assume limited joint liability conditionally, that is, the spouse of the debtor can assume joint liability within the scope of the joint property divided or not, when it refers to divide joint property and repay joint debt at the time of divorce,. The problem also reflects the misunderstanding of the supreme people’s court on the scope of liability property, namely that, when the spousal community debt is equal to the joint debt of the couple, the scope of property settlement should how to be recognition.

III. IMPROVEMENT OF ASSISTING SYSTEM OF SPOUSAL COMMUNITY DEBT

China’s spousal community debt systems mainly include the Art.41 of the Marriage Law, the Art.24 of the Judicial Interpretation of the Marriage Law II and its supplementary provisions as well as the Judicial Interpretation of Spousal Debt Trial. However, at present, the only legal basis is far from being able to solve the problems of marital debt in judicial practice. The case mentioned above also clearly reflects the disadvantages of the lack of property management system and the special legal property system in the legal system. Apart from the daily domestic agency system mentioned above, a series of other supporting systems, including the establishment of a special legal property system and a public notice system of agreed property system as well as property management system. They are also needed to comprehensively improve China’s marital community debt system. In addition, in view of the fact that China does not have a special legal property system, it is impossible to convert common property into personal property in a timely manner after couples separate due to their bad feelings to each other, which makes the debts incurred by one spouse of the couple after separation easily recognized as community debts, and that doubtlessly damages the interests of the spouse of the debtor.

A. *Establishing a Special Legal Property System*

To some extent, the marital property system determines the marital community debt system [3]. The consummation of spousal community debt system cannot be separated from the perfection of property system. The payment and compensation of marital debts must also be based on the property system. The marital property system is the distribution mechanism of the major property interests of the husband and wife. Even if the husband and wife implement the separate property system, the separate property is only the property distribution rules and relations within the marriage. For the external society, the commonality of the marriage community does not change [4]. In view of the fact that the property between couples directly involves whether the creditor’s rights can be realized or not, the marital property directly determines the property that the couples bear the responsibility to the public. Therefore, not only does the current marital property system protects the legitimate property interests of the couple, but also protect the interests of creditors and safeguards the security of transactions [5]. Although Chinese Marriage Law does not set a special legal property system, the Art. 99 of the Property Law stipulate that “the joint owners can request to divide the property

when the common base is lost or there is a major reason for the division” [6]. This article can be used as the theoretical basis of the special legal property system. The purpose of the special legal property system is to prevent the malicious reduction of personal property by debtor when the spouse of a couple colludes with the creditor to harm the interests of the other party during the marriage.

Special legal property system is applied when legal cause appears one part of the husband and wife can apply for changing common property into separate property [7]. At present, women’s social statuses have been improved. Compared with men, women are still in a weak position. One of the roles of the special legal property system is to protect women’s property rights in marriage, which is also consistent with the legislative concept pursued by the marital debt system. Furthermore, the economic statuses of men are higher than that of women on the whole, and the party engaged in business activities outside is mostly male. In recent years, the cases of illegal transfer, concealment, sale of community property of husband and wife, and generate debt are mostly male. It is general that the husband infringement of the property interests of the wife when it comes to comminute the property [8]. In view of this situation, the Marriage Law of China provides that the other party can request the re-division of the common property within the legal period after divorce. But this is only remedial. If added the special legal property system to the anticipated prevention, married women will know that they can active and timely change the type of statutory marital property system in accordance with the law on the positive in a special period of legal, so that they can maintain the lawful rights and interests in the marriage. In the end, it can reduce the probability of unilaterally by debt.

The special legal property system is an indispensable and necessary supplement to the general legal property system, which is a complementary to adapt to the adjustment of the general and special circumstances of the relationship between husband and wife. There is no doubt that we should establish the special property system. The question is when the circumstances of special legal property system are applied. According to the Professor Jiang, there are three cases for which the special legal property system is applicable. First, one of the couple’s property is refused to support their personal debts; Second, one of the spouses refuses to report his debt to the other part; Third, one party of the husband and wife does not properly manage the community property and does not improve the bad situation. The Professor Chen basically agrees with the above views, but she has a slight different in expression: husband or wife can’t manage common property or abuse common property rights.

In a whole, scholars have similar views. As long as maintaining the common property system will damage the legitimate rights and interests of the other spouse or increase the liability of the other party, the special legal property system can be applied. Unfortunately, though most scholars in the area of marriage advocate to set up special legal property system, the Scholars Suggested Draft Civil Code of China (hosted by Wang) and The Expert Proposal Draft Law

of the People’s Republic of China on Marriage and Family law are not permitted to establish the special legal property system. Only The Draft Proposal of the Chinese Civil Code presided by Professor Liang, which clearly stipulated the special legal property system, but it was not adopted at last.

B. Improving the Publicity of Agreed Property System

Although the agreed property system has no direct impact on the spousal debt itself, it indirectly restricts the settlement of the marital debt. According to the Marriage Law, both husband and wife can agree on the ownership of property before and after the marriage. There is no provision about the agreed of the management of property of husband and wife and the liability of debt payment.

In principle, the husband and wife may agree on the scope of liability and property of spousal community debts before or after marriage. The contract itself lacks the appearance of rights, so, whether the contract is published is bound to affect the final decision of the creditor. There are two kinds of legislation in the world: one is dual-track system and the other is single-track system. Dual-track system takes France, Germany for example. French Law stipulates that a couple’s property deed shall be entered into the marriage certificate or declared when entering into a contract with a third person; German Law stipulates that husband and wife should register their marital property deeds in the marriage property register, and the court should announce it. Single-track system countries are such as Italy and Japan. The Italian Law stipulates that the date of marriage contract, the notary entrusted, the identity of both parties and the type of marital property system adopted. They should be recorded in the remarks column of the marriage certificate of the couple. Japanese Law takes notary as the essential of confrontation. Professor Xia thinks that the Marriage Law does not stipulate the public announcement procedure of system of spousal agreed property and debt liability, which belongs to legal loophole apparently.

Of course, in order to protect the interests of creditors, different countries and regions have different provisions in the contractual property relationship. First, Japan and Taiwan have provisions when the contract entered into or abolished by the parties, the court should be asked to revoke the contract in accordance with the provisions of the general debt law and if there is any fraud against the creditors. Secondly, in order to avoid the debtor to defraud the creditor, Japan and France stipulate that it is prohibited to enter into or annul the marital property contract. If the contract is entered into or abolished, it will be invalid from the beginning.

IV. CONCLUSION

The Judicial Interpretation of Spousal Debt Trial has been issued for half a year, but there are still many basic court even intermediate court rule in the similar case applied the Art.24. For example, the above case, to a certain extent, reacts to the latest Judicial Interpretation of strong principle, weak operability. When China stipulates the spousal community debt system in the civil code, it shall formulate reasonable rules for the possible marital debt problems in

practice. As for the community debts of husband and wife, firstly, it should clearly stipulate when they are community debts and when they are personal debts, that is, the scope of daily domestic agency of husband and wife should be clarified. However, Judicial Interpretation of Marital Debts is too abstract at present, which is not conducive for the court to make a unified judgment. Secondly, put the spousal community debt rules into the joint property management system of husband and wife, so as to clarify the scope of the liability property and reasonably distribute the liability. Finally, a special legal property system is established to resolve the debtor spouse's property preservation under specific causes, and improve the marital debt public disclosure system in the agreed property system to maintain information symmetry as well as balance the protection of the "right to know" between the creditor and the spouse of debtor.

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