

# Study on the System of Representation of Persons Incapable of Civil Behavior in Litigation for Divorce

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## Abstract

**This paper combines the current situation of domestic practice and foreign governance experience, by analyzing the provisions of Article 62 of the Interpretation of the Supreme People's Court on the Application of the Civil Code of the People's Republic of China > Marriage and Family Part (I), points out the four legal deficiencies in China's litigation and divorce agency system for persons without civil capacity, and puts forward the four corresponding ways of improvement, and seeks to provide some new ideas for the construction of the legal system of China in relevant aspects.**

## Keywords

**Incompetent persons; Litigious divorce; Representation.**

## 1. Background and Significance of The Study

Along with the rapid development of modern medical technology, more and more patients with serious illnesses have a chance of survival, and the base of the group of people without civil capacity has risen. Take the vegetative person as an example, according to incomplete statistics, there are about 100,000 new "vegetative people" in China every year, and the number of new people in the world is as high as 530,000 per year. [1]

At present, China's incapacitated person divorce litigation agency system in the existing regulations and traditional theory is still lack of strong support, but the judicial practice of incapacitated person divorce cases have been commonplace. China's first botanical divorce case occurred in 2000, and since then the number of divorce cases of persons without civil capacity for more than twenty years has also increased year by year. The rapid growth of this group and the case base has sounded the alarm for China to accelerate the improvement of the legal system for persons without civil capacity.

From an individual perspective, the construction and improvement of the litigation divorce agency system for persons without civil capacity can protect the legitimate rights and interests of persons without civil capacity and their relatives. Imagine, if the spouse of the person without civil capacity is unwilling to dissolve the marriage relationship based on improper intent, such as the existence of abuse or victimization, intentional transfer or misuse of property and other circumstances, then there is no ability to express the meaning of the incapable person will be trapped in a long time in the marriage of the shackles of the person and property rights can not be guaranteed.

From a macro point of view, the establishment of a sound system of divorce agency for persons without civil capacity is the urgent need of reality; it is the proper meaning of the freedom of marriage; it is the renewal of jurisprudential thinking; it is the trend of international practice. The establishment of such a system can effectively promote social harmony, promote the spirit of the rule of law, emphasize the protection of vulnerable groups, indirectly increase the marriage rate, and save judicial resources, among other things.

## 2. Comparative Law Studies

Since the twentieth century, along with the rapid progress of modern medicine and the rapid development of social sciences, the issue of divorce for people without civil capacity has gradually entered the public eye. In the second half of the twentieth century, civil law countries began to formulate targeted legal norms: according to Germany in 1877 promulgated the German Code of Civil Procedure, Article 607, paragraph 2, with the permission of the guardianship court, the incapacitated party's legal representative can be filed on behalf of the application for divorce or annulment of the marriage; according to the Japanese 1898 enacted the Japanese Personnel Procedure Law, Article 4 provides that, in the spousal Under Article 4 of the Japanese Personnel Procedure Law enacted in 1898, in divorce proceedings in which one of the parties is the interdicted spouse, the "supervisor of guardianship" and the "guardian" may file or respond to the divorce proceedings; under Article 249 of the French Civil Code, the guardian may file a petition for divorce in the name of the person under his/her guardianship after having heard the opinion of a doctor and with the approval of the meeting of relatives; under the 1995 Law, the legal representative of an incapacitated party may file a petition for divorce or annulment on behalf of the incapacitated party. Under article 249 of the French Civil Code, a guardian may file a petition for divorce in the name of the ward after hearing a doctor and obtaining the approval of a meeting of relatives; under article 16 of the 1995 Family Code of the Russian Federation, a marriage may be terminated on the basis of a petition by the guardian of an incompetent person.

At the end of the twentieth century, China's first case of divorce of vegetative person will be incapable of civil divorce issue pushed to the spotlight, the butterfly effect caused by scholars after more than ten years of discussion and research. Compared with our country, several typical civil law countries mentioned above have clearly affirmed that the agent of the civil incapable person has the right to represent the person in divorce litigation as early as the end of the twentieth century, and some of the countries have also stipulated a more comprehensive pre-procedure, such as France, which requires that "the opinion of the doctor is listened to and approved by the meeting of the family". However, it was only in 2011 that article 8 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Marriage Law of the People's Republic of China (hereinafter referred to as "Interpretation of the Marriage Law III") recognized for the first time the right of representation in divorce proceedings of the legal guardian of a person with no capacity for civil conduct. As this article has been invalidated by the introduction of the Civil Code, it will not be repeated here.

If the spouse of an incapacitated person commits any of the acts stipulated in Article 36(1) of the Civil Code, other persons qualified for guardianship may request that his/her guardianship be revoked and a new guardian be appointed in accordance with the law; if the changed guardian files a divorce lawsuit on behalf of one of the parties who is incapacitated for civil behavior, the People's Court shall accept the case." This judicial interpretation mainly includes three aspects: first, it gives the legal guardian of the person without civil capacity the right to bring a divorce lawsuit on behalf of the person without civil capacity; second, it stipulates the antecedent procedure for the exercise of the right, i.e., to change the guardianship as a necessary precondition for the exercise of the right to bring a divorce lawsuit; and third, it clarifies the circumstances in which the system of divorce agency is applicable, i.e., when the spouse of the person without civil capacity has committed an act that seriously damages the physical and mental health of the person without civil capacity. Behavior.

This judicial interpretation is indeed to a certain extent to ease the right to divorce the civil incapacity in name only embarrassing situation, but there are still many shortcomings, such as the choice of legal representatives of civil incapacity, the definition of the standard issue of granting a divorce, the problem of the agency authority, the problem of divorce relief assistance

for civil incapacity, etc. have not been responded to and resolved, the author believes that there is still a larger The author believes that there is still much room for improvement.

### 3. Shortcomings of Our Current System

#### 3.1. Ambiguity of proxy rights

In civil litigation, there are civil agent and litigation agent two nature of agency behavior. The former contains the free will of the parties to dispose of their civil rights, and is incidental to the disposition of their substantive rights, such as suing or changing litigation requests, while the latter is purely a disposition of their litigation rights, such as providing evidence, applying for disqualification, and debating. Because of the "marriage and family interpretation of the first" article 62 provides that the legal agent can be on behalf of the divorce proceedings, so its agent behavior should be characterized as a civil agent, that is, the legal agent can be on behalf of the disposition of the substantive rights of persons without civil capacity.

Divorce as a status behavior after all has its own particularity, the survival of the relationship between husband and wife as the focus of the divorce litigation naturally by the guardian agent, but here will the divorce agent characterized as a civil agent does it mean that the incapacitated person divorce litigation, all personal and property relations can be ipso facto applicable agent? For example, how should the issues of child support, marital property and debt be handled?

Because article 62 of the Marriage and Family Division Interpretation 1 does not specify the authority of the specific agent, in judicial practice, there is a situation in which there is nothing to rely on and in which it is difficult to decide on a case. China's first case of divorce of a vegetative person, for example: in 1991, Xu Mou and Li Mou registered marriage. After marriage, the two often have conflicts, the wife Li Mou therefore left home. The husband, Xu, was struck by an electric current in 1995 and was identified as a vegetable. 2000, Xu's mother, as his legal representative, filed a divorce lawsuit with the court. After a hearing, the court found that the couple's relationship had broken down and granted a divorce in accordance with the law. However, the issues of child-rearing rights, the couple's common property and housing were not dealt with.

#### 3.2. Cumbersome pre-programming

With regard to the relationship between the claim for change of custody and the claim for divorce, the academic community holds two opinions, the "premise" and the "non-premise". The former is mainly based on the consideration of the legality of the proceedings, because if the custody relationship is not changed in advance, the spouse is still the legal guardian of the incapacitated person, which will lead to the situation where the plaintiff and the defendant are the same person in the divorce proceedings. The "non-precedent theory" is that the change of custody and divorce are independent of each other, taking into account the urgency and convenience of the protection of rights and interests, no need to distinguish between the two in order of precedence. China's "marriage and family interpretation of the first" article 62 supports the "premise" of the point of view, the change of custody as a legal representative of the exercise of the right to divorce litigation as a necessary precursor to the procedure, but the author is still on the change of custody of the reasonableness and necessity of doubt.

First of all, the change of custody as a necessary pre-procedure is time-consuming and laborious, no institutional rationality. First, in the time is not conducive to the timely protection of the legitimate rights and interests of the parties; Second, in the cost of relatives for the incapacitated person will be discouraged from speaking out for the incapacitated person, if the court ultimately ruled not to divorce, the new guardian will also be in the social and legal situation of the double embarrassment; Third, in the effectiveness of the judicial resources are not conducive to saving, improve judicial efficiency.

Secondly, changing the guardianship is not the only option to make the proceedings legal and there is no procedural necessity. For example, when the spouse acts as the guardian, Japan has chosen the "guardianship supervisor" as the divorce litigation agent, and Taiwan has chosen the "person appointed by the meeting of relatives" as the divorce litigation agent, i.e., through the "meeting of relatives" or the "meeting of relatives" or the "meeting of relatives". In Taiwan, "the person appointed by the council of relatives" is chosen as the divorce litigation representative, which means that a change of custody can be avoided through the operation of the "council of relatives" or the "guardianship court". Although the circumstances and systems of each region are different, and it is not possible to transplant laws blindly, we can refer to this idea of "straight-line legislation" in order to avoid the cumbersome front-loading of litigation procedures in a "curved line".

### 3.3. Unknown applicable standards

According to Article 62 of Interpretation 1 of the Marriage and Family Codification, a guardian of an incapacitated person may act as a proxy only if the guardian has committed an act that "seriously jeopardizes the physical or mental health of the person under guardianship". However, what circumstances can be recognized as damaging the physical and mental health of an incapacitated person? What are the criteria for determining "serious"? What are the criteria for the determination of "serious"? Is the boundary between quantitative and qualitative changes left entirely to the discretion of the judge? At present, there is no response from our laws and judiciary.

Due to the lack of cognition and expression of the person without civil capacity, unable to fully feel or independently reflect the damage caused by their spouses to their physical and mental health, so the judicial interpretation of the "serious damage to the physical and mental health of the ward" in practice, it is difficult to accurately determine. Imagine, if an incapacitated person has been sick for several years, the protracted care makes his spouse exhausted, savings are meager, at this time the third person and the spouse fell in love and cohabitation, but confined to the moral and legal constraints, the two agreed not to register the marriage and will be together to care for the incapacitated person, and even agreed that once the incapacitated person shows signs of recovery will be cut off immediately, then this situation Can such a situation be recognized as "seriously impairing the physical and mental health of the incapacitated person"? If such a situation occurs to a normal person, the element of cohabitation can not only cause the "breakup of the couple's relationship", but can also lead to the "compensation for damages" under Article 1091 of the Civil Code, but one of the subjects of the assumption is the person without civil capacity, so the criteria and the result of the determination are naturally different. Criteria and results should be different. In terms of this hypothesis, the physical health and property interests of the incapable person are not damaged, and even more human and material resources to give him unpaid care, the only focus of controversy is whether the cohabitation behavior will damage his mental health, and this controversy is an open proposition for all to see and hear, standing in different perspectives such as ethics, medicine, sociology, etc., will arrive at their own established but very different views.

In addition to the "damage to the physical and mental health" in the practical determination of controversy, "serious" as a degree of modifier brings more ambiguity, so the author believes that the "marriage and family interpretation of a" Therefore, the author believes that Article 62 of the "Interpretation I of the Marriage and Family Part" is unclear on the criteria for the application of the divorce system for persons without civil capacity. It only provides guidelines, but does not provide a specific list, nor does it provide any guiding standards or cases for reference, which does not adequately meet the needs of judicial practice.

### 3.4. Lack of access to remedies

Due to physical defects, the person without civil capacity cannot take care of himself or herself, nor can he or she obtain a stable income on his or her own, so most of them rely on their spouses to take care of them and help them during the marriage, and they are likely to fall into a difficult situation after the divorce. In addition, due to the lack of legal personality of the person without civil capacity, it is usually in a weak position in the divorce proceedings, although the judge in the decision may be able to take appropriate care of the party without civil capacity, but it is still difficult to support the basic life of the person without civil capacity in the post-divorce. Based on the above two considerations, the incapable person may encounter difficulties both in the divorce proceedings and after the divorce, so we should consider constructing a way of relief for the incapable person after the divorce. Observation of the current provisions, China has only made a preliminary conception of the divorce agency system for persons without civil capacity, and did not improve its subsequent relief, and this system has been implemented for more than ten years since the promulgation of the Marriage Law Interpretation III Article 8 in 2011, which needs to attract our attention and discussion, otherwise not only hinder the implementation of the divorce agency system for persons without civil capacity, but also improve its follow-up relief. The implementation of the divorce agency system, also contrary to the original intention of protecting the legitimate rights and interests of persons without civil capacity.

## 4. Suggested Improvements to The Current System

### 4.1. Clarification of agency authority

Article 62 of the "Marriage and Family" explains that the divorce agent of an incapacitated person is characterized as a civil agent, but it does not specify the specific authority of the agent, which makes it difficult to be applied in all cases in judicial practice. The author believes that our country should be clear on the basis of the nature of its civil agent, as soon as possible to clarify the legal agent for divorce proceedings.

Combined with the above "compromise" point of view, the author believes that the "marriage and family interpretation of article 62 of article 62 of the agent should be characterized as a civil agent, but the essence of the law and non-statutory agent in the disposition of the entity of the rights of the person without civil capacity, i.e., the legal representative of the agent. The legal agent's authority is only the legal provisions of the living body, rather than the expression of his personal will. In other words, although the legal representative can initiate divorce proceedings on behalf of the person without civil capacity, but does not have the right to replace the person without civil capacity to make the intention of divorce. Professor Shi Shangkuan once pointed out that "the law of kinship does not allow arbitrary agency, but allows the legal agent" [2], "marriage and family interpretation of article 62 is so, the reason why the agent on behalf of the right to divorce proceedings, because the law is first formulated by the person incapable of civil behavior in a particular situation has the intention of divorce, in essence, is the law of the person incapable of civil behavior to extend the will of the will of the person incapable of civil behavior. In essence, it is the extension of the will of the incapable person, that is, the will of the incapable person himself, rather than the will of the non-statutory agent.

Based on this understanding, the scope of the right of the civil incapacity of divorce agency should only be clearly stipulated by law. The author's claim is the legal agent can lawfully full civil agency, that is, the whole process on behalf of the civil incapacity of the divorce proceedings, including the granting of divorce after the child support, spousal property and debt, and other trial content. This assertion is based on two considerations: first, the original purpose of setting up the right of representation in divorce proceedings is to safeguard the lawful rights and interests of persons without civil capacity as far as possible, and it would be



difficult to achieve the legislative purpose if only divorce were granted without dealing with subsequent property and child support matters. Secondly, the legal agent's agency from the law and restrictions on the grant, its nature is the law of the "voice machine", granting its full agency will not make the litigation too much involved in the subjective will of the agent, and the final decision by the court on the basis of the facts, the law as the criterion to make, will not result in arbitrary disposition of the legal rights and interests of the person without civil behavior capacity. (c) The situation of arbitrary disposition of the lawful rights and interests of persons without civil capacity.

#### **4.2. Change of guardianship for broken chains**

Article 62 of the "Marriage and Family Section Interpretation I" of China will change the custody claim as a necessary precondition for divorce, but the author believes that its reasonableness and necessity is doubtful, in order to simplify the litigation process, facilitate the implementation of the policy, and improve the judicial efficiency, the author advocates for breaking the chain of change of the custody claim.

Through comparative law research, in the selection and determination of legal representatives, Japan has established a guardianship supervisory body, Taiwan has set up a kinship meeting system, and Manitoba, Canada has enacted a health care directive act ..... The common legislative idea is to avoid the cumbersome change of guardianship lawsuit through the direct provisions of the law, the relatives' direct selection, and the parties' prior agreement. Combined with China's national conditions, because China's civil litigation is usually the determination of the parties to the court, and did not set up a legal system similar to the meeting of relatives, so the author believes that our country is not suitable for the legal representative of the right to choose to the relatives of the incapable person, and more appropriate to take the direct provisions of the law or the parties to the pre-determination of the model.

Specifically, the author has conceived two practice paths corresponding to these two modes: one is to hand over the determination of the legal agent to the court, that is, the law expressly provides for the selection of the legal agent of the civil incapable person with reference to the candidate of the guardian under the civil code and his or her subordination, such as Prof. Yang Lixin, in the study of legal issues related to vegetative person, has suggested that the legal guardian other than the spouse act as the agent for the vegetative person's right to divorce in order [3] The legal representative of the planted person is the legal representative of the planted person. The second is to return the right of determination of the legal agent to the agent, that is, to broaden the scope of application of intentional guardianship, and to retain the valid expression of meaning of the person without civil capacity before the illness. Although China has a system of intentional guardianship, and most of the time also has priority over the legal guardianship, but usually think that the scope of intentional guardianship should be subject to the civil code article 161, paragraph 2 of the limitations of the intentional guardianship can not act on behalf of the identity of the act, including divorce, and the author advocates that the scope of the intentional guardianship of the agent can be considered to be conditional on expanding, and this claim has its reasonableness and legitimacy. First of all, the reasonableness is to broaden the scope of the intended guardian's agency has its legal basis, its legal basis and foreign advance medical directive system is similar, are based on the voluntary and effective authorization of the special subject to allow its appointed person has the right to dispose of the parties including the right to life and health and other basic human rights, including the right of the rights. Secondly, the legitimacy is mainly reflected in Article 62 of the "Interpretation of the Marriage and Family Part I", which grants the right to represent a person in a divorce proceeding to a "person qualified for guardianship", i.e., it does not exclude the intended guardian, which means that the space for the application of intended guardianship has been reserved when the legislation was enacted. In order to maximize the maintenance of the will of

the person incapable of civil behavior, the author believes that our country to consider expanding the scope of the intended guardian's agency is a useful attempt to make the intended guardianship of the person incapable of civil behavior to become a solution to the legal personality of the person to make up an effective model.

### 4.3. Defining the scope of application

Generally speaking, China's law to the breakup of the couple's relationship as the criteria for the granting of divorce, but based on the special nature of the divorce of persons without civil capacity, it can only be conducted by the guardian on behalf of the divorce proceedings, so the granting of divorce will have to be attached to the application of the conditions of the divorce agency system as a necessary prerequisite, that is, it must be satisfied with the "serious damage to the physical and mental health of persons without civil capacity" and "breakup of the couple's relationship" at the same time. "and" the breakup of the couple's relationship ", in essence, is to limit the circumstances of its divorce.

The author believes that the marital autonomy of persons without civil capacity and their spouses should not be different from ordinary people, their divorce should still be based on the breakdown of conjugal feelings as the standard, in order to correct the "Marriage and family interpretation of the first" article 62 of the freedom of its divorce is improperly restricted, we should expand the scope of the application of the divorce agency system, the concrete permission of the incapable of civil behavior. (b) The circumstances under which a couple may divorce. Reference can be made to Article 1079 of the Civil Code of China, which lists a number of cases in which divorce is authorized, including domestic violence, abuse, and abandonment, as well as bigamy, cohabitation, persistence of bad habits, separation, and disappearance. However, the specific circumstances of the specific analysis, we should recognize that the incapable of civil behavior of the "breakdown of conjugal relations" and ordinary people to determine the criteria to be different, for example, the concept of "cohabitation case" is controversial, we can not unilaterally civil code article 1079 directly applied to the incapable of civil behavior, but also the case of "cohabitation case", we can not unilaterally. Article 1079 of the Civil Code cannot be applied directly to divorce cases involving persons without civil capacity.

### 4.4. Complementary remedies

Due to the person without civil capacity in physiological and legal dual capacity defects, it is difficult to maintain a basic life after divorce, and China's current system does not have a person without civil capacity for divorce agency system supporting the corresponding person without civil capacity for divorce relief. The author believes that China should make up as soon as possible the civil incapacity of divorce relief, specifically from the economic help, economic compensation, compensation for damages to consider three aspects. This can not only protect the vulnerable party in the basic life after divorce, but also in the spirit of comfort their relatives. First, the divorce economic help is mainly difficult to live on one side of the request of the other side from personal property to give appropriate help. Of course, in practice, can not be applied across the board economic help, need to be specific combined with the incapacitated person's own financial situation, child support situation, the spouse's economic conditions and so on. Second, the divorce economic compensation is for the family during the marriage to pay more for the party to give appropriate economic compensation, such as civil incapacity before the illness for the support of children, support the elderly, support for the spouse to pay more, even if the incapacity can not continue to domestic work, also does not prevent its legal representative on behalf of the request for economic compensation. Thirdly, divorce damages means that if one party's faulty behavior leads to divorce and causes damage to the other party, the party not at fault has the right to ask for compensation, including material damages and moral damages.

## 5. Conclusion

In general, the author believes that Article 62 of the Interpretation of the Supreme People's Court on the Application of the Civil Code of the People's Republic of China to the Marriage and Family Part (I) affirms the right of legal representatives of persons without civil capacity to represent them in divorce litigation, which is of course of progressive significance, but there are still four major shortcomings of vague authority of the agent, cumbersome antecedent procedures, unclear standards of use, and lack of remedies, and it is necessary to further improve the legislation and the supporting system. Supporting systems need to be further improved. For the above four major legal deficiencies, the author advocates clarifying the authority of the agent, breaking the chain of change of custody, defining the scope of application, and supplementing the relief methods, in order to maximize the protection of the lawful rights and interests of the person without civil capacity and his/her spouse.

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