

Study on the Validity of Marital Fidelity Agreement

Xiaojie Hu^{1, a}

¹School of Law, Anhui University of Finance and Economics, Bengbu 233000, China

^a2646184298@qq.com

Abstract

In recent years, with the continuous improvement of China's economic level and the increasing degree of social and cultural openness, the awareness of protection of personal rights and interests in marital relations has continued to rise, and the traditional view of marriage has been affected, and more and more couples choose to sign marital fidelity agreements in order to guard their marriage. However, the Civil Code and related interpretations are not clear how to adjust the spousal fidelity agreement, resulting in judicial practice on the validity of the spousal fidelity agreement "different judgment" phenomenon, the judicial credibility is affected. From the essence of marriage is a special "contract", the duty of fidelity between husband and wife both moral and legal nature. The spousal fidelity agreement both personal and property and different from the general civil contract, according to the type of responsibility agreed upon by the parties, the fidelity agreement should be divided into the fidelity agreement with the restriction of personal rights as the consideration, the fidelity agreement with the content of property division, mixed fidelity agreement, through the type of disposal to determine the effectiveness of the fidelity agreement, to protect the legitimate rights and interests of spouses, to play a disciplinary role for violations of the duty of fidelity and establish a healthy and civilized view of marriage and family.

Keywords

Spousal fidelity agreement, Duty of fidelity, Atypical contract, Judicial application.

1. Introduction

As society progresses and develops, people's traditional values and views on marriage are constantly changing. At present, "divorce" is a common occurrence. The "Statistical Bulletin on Civil Affairs Development in 2019" released by the Ministry of Civil Affairs shows that in 2019, 4.701 million pairs of divorces were processed according to the law nationwide, an increase of 5.4% over the previous year, of which 4.047 million pairs of divorces were registered by civil affairs departments and 653,000 pairs of divorces were decided and mediated by the court; the divorce rate was 3.4%, an increase of 0.2 thousandths of a point over the previous year. According to the survey, 50.16% of divorces in China are due to third-party meddling, and the cheating of the other party is the primary factor that generates the idea of divorce, in which case, simple moral maintenance is no longer enough to secure a marriage. Therefore, in order to protect the legal rights and interests of each spouse in the marriage, the "spousal fidelity agreement" has become their preferred "marriage insurance policy". In recent years, due to the increasing number of legal disputes caused by the couple's fidelity agreement, the "Marriage Law Interpretation (3)" has undergone several amendments, but until the "Marriage Law Interpretation (3)" published in 2011 for public comment and the official draft, there is still no provision on the fidelity agreement; at the same time, the implementation of the Civil Code this year, the marriage and family part also does not have a clear response to the issue of the validity of the couple's fidelity agreement. The Civil Code, which was implemented this year, does not have a clear response to the validity of fidelity agreements. As a result of the lack of clear legal

provisions, different judges adjudicated similar cases with opposite results. Some judges affirmed the validity of the fidelity agreement and awarded the no-fault party the corresponding compensation; some judges considered that the fidelity agreement lacked legal basis and did not support the parties' claims. As a result, the validity of the "spousal fidelity agreement" has caused extensive controversy and discussion in academic circles as well as in specific practice.

2. Overview of Spousal Fidelity Agreements and The Duty of Fidelity

2.1. Characteristics of the spousal fidelity agreement

The law does not explicitly regulate the spousal fidelity agreement, which is a term created by people in social life according to practical needs. In general, the spousal fidelity agreement refers to the agreement between the spouses to violate the "spousal fidelity duty" and the agreement related to the emotional and sexual fidelity of both parties. Such agreements are usually in the form of agreements, warranties, promises, etc., and are usually entered into by spouses for the purpose of binding each other and stabilizing their marriage.

2.1.1. The subject of the agreement has special characteristics

To qualify for the subject of entering into a spousal fidelity agreement, the prerequisite is that the parties must have a legal marital relationship. On the understanding of the legal marital relationship, including both men and women registered by marriage and also include men and women in de facto marriages recognized by law. Therefore, for other intimate relationships between men and women signed by the "fidelity agreement" are not the scope of the fidelity agreement, the agreement between the two parties do not meet the qualifications of the conclusion of such agreements. Because China's current law does not protect the relationship, so the relationship between men and women in order to express the sincere feelings of the lover or for other reasons, the two signed a joint "duty of fidelity" as the content of the agreement, does not belong to the object of this article, its effectiveness will not be recognized by law. However, a man and woman in a cohabitation relationship who sign a "fidelity agreement" and then get married can be retroactively recognized as a "conjugal fidelity agreement".

2.1.2. Diversity and autonomy of agreement content

The Civil Code does not contain specific provisions on the content of "fidelity agreements", so in practice the content of the agreement reflects the independent agreement of the subject parties. At present, the content of the fidelity agreement between husband and wife in life mainly includes two aspects: personal and property relations. The content of the agreement in the personal relationship can be divided into two cases, one is the waiver of personal rights, such as a breach of the agreement due to a lack of emotional attachment, the party at fault will unconditionally agree to divorce or loss of child support, custody, visitation rights, etc.; the second is the restrictive agreement on personal freedom, such as mental or physical cheating, respect and care for each other. The property relationship, on the other hand, is relatively broad in scope, and can agree on the ownership of both the common property of the spouses, as well as the ownership of personal property in addition to that. One type of agreement is the agreement to pay a certain amount of property, for example, a certain amount of compensation or liquidated damages to be paid by the party who violates the fidelity agreement. Another type is an agreement to give up property, such as an agreement that the breaching party will not share or share less of the couple's common property.

2.1.3. The purpose of the agreement is justified

A contract is set, there must be its maintenance of the rights and obligations of the relationship, through the implementation and implementation of the contract to ultimately achieve the desired results of both parties. The content of the spousal fidelity agreement is complicated,

some involving property, some involving personal, or even an agreement with both property and personal attributes, regardless of how the parties agree on the content of the agreement, the purpose of its signing must be to maintain the continuity and stability of marital life and to protect the marriage from interference by other external factors. The spousal fidelity agreement is actually a self-restraint and introspection of both parties to the agreement, not a means to bind or restrict the personal freedom of the other party or a path to obtain wealth through an unequal agreement, and the realization of its property rights is only a punishment for the defaulting party not the ultimate purpose.

2.1.4. The agreement has a strong ethical dimension

Ethicality is one of the important characteristics of our kinship law. China's monogamous marriage system itself contains the obligation of mutual fidelity between husband and wife, and the duty of fidelity between husband and wife is a moral concept under the order of marriage and family before it is regulated by law, and the parties concerned follow the moral requirements of family ethics and social ethics, and need to rely on their inner moral beliefs and the influence of social evaluation for self-restraint. Nowadays, although the spousal fidelity obligation has entered the legal level, but the law and ethics are not opposed to each other, so the ethical color of the fidelity obligation still exists, so the spousal fidelity agreement is also an ethical requirement under the current marriage system.

2.2. The nature and function of the spousal duty of fidelity

The duty of spousal fidelity arises from the marriage and family relationship in human society, and is a product of the development of human marriage system to a certain historical period. In order to achieve the goal of a happy marriage, both spouses are obligated to be faithful to each other in terms of feelings, property and spirit. In the early days, when men were in charge of the entire family wealth and inheritance rights were exclusive to men and women were in an unequal position, the duty of fidelity was a unilateral duty imposed on the woman. In addition, the wife's infidelity was dealt with very strictly, for example, the "seven exits" system recorded in the Da Dai Rituals. For example, the husband could have multiple concubines in order to continue the family. With the progress of social civilization, modern society emphasizes the equality of men and women and the economic independence of individuals, marriage is no longer a shackle for women, they have full freedom and power, and the duty of fidelity becomes a mutual obligation between spouses in sexual, emotional and material life. Specifically, the concept of spousal fidelity is understood in a broad and narrow sense in the legal sense as well as in the ethical sense. The spousal fidelity obligation in the narrow sense refers to the obligation of chastity, i.e. the obligation of exclusive spousal sexual life; the spousal fidelity obligation in the broad sense also includes the obligation not to maliciously abandon the spouse and not to sacrifice or harm the interests of the spouse for the interests of a third party. The spousal fidelity obligation in the ethical sense, on the other hand, refers to the fidelity and specificity contained in all aspects of the relationship between the two spouses.

Article 104 of the Civil Code, Marriage and Family, emphasizes that men and women are equal and free in marriage and that no organization or individual may interfere. Due to the private nature of the marriage relationship, the law cannot interfere too much, so the provisions of the article provide for advocacy, principle provisions and the application of the basic principles of civil law to regulate. In the relatively economically backward period, the duty of fidelity was usually understood as the duty of chastity, that is, one of the spouses shall not engage in extramarital sex; now the duty of fidelity is not only the regulation of extramarital sex between the two parties, but also either party shall not arbitrarily dispose of the common property of the spouses, or for the benefit of a third person. It can be seen that "husband and wife shall be faithful to each other" has a vital role in maintaining family harmony and enhancing social good

morals, and also plays a significant regulatory role in safeguarding the common property of husband and wife and the legitimate rights and interests of individuals.

3. The Legal Nature of The Spousal Fidelity Agreement in The Era of The Civil Code Should Be Determined

3.1. Fidelity agreements should be considered as covenantalizing the legal duty of fidelity

The spousal fidelity agreement is a quantification of the duty of fidelity. In light of trends in family law, in recent decades the law has given the parties more rights to negotiate the marital relationship and the consequences of divorce. When couples set explicit terms for this equal agreement, courts are increasingly willing to enforce them. With the change in social attitudes, the rule of rationalized property law has been introduced into family law, which is an important trend in modern society, with the aim of demonstrating the independence of the individual to preserve his or her personal and economic freedom and to adapt to social and economic development. This indicates that the factor of "union" (typically economic groups), which upholds market rationality, has gradually penetrated into the spousal groups, thus contributing to their development into "imperfect communities". In modern society, the links between family members and the outside world have become complex and diverse, and various extramarital affairs and adultery have seriously eroded the foundation of marriage and family. It is undeniable that the moral constraints of marriage are diminishing, and the original social control of public opinion and morality is weakening. Although marriage is bonded by emotions, it is not just about emotions as the idealists envision. In order to try to maintain the marriage relationship and cope with the adverse consequences of divorce, the "fidelity agreement" between the spouses should be considered as a prudent choice made by rational people after fully weighing the pros and cons. The breach of contract or compensation agreed upon in the "fidelity agreement" can be regarded as a concrete translation of the provisions of Article 103 of the Civil Code, which stipulates that "families shall establish good family morals" and "spouses shall be faithful to each other." and the prior agreement of the damages, so that the subjective emotions such as "extramarital affairs" can be objectified to be regulated by law and can be observed by the parties. This not only helps the parties to the marriage to comply with the norms of marriage law, but also can promote the moral self-discipline of the parties to the marriage. In this sense, the spousal fidelity agreement is a self-restraining act of the spouses to ensure the stability of the marriage and family. Of course, because of the uncertainty of the specific content of "fidelity", this agreement is not a complete contract, that is, it hovers between moral and legal obligations.

3.2. Spousal fidelity agreements are classified as atypical contracts

Marital dispute cases, involving spousal fidelity agreement type of case more and more, if a blanket inadmissibility is obviously not in line with the "must respond" rule of law concept. For this type of case, first of all, the nature of the loyalty agreement to identify, secondly, combined with the path of previous decisions, theoretical views on the type of spousal loyalty agreement analysis, and finally in the Civil Code system to seek the application of spousal loyalty agreement space to achieve the same case with the same sentence, to improve judicial credibility.

The typical contracts listed in the civil law system do not have provisions related to spousal fidelity agreements, but the name "spousal fidelity agreement" is a kind of living language because the subject of the agreement is the spouses and the content includes mutual fidelity obligations and agreement on damages. Fidelity agreements, property agreements and divorce agreements have the dual nature of personal and property consent. The fidelity agreement has

some overlap with the content of the two, belonging to a completely different agreement, but in practice, they are often confused. First, the time of signing different. Fidelity agreement signed during the marriage, the infidelity of the emergence of prior prevention or after the warning; spousal property agreement can be signed before or after the marriage, the agreement on the attribution of property between the two parties; divorce agreement is a rupture in the relationship can not continue to maintain, the dissolution of the marriage signed, the two sides on common property, child support, etc. to make the consultation. Second, the purpose is different. Spousal fidelity agreement has a certain value to maintain marital stability; the purpose of signing a divorce agreement is to divorce and peacefully resolve the changes in personal and property relations; the purpose of signing a property agreement between husband and wife is to promote frank communication between men and women, clarify the goals of marriage, eliminate misunderstandings, confirm a form of property management of marital property, and set the protection of both parties on the basis of relative fairness. Again, the contents are different. Spousal fidelity agreement is a common understanding of the duty of fidelity between the two parties, agreeing to abide by the duty of fidelity to each other, and the agreement on the division of property is a breach of duty for violation of the fidelity agreement; divorce agreement is an agreement based on the voluntary settlement of the marital relationship between the two parties, with child custody, division of common property, distribution of debts and debts, etc.; the content of the spousal property agreement is to clarify the attribution of pre-marital and post-marital property. Finally, the application of the law is different. Article 1076 expressly provides for the precautions of divorce by agreement; Article 1065 provides for the guidelines for the application of the property system agreed upon by the spouses; there is no express provision for the spousal fidelity agreement at present, and there is a great difference in the determination of its validity in the adjudication.

Before the promulgation of the Civil Code, the controversy over the legal nature and application of the "spousal fidelity agreement" centered on the General Principles of the Civil Law (repealed), the Contract Law (repealed), the Marriage Law (repealed), the Tort Liability Law (repealed) and related legal provisions. Spousal right is a concept introduced from the common law system, and the Civil Code does not include it in the title of personality rights, so the non-fault party cannot claim tort damages from the third party and the unfaithful party according to the title of tort liability. The parties intended to have some kind of identity relationship or property relationship through the act of signing a loyalty agreement, which satisfies the elements of a valid civil legal act (the parties are qualified, the intention of both parties is true, does not violate the mandatory provisions of laws and regulations, and does not violate public order and morality), that is, the civil legal relationship is established and valid, but Article 2 of the Contract Law excludes the identity relationship agreement. In addition, the parties agreed that the other party has the right to claim rights in the event of infidelity, similar to the civil legal act with conditions, but the "fidelity agreement" with the condition of "infidelity", this condition does not have the legality is not applicable. It can be seen that the legal nature of the couple's fidelity agreement can not form a unanimous view, the theoretical doctrine between each other is the lack of legal basis to link each other.

Now that the Civil Code is in force, the rules of property law - especially the doctrine of legal conduct - are strongly aggressive and expansive as norms of a "public cause" nature. The "integration" of the entire code makes it logical to apply the "public causation" derived from the "induction" of the traditional civil law field by "deduction" The new referral clause in the Civil Code takes this momentum to the extreme in the form of express statutory language. Article 464 of the Civil Code states, "Agreements concerning identity relations such as marriage, adoption, guardianship, etc., shall be governed by the provisions of the law governing such identity relations; if there are no provisions, the provisions of this Part may be applied by reference according to their nature." Article 101 provides that "the protection of the identity

rights of natural persons arising from marriage and family relations, etc., the relevant provisions of Part I and Part V of this Law and other laws shall apply; where there are no provisions, the relevant provisions of this Part on the protection of personality rights may be applied by reference according to their nature." According to the above provisions, the identity agreement in the kinship-family relationship, "if there is no provision", can refer to the application of the provisions of the contract title; the protection of the identity rights in the kinship-family relationship, "if there is no provision", can refer to the application of the provisions of the personality rights title. Therefore, the law does not prohibit people to negotiate and reach an agreement about identity relations, but such agreement about identity relations should be regulated by the law of marriage and family codification, and the court should examine whether the agreement violates the provisions of marriage and family codification when confirming the validity of the agreement about identity relations.

It can be seen that the fidelity agreement signed by both spouses equally and voluntarily and agreeing to hold one of them liable for infidelity is in line with the principles of equality, voluntariness and fairness in content, and the civil activities engaged in by civil subjects do not violate the basic principles of the General Provisions. Fidelity agreement is a "contract" with both personal and property attributes, and belongs to the atypical contract stipulated in Article 467, and the provisions of the General Rules of Contracts shall apply because there are no matters and contents clearly stipulated by law. The formal requirements for the establishment of a contract are, respectively, that the parties are qualified, that the intention is true and agreed, and that the civil legal relationship can be created, changed or destroyed. The invalidation theory is based on "the agreement of identity relations such as marriage, the legal provisions regulating identity relations shall apply" and then deny the validity of the application, it is undeniable that personal freedom cannot be agreed upon by agreement, but marriage not only includes identity relations but also property relations, which is excluded only on the basis of the moral properties of marriage. This is a "fundamentalist" idea. The first one thousand and ninety-one stipulates that no-fault parties can claim damages from the party at fault for serious violations of infidelity, but for general infidelity provisions are not clear, fidelity agreement is essentially the parties to the form of a "contract" against violations of general infidelity means of relief, through self-restraint, the hidden duty of fidelity externalized, to protect the stability of marriage. The agreement is a "contract" that provides a remedy for the breach of general infidelity. Therefore, the fidelity agreement signed between the two parties on the basis of consciousness and voluntariness coincides with the spirit of the marriage law, and there is no fraud or coercion, and the parties are willing to bind their behavior through the fidelity agreement and agree in advance on the liability for breach of the fidelity agreement, which is in line with the characteristics of atypical contracts to supplement the lagging nature of the law in social practice, thus appearing such dual properties involving personal and property atypical contract.

4. The Validity of Spousal Fidelity Agreement and The Path of Judicial Application

According to the previous series of analysis on the spousal fidelity agreement, the spousal fidelity obligation is originally a moral obligation between spouses, but due to the unanimous consent of both parties, it has become a legally binding contractual obligation. According to the Civil Code, Article 464, paragraph 2, Article 467, Article 508 to determine the basic principles of the effectiveness of the spousal fidelity agreement are as follows: First, with legal marital relations and full civil capacity. Second, the couple's intention is true. If they are forced to sign the agreement by the other party, whether physically or mentally, or if they are forced to sign the agreement by the other party's threat, they do not mean to be true. Third, a fidelity

agreement must not be contrary to public order and morality. The Civil Code also reflects the principle of public order and morality. The fidelity agreement of the couple, whether initially signed or finally agreed upon legal responsibilities, should not deviate from the stable values of public order and public interest that have been formed in the hearts of the public.

4.1. Typological disposition of the validity of the spousal fidelity agreement

According to the different types of responsibilities agreed by the parties, loyalty agreements can be divided into loyalty agreements with the restriction of personal rights as consideration, loyalty agreements with the division of property, and mixed loyalty agreements, and the effectiveness of each type of loyalty agreement is specifically analyzed below.

4.1.1. Determination of the validity of the fidelity agreement in consideration of the restriction of personal rights

A fidelity agreement that restricts personal rights is one in which the spouses sign an agreement specifying that if one of them later violates the agreement related to the duty of fidelity, he or she will be subject to restrictions on marital freedom, child custody and the obligation to agree to certain acts or omissions.

Fidelity agreements that restrict the freedom of marriage are invalid. The Marriage and Family Division of our Civil Code establishes the basic principle of freedom of marriage, under which the two parties who wish to enter into a spousal relationship have full autonomy of intention and are free to enter into a marriage or dissolve a legal spousal relationship by mutual consent. For example, in the case of marriage, a man and a woman may apply to a registry office to register their marriage based on their free will and compliance with legal age and other relevant regulations; in the case of divorce, one or both of them may apply to a registry office for divorce or dissolve the marriage through litigation if the relationship between them has broken down and there is no possibility of restoring their original feelings. If a fidelity agreement stipulates that "in the event of infidelity by one of the parties, the marriage will be unconditionally dissolved, and the marriage will be dissolved with a clean slate, a renunciation of common property or compensation for moral damages to the other party, etc." or "the parties shall be faithful to each other in entering into marriage, and either party shall be required to compensate the other party for moral damages in the event of divorce ", this private law act violates the principle of freedom of marriage as agreed in public law. In this respect, the personal type of spousal fidelity agreement is essentially an interference with personal rights, which is suspected of overstepping the boundaries of the law. In addition, the Constitution, as the fundamental law of China, clearly stipulates that the personal freedom and human dignity of any person shall not be violated, and the content of such a fidelity agreement signed by the spouses is seriously contrary to the provisions of the Constitution and the Civil Code and is therefore invalid.

Likewise, a fidelity agreement that restricts child support is invalid. Article 1067 of the Marriage and Family Division of the Civil Code provides for parental support obligations, and Article 104 provides for parent-child relations after divorce. If a couple agrees in a fidelity agreement that "in the event of a divorce due to a breach of fidelity obligations that results in the breakdown of the relationship between the two parties and cannot be restored, it is agreed that the unfaithful party will voluntarily relinquish custody of the children or will never be able to see the children and will pay monthly This agreement limits the unfaithful party's custody and visitation rights and is a deprivation of human feelings and rights granted by law. This indicates that any arbitrary deprivation of parental rights is contrary to the Civil Code, and therefore this type of fidelity agreement is often found to be invalid in practice.

In addition, if the fidelity agreement is made as follows: not to stay out at night, not to chat with other people of the opposite sex in private through WeChat, to be alone in a room, etc.; the party who violates the duty of fidelity has to kneel down and beg for forgiveness, to admit wrongdoing

in public, etc., it is an infringement of personal freedom and personality rights, which seriously violates the spirit of the legislation of marriage and the public order and morality, and should be considered invalid.

In summary, if the couple's fidelity agreement to restrict personal freedom and infringement of personal rights as the consideration for the property division agreement, such agreements may not be used as the basis for determining the division of property between spouses, child support belonging to. For the division of property, the parties may agree to deal with it; if the parties cannot reach an agreement, the court shall decide according to the family property situation, the extent of their respective contributions in life, and the degree of fault of the unfaithful party, in accordance with the principle of taking care of the party who is not at fault. For child custody, the court will decide in accordance with the principle of favoring minor children, and the maintenance can be agreed by both parties or decided by the court.

4.1.2. Determination of the validity of the fidelity agreement with the content of property division

Fidelity agreement with property division specifies in the signed agreement that if later one of the parties has an extramarital sexual act such as "extra-marital affair", "prostitute", "package mistress" or other. In the event of a divorce due to a breach of marital fidelity, it is agreed that the unfaithful party will unconditionally pay a certain amount of money. Generally speaking, the fundamental purpose of such agreements is to divide property between the two parties as the main content, the infidelity described is a factual state, due to the infidelity of the defaulting party such facts, resulting in the breakup of the couple's feelings and divorce, this agreement as the standard for property division. It is mainly divided into the following categories: "netting out", "indemnity type", "security deposit type", etc.

The "netting out" type of marital fidelity agreement is usually found to be invalid. In order to maintain the stability of the marriage, or the time and energy spent for the happiness of the family and set up a guarantee, in the event of the breakdown of the marriage, the unfaithful party agreed to give up his or her premarital property and common property, that is, the net out of the household. Judicial decisions often do not support such litigation requests because they are unfair and contrary to public order and good customs. If the parties cannot agree on the division of property, the decision will be made based on the family property status, work situation, the degree of fault of the unfaithful party, etc., and also based on the basic principle of taking care of the rights and interests of the children and the party who is not at fault. For example, in the case of "Zhang Shaoping and Jing Yulong Creditor Revocation Dispute", the court found that there was a suspicion of excessive deprivation of the rights and interests of the parties, rather than legality. However, the "net out of the family" to a certain extent belongs to the extension of the husband and wife agreement property system, from its agreed content, the parties mean to express the true, can accurately understand the consequences of responsibility and willing to bear, to warn both sides of the role of infidelity, if the parties voluntarily perform after the remorse request the people's court to recover, the people's court will not be Support.

The "compensation" type of spousal fidelity agreement is usually found to be valid.⁷² The "compensation" type of spousal fidelity agreement is a more common type of spousal fidelity agreement involving property relations in practice. This kind of agreement generally to the couple agreed to mutual fidelity obligations, such as the agreement "shall not have extramarital affairs", "shall not have extramarital sex" and other obligations for the content, but if the parties violate the provisions of the agreement, the parties shall perform the pre-determined liability for breach of contract, and compensation. The parties shall compensate the corresponding amount of property. From the above analysis, it can be seen that the spousal fidelity agreement can be applied by analogy to the relevant provisions of atypical contracts, and the "compensation" agreed upon by the parties belongs to the breach of the fidelity agreement by

the unfaithful party, that is, the liquidated damages. The marriage and family part of the first thousand and ninety-one enumerated "bigamy, cohabitation with others", and the agreement of infidelity in extramarital sex there is a cross overlap, that is, the circumstances listed in the article belongs to the special infidelity, infidelity agreement agreed to infidelity for general infidelity. It can be seen that, at present, China's marriage and family codification of serious damage to the marriage relationship to be punished, the minor infidelity is still to morality to be regulated, but the social life is diverse, the public awareness of the growing rights, the couple's fidelity agreement has become a means to protect the rights and interests of both men and women. According to the principle of "special law is superior to general law", the agreed compensation is regarded as general provisions, divorce damages as special provisions, when the two are competing, special law is superior to general law, serious infidelity can be applied to Article 1091, general infidelity can be punished according to the fidelity agreement signed by both parties. From the legislative point of view, the damages agreed in the fidelity agreement make up for the lack of divorce damages. Therefore, the agreement on the compensation type of fidelity agreement in line with the elements of the establishment of atypical contracts, and does not violate the mandatory provisions of the law and does not violate public order and morals, is conducive to maintaining the stability of the marriage and to protect the legitimate rights of individuals can be given effect to the agreement.

A "security deposit" type of marital fidelity agreement is usually considered valid. The spouses agree to periodically deposit a portion of their joint savings into a pre-established fund account as a security deposit for their fidelity to each other. If one spouse acts unfaithfully to the other during the marriage, all of the funds in the account will belong to the other spouse. If both parties have been faithful to each other during the marriage, the funds in the account will be owned jointly by both parties. For the time being, the "security deposit" type of fidelity agreement is not a common type in practice, but its validity should be affirmed. First of all, the couple reached a consensus, and the amount of the security deposit each of them to meet the affordability, either party to bear the financial responsibility will not form the situation of life can not be guaranteed. Secondly, the purpose of setting up a "security deposit" is to maintain marital stability and the legitimate rights and interests of individuals, and it does not violate the spirit of the legislation on marriage and family. Finally, as long as the subject of the "security deposit" has a legal marriage relationship and the corresponding civil subject qualification, equal consultation, does not violate the mandatory provisions of the law, does not violate public order and morality, the validity of this agreement should be recognized.

4.1.3. Mixed loyalty agreement validity determination

In short, fidelity agreements contain both property and personal relationships in their content and are most common in practice, usually falling into the following categories:

A mixture of personal and property relationships with independence. A fidelity agreement contains both personal and property relationships, but they exist independently of each other and do not affect each other. For example, a husband and wife agree that "either party shall not engage in sexual infidelity outside of marriage, and if a breach of the agreement results in the breakdown of the marriage, the unfaithful party shall be liable for certain property upon divorce and the children shall be raised by the non-faulting party." The clauses that restrict personal rights as consideration and the clauses with the content of property division are separately disposed of according to the above classification, and the invalidity of one of the clauses does not affect the validity of the other clause.

Hybrid fidelity agreements in which the personal relationship plays a dominant role. This type of fidelity agreement is usually entered into to warn the unfaithful party of further infidelity, e.g., if one of the parties is unfaithful and after reconciliation, the parties choose to continue to live together and agree that if the unfaithful party is unfaithful again, the non-faithful party has

the right to file for divorce at any time and the unfaithful party accepts unconditionally and is clean. According to the above, the legal nature of the freedom of divorce of the parties to a marriage is such that it cannot be agreed upon by agreement. Such an agreement deprives the unfaithful party of the right to divorce and imposes severe financial penalties, the purpose of which is to protect the stability of the marriage and family by limiting the freedom of the unfaithful party to divorce during the duration of the subsequent marriage. The court will not support the agreed property relationship because it is not enforceable, but those who comply with Article 109 of the Civil Code may request damages for divorce; if an agreement cannot be reached on the division of property, the court will decide according to Articles 107 and 108.

A mixed fidelity agreement in which the property relationship plays a dominant role. This type of fidelity agreement usually has a large accumulation of property before marriage, e.g., a remarried man and woman agree by negotiation on the ownership of common property before and after marriage, and agree that both parties shall not engage in sexual infidelity such as extramarital sex, and that any violation will result in an unconditional divorce and compensation for damages. Article 1065 of the Civil Code stipulates that spouses may agree on pre-marital and post-marital property, and that the essence of the property relationship is that the spouses agree on the property system, and that the agreement on the personal relationship is invalid and the property relationship is not affected. According to the above discussion, "damages" include material damages and moral damages, and the court shall support the agreement of the parties and the possibility of its implementation.

4.2. Judicial application of the validity of agreements involving marital fidelity

4.2.1. If there is a valid fidelity agreement, it will be agreed upon

With the promulgation of the Civil Code, the Marriage Law was transformed into the Marriage and Family Division, ending its isolation from the Civil Law. Article 464(2) of the Contracts Division, which "applies by reference", establishes a larger contractual concept and provides a basis for the application of the property relationship in the spousal fidelity agreement. First of all, to determine whether the agreement signed between the couple belongs to the special status agreement of the Marriage and Family Part, if not, then to analyze the type of fidelity agreement, the existence of a valid fidelity agreement from its agreement.

4.2.2. Restricted interpretation of the duty of fidelity agreed in the fidelity agreement

The parties' agreement in the couple's fidelity agreement is more different, coupled with the court's position on the interpretation of the text of the fidelity agreement, the scale of different grasp, resulting in "different judgments in the same case". For example, Gao and Chen signed a fidelity agreement agreeing that "..., if one of the parties has hurt feelings and betrayal, then ...". The court of first instance held that the chatting with the opposite sex was sufficient to prove the existence of infidelity; the court of second instance held that chatting with online friends had some harm to feelings, but not to the extent agreed by the parties. Through the above analysis, the violation of the duty of fidelity includes "general infidelity" and "special infidelity", and the damages are divided into "general damages" and "special damages" for divorce due to the breakdown of marital relationship caused by the violation of fidelity agreement. "Article 109 expressly stipulates the legal circumstances under which the non-faulting party may request compensation for divorce damages, and for general adultery that does not constitute extramarital cohabitation, the court will not take the initiative to award one of the spouses who commits adultery to compensate the other according to the provisions of Article 109. The court will not award compensation to one of the spouses for adultery under Article 103, nor will it order the adulterous spouse to bear the responsibility of violating the duty of fidelity under the advocacy clause of Article 143, "Spouses shall be faithful to each other. It can be seen that the provisions of Article 103 of the Civil Code on the "duty of fidelity" are too broad and general,

and are not sufficient to clarify the determination of the breach of the duty of fidelity in cases involving marital fidelity agreements.

In practice, according to the content of the couple's fidelity agreement, the duty of fidelity can be divided into concrete and abstract type. In the case of spousal fidelity agreement, the specific agreement usually agrees that "no extra-marital sex"; the abstract agreement usually agrees that "both parties should be faithful to each other, no emotional betrayal", that is, including personal and ethical morality. Before the registration of marriage, men and women, as independent and free individuals, enjoy the right to sexual freedom, and the law should remain modest and regulated by social moral norms; after the registration of marriage, because the marriage relationship forms a "community", based on social morality and ethics, and the protection of marital stability, "sex" should be limited to specific objects, the couple is through the signing of fidelity agreement from emotional fidelity to sexual fidelity. Thus, the couple's fidelity agreement expressed in the emotional fidelity, from a certain degree of the upper limit of interpretation for sexual fidelity.

4.2.3. Application of the fidelity agreement presupposes the dissolution of the marriage

Article 4 of the Judicial Interpretation of the Marriage and Family Part of the Civil Code (I) specifies that the court will not accept the situation where the parties sue only on the basis of the "duty of fidelity", the most fundamental reason is that Article 103 has only an advocacy role, without specific rights and obligations. According to the above discussion, the parties through the signing of the fidelity agreement will be faithful from the abstract into concrete, "contract" with clear rights and obligations, so it has a litigable. According to the combining of spousal fidelity agreement dispute cases, the case type disputes usually occur as follows: First, during the marriage, one party does not sue for dissolution of marriage, only based on the breach of fidelity agreement to the court, such disputes are still the essence of the family internal conflicts, belong to the mapping of the breach of fidelity obligation suits only. If the court accepts the case, part of the common property between husband and wife will be put from "one pocket" to "another pocket", because the marriage relationship "merged into one" and the property was "mixed". The phenomenon of "another pocket" without realistic value, a waste of judicial resources, and may even harm the rights and interests of third parties. Secondly, in the process of divorce proceedings, the couple's feelings break down to request the dissolution of the marriage, the fidelity agreement has clear rights and obligations, if one of the parties violate, the court should be supported. Third, after the termination of the marriage, this type of case for the couple after the dissolution of the marriage found that there is infidelity and for this reason to the court, when the main dispute for the property dispute, in practice, the court tends to marital property disputes to be accepted. In addition, the infidelity agreed in the fidelity agreement and the request for divorce damages in the case of competing, above called "general infidelity" and "special infidelity", the judicial interpretation of Article 87 clearly provides that divorce is not prosecuted only for the existence of Article 87 of the judicial interpretation clearly stipulates that the court shall not accept a request for damages for "special infidelity". In terms of the violation of the "duty of fidelity" request for property compensation, spousal fidelity agreement and divorce damages system there are similarities. Therefore, in judicial practice, the application of spousal fidelity agreement also need to divorce as a prerequisite.

5. Conclusion

In summary, the marriage rate in China is decreasing and people are treating marriage more cautiously. Combined with judicial practice, infidelity, which is now increasingly unacceptable to the public, has become a major cause of divorce, and the demand for spousal fidelity has consequently risen. With the general rise in awareness of the rule of law these days, spousal

fidelity agreements have become one of the "legal means" to address infidelity. Although the Civil Code has increased the bottom clause for requesting damages for divorce, infidelity such as cheating and extramarital affairs cannot yet reach the standard of legal situation, and the rights and interests of the parties concerned cannot be remedied. However, the explicit provisions of Article 464 and Article 508 provide an institutional conduit for property rules to enter the marital field.

Firstly, this paper argues the possibility of legal regulation of the duty of fidelity, and explains that the duty of spousal fidelity is limited to sexual fidelity; because of the special nature of the marital relationship, the parties restrict "sex" to specific objects by agreement, which is in line with moral norms and does not violate the provisions of restricting personal freedom. Secondly, the content of the fidelity agreement contains personal and property relations, through the analysis of the path of judicial decisions, combined with the relevant provisions of the sub-contract, the spousal fidelity agreement is classified as an atypical contract. Finally, according to the content of the couple's loyalty agreement, the type of analysis: the agreement to restrict the freedom of marriage, personal freedom and other personal rights is not recognized; the "compensation" type of loyalty agreement is in line with the relevant provisions of the atypical contract should be recognized; the mixed type of loyalty agreement should be integrated to determine the legal effects intended by the parties to determine its effectiveness. The agreement should be recognized.

Due to the author's lack of judicial practice experience, the discussion of the validity of the spousal fidelity agreement may be relatively shallow, and I hope that more scholars will conduct research to better solve the problem of adjudication of spousal fidelity agreements, to achieve similar cases, to improve judicial credibility, and to propose practical solutions.

References

- [1] Mei Xiaying, Ye Xiongbiao: Research on the issue of marital fidelity agreement, *Law Application* (2020), No. 3, p. 102-112.
- [2] Shen Chen: The validity of intra-marital agreement under the view of Civil Code, *Law Review*, (2021), No. 6, p. 181-193.
- [3] Wang Xudong: "Loyalty Agreement" triggered by legal thinking, *Journal of Nantong Normal College (Philosophy and Social Science Edition)*, (2004), No. 4, p. 29-32.
- [4] Wu Xiaofang: An analysis of the difficult problems of current marriage and family cases, *People's Justice*, (2010), No. 1, p. 54-58.
- [5] Chen Wei and Duan Yan: Review of the 2012 Annual Meeting of the Marriage and Family Law Research Society of the Chinese Law Society, *Journal of Southwest University of Political Science and Law*, (2013) No. 1, p. 24-28.
- [6] Jiang Yue: The legislative choice of personal relationship between husband and wife in contemporary civil code, *Legal and Commercial Research*, (2019), Vol. 36, No. 6, p. 28-38.
- [7] Sui Pensheng: Analysis of spousal fidelity agreements - with a focus on legal relationships, *Journal of Law*, (2011), Vol. 32, No. 2, p. 38-41.
- [8] He Xiaohang, He Zhi: Legal reflection on spousal fidelity agreement, *Application of Law*, (2012) Vol. 3, p. 54-58.
- [9] Jing Chunlan: Interpretation of the rules of adjudication of "fidelity agreement" between husband and wife, *Politics and Law*, (2017), No. 8, p. 153-160.
- [10] Guo Zhanhong: Jurisprudential reflection on the fidelity agreement of husband and wife, *Journal of Ningbo University (Humanities)*, (2010), vol. 23, no. 2, p. 110-113.

- [11] Wang Goya, Loyalty agreement between husband and wife: value perception and validity judgment, Political Law Series, (2009), No. 5, p. 37-44.
- [12] Huang Lei, Yu Laide: On the duty of fidelity of husband and wife, Politics and Law, (2007), No. 6, p. 104-108.
- [13] Tong Hang: The validity of the spousal fidelity agreement, Journal of Gansu University of Political Science and Law, (2014) No. 6, p. 118-125.