

On the Determination of Marital Relationship After Declaration of Death and Its Revocation

Ye Zeng

School of Southwest Petroleum University, Sichuan 10615, China

Abstract

The Civil Code further improves the declaration of death system based on inheriting the original declaration of death system. Among them, Article 51 contains a hidden legal loophole that needs to be properly applied through purposive restriction. According to the purpose of the declaration of death system, the original marital relationship terminates when the surviving spouse remarries; the person declared dead does not have the right to enter into a new marriage with others; only when both parties to the remarriage are in good faith does the remarriage have a legitimate basis for validity, and even if the declaration of death is revoked, the marital relationship between the surviving spouse and others remains valid.

Keywords

Declaration of Death; Revocation of Declaration of Death; Validity of Marriager.

1. Introduction

Declaration of death is a legal fiction of death, and the legal consequences it leads to are not consistent with natural death. Declaration of death does not necessarily result in the loss of civil rights and civil capacity of the person declared dead. The legal effect of declaration of death only applies to personal and property relationships formed before the declaration of death. Among the effects of declaration of death on personal relationships, the marital relationship of the person declared dead is particularly important. In this regard, the Civil Code stipulates that "the marital relationship of a person declared dead is terminated from the date of the declaration of death. If the declaration of death is revoked, the marital relationship is automatically restored from the date of the revocation of the declaration of death. However, if the spouse has remarried or has submitted a written statement to the marriage registration authority unwilling to restore the marital relationship, this does not apply." However, there are still some controversies regarding this provision: Does the termination of the marital relationship apply to the surviving spouse or both parties? Is the termination immediate or does it occur when the surviving spouse remarries? Does the subjective intention of the remarrying parties affect the validity of the remarriage after the surviving spouse remarries? The analysis and argumentation of these issues are beneficial to the application of the declaration of death system in practice.

2. Marital Validity Models After Declaration of Death and Its Revocation

2.1. Foreign Models

In Roman law and the medieval period, there was no systematic declaration of death system or relevant provisions on the determination of marital validity after declaration of death. In the medieval period, theology prevailed, and the church controlled all aspects of people's lives, including marriage. Remarriage was considered by the church as disloyalty to God and a violation of marriage. Therefore, remarriage by the surviving spouse after declaration of death was not tolerated by the church, and there was no room for the determination of the validity of

the surviving spouse's remarriage. In modern times, various countries have gradually established systematic provisions on the declaration of death system and recognized the remarriage freedom of the surviving spouse. However, there are different legislative models regarding whether to maintain the original marital relationship or the new marital relationship of the remarrying spouse after the "deceased" returns and revokes the declaration of death.

The Japanese Civil Code stipulates that the revocation of a declaration of disappearance (similar to the declaration of death system in China) does not affect the validity of acts performed in good faith between the declaration of disappearance and its revocation. The prevailing view in Japanese legal circles is that the acts stipulated in the code include both property acts and identity acts. If the surviving spouse remarries, and both parties to the remarriage are in good faith, the remarriage remains valid, and the previous marriage does not revive; if one party to the remarriage is in bad faith, the previous marriage revives, and the subsequent marriage is annulled for constituting bigamy. The mainstream view in current Japanese academia is that the revocation of a declaration of disappearance does not affect the validity of acts performed in good faith between the declaration of disappearance and its revocation. From the perspective of "respecting the current intention of the parties as much as possible," the previous marriage does not revive, and only the subsequent marriage remains valid. In this case, the person declared missing can only seek remedies such as spiritual consolation and property division. However, the surviving spouse is given the right to dissolve the subsequent marriage, meaning that if the surviving spouse, in good faith, does not wish the subsequent marriage to continue after the declaration of disappearance is revoked, they can dissolve the subsequent marriage. Thus, in Japanese legislation, a declaration of disappearance leads to the termination of the marital relationship. If the declaration of disappearance is revoked and the surviving spouse has not remarried, the marital relationship revives; if the surviving spouse has remarried, the legislation does not specify how the good or bad faith of the parties affects the remarriage.

According to the current German Civil Code, if one spouse remarries due to the declaration of death of the other, the remarriage is only invalid if both parties to the remarriage knew that the declared dead person was still alive at the time of the marriage, as it violates the prohibition of bigamy. The marital relationship of the declared dead person is terminated due to the validity of the remarriage, and even if the declaration of death is revoked, the previous marital relationship remains terminated. If the declared dead person is still alive, unless the surviving spouse knew that the declared dead person was still alive at the time of remarriage, the surviving spouse can request the annulment of the subsequent marriage. The request for annulment must be made within one year from the date the surviving spouse knew that the declared dead person was still alive. Thus, in German legislation, a declaration of death does not terminate the marital relationship of the declared dead person, and the surviving spouse has the freedom to remarry. If both parties to the remarriage knew that the declared dead person was still alive at the time of the marriage, the remarriage is invalid, and the previous marital relationship remains valid. If one or both parties to the remarriage did not know that the declared dead person was still alive, the previous marital relationship is terminated due to the formation of the subsequent marital relationship. If the surviving spouse did not know that the declared dead person was still alive at the time of the subsequent marriage, they can apply to dissolve the subsequent marital relationship after the declaration of disappearance is revoked.

2.2. Chinese Validity Model

The earliest declaration of death system in China was stipulated in the General Principles of Civil Law promulgated in 1986, but it did not mention the impact of declaration of death on marital validity. The 1988 Opinions on the General Principles of Civil Law filled the gap regarding marital relationships. Compared with the provisions of the Opinions, Article 51 of the

2017 General Provisions of Civil Law made two main adjustments. First, it deleted the expression "if the spouse remarries and then divorces or the remarried spouse dies, the marital relationship cannot be automatically restored." The phrase "spouse remarries" fully covers the content of this expression, reducing redundancy in the legal text. Second, it added that the spouse of the declared dead person "submits a written statement to the marriage registration authority unwilling to restore the marital relationship" as another exception to the automatic restoration of the marital relationship. This undoubtedly expands the ways in which the surviving spouse can choose to terminate the marital relationship, better protecting the marital rights of the surviving spouse. Additionally, requiring a written statement enhances operability. The Civil Code passed in 2020 basically inherited this provision, only changing "termination" of the marital relationship to "elimination."

3. Marital Validity of the Declared Dead Person After Declaration of Death

Regarding the marital validity of the declared dead person after declaration of death, Article 51 of the Civil Code mentions that the marital relationship of the declared dead person is terminated from the date of the declaration of death. From the provisions of this article, the impact of declaration of death on marital relationships is consistent with natural death, as both parties' marital relationship is terminated, and both can remarry after the declaration of death. However, in practice, there may be extreme situations. If one of the legal consequences of declaration of death is the termination of the marital relationship, and the declared dead person has the freedom to remarry, then it is inevitable that some may use the declaration of death system to escape the constraints of the original marital relationship, which could easily lead to the collapse of social morality. Some scholars believe that this is a hidden legal loophole in the declaration of death system, and the article needs to be supplemented through purposive restriction. The purpose of declaration of death is to promptly settle the personal and property relationships of the missing person within a certain geographical range centered on them, to end the long-standing unstable state. According to the Opinions on the General Principles of Civil Law, which places the spouse in the first position of the declaration of death applicant, the identity and emotional interests of the spouse are prioritized. Before the promulgation of the General Provisions of Civil Law, some scholars suggested that there should be no order restriction for declaration of death applicants, but to protect the rights of the surviving spouse, it should be stipulated that if the spouse opposes the application for declaration of death of the missing person, the marital relationship between the missing person and the surviving spouse continues to exist after the missing person is declared dead. In summary, one of the purposes of the declaration of death system is to protect the rights of the surviving spouse and grant them the right to remarry. If the declared dead person also has the right to enter into a new marriage with others during the period of declaration of death, it will inevitably harm the rights of the surviving spouse, which is inconsistent with the purpose of the declaration of death system itself. Article 46 of the Civil Code does not stipulate the order of declaration of death applicants, aiming to allow interested parties to apply for the declaration of death of the missing person in a timely manner without order restrictions, to stabilize the legal relationship with the missing person as soon as possible, and to avoid the situation where the first-order applicant does not apply for declaration of death for a long time, endangering the rights of the subsequent-order applicants. However, the special identity rights of the surviving spouse should also be given attention.

From the above, it can be seen that the legislative purpose of Article 51 of the Civil Code is only to free the surviving spouse from the constraints of the original marital relationship and grant them the right to choose to remarry. However, the provisions of Article 51 include the special situation where the declared dead person can enter into a new marriage during the period of

declaration of death, so it is necessary to exclude this situation based on the legislative purpose of the declaration of death system, so that the declaration of death has different legal consequences for the surviving spouse and the declared dead person. That is, after the declaration of death takes effect, only the surviving spouse can enter into a new marriage, and the original marital relationship remains valid for the declared dead person. Whether the declared dead person's remarriage constitutes bigamy depends on whether the surviving spouse has entered into a new marriage. Before the surviving spouse remarries, the declared dead person's remarriage with others constitutes bigamy. From the perspective of legal teleology, the view that the marital relationship is absolutely terminated after declaration of death is too absolute and not truly applicable in practice at a time may be put in one set of brackets [3, 4]. The references are to be numbered in the order in which they are cited in the text and are to be listed at the end of the contribution under a heading *References*, see our example below.

4. Marital Validity of the Surviving Spouse After Declaration of Death and Its Revocation

After the declaration of death, the surviving spouse is freed from the original marital relationship and has the right to enter into a new marriage. Whether the spouse remarries is a decisive factor in whether the original marital relationship continues.

4.1. Spouse Has Not Remarried

Some believe that the marital validity produced by China's declaration of death system is similar to the "termination theory" adopted in French and Swiss legislation. According to the French Civil Code, after a declaration of disappearance, the original marital relationship is definitely terminated, even if the declared missing person reappears and the declaration of disappearance is revoked. The Swiss declaration of disappearance system also produces the same marital validity. After the declaration of disappearance, the marital relationship between the two parties no longer exists, even if the missing person reappears after the declaration of disappearance judgment is made. In legislation, China's Civil Code also stipulates that after the declaration of death judgment is made, the marital relationship between the two parties is terminated from the date of the declaration of death, but if the declaration of death is revoked, the marital relationship is automatically restored from the date of the revocation. There are two exceptions where the marital relationship is not automatically restored. The first is if the surviving spouse has remarried. The purpose of this provision is to protect the rights of the surviving spouse to remarry and the marital relationship between the surviving spouse and others. In this case, even if the surviving spouse remarries and then divorces or the remarried spouse dies, the original marital relationship will not be automatically restored. The second is to respect the will of the surviving spouse, who submits a written statement to the marriage registration authority unwilling to restore the marital relationship. In practice, in addition to the situations stipulated in the legislation, special situations should also lead to the revocation of the declaration of death. Special situations refer to cases where the actual date of death of the natural person does not match the "effective date of the judgment" or the "date of the accidental event." This is because the declared dead person who knows the actual date of death is no longer in a state of life and death uncertainty, which does not meet the application conditions of the declaration of death system. In summary, China's legislation does not adopt the "immediate termination theory" model similar to France and Switzerland.

The prevailing view in China is that for the surviving spouse, once the declaration of death judgment is made, it produces the legal effect of the termination of the marital relationship. According to this view, under the circumstance that the Civil Code does not stipulate the order of declaration of death applicants, if other interested parties besides the spouse apply for the

declaration of death, once the declaration of death judgment takes effect, the marital status of the surviving spouse becomes "widowed," and the surviving spouse becomes "widowed" without the right to choose. In this case, it is easy to deprive the surviving spouse of the right to marital freedom, which is not conducive to protecting the rights of the surviving spouse and is inconsistent with China's traditional family ethics. In practice, there are cases where the surviving spouse maliciously applies for the declaration of death and remarries to prevent the restoration of the original marital relationship. For example, in the case of Cao forging evidence to apply for the declaration of death of Qu, the appellant Qu and the outsider Cao registered their marriage on October 10, 2004. Later, Cao wanted to divorce Qu, but Qu refused. Cao then forged evidence and applied to the Zhuanghe Shaling Farm and the Zhuanghe Public Security Bureau for a certificate of Qu's disappearance on March 18, 2009. On March 20, 2009, Cao took the certificate issued by the above units to the court to apply for the declaration of death of Qu. On May 13, 2010, the court made the (2009) Zhuang Min Te Zi No. 1 civil judgment, declaring Qu dead. On July 7, 2010, Cao registered a marriage with Song. In this case, Cao forged evidence of Qu's disappearance, used the declaration of death system to achieve the purpose of divorcing Qu, and then married someone else, constituting bigamy. Some even use the declaration of death system to divorce their original spouse and marry someone else to seize the original couple's joint property. In addition, as discussed earlier, for the declared dead person, before the surviving spouse remarries, the marital relationship still exists, and their remarriage with others constitutes bigamy. In contrast, for the surviving spouse, the marital relationship is terminated, and their remarriage with others constitutes divorce or widowhood. According to the marriage provisions of China's Civil Code, the marital relationship is composed of both spouses. The marital relationship of the declared missing person still exists, while the marital relationship of the other party has been terminated. This situation is obviously inconsistent with China's legislation and violates the legal system. To resolve this contradiction, it should be considered that after the declaration of death judgment takes effect, the marital relationship between the two parties is not immediately terminated, but is terminated when the surviving spouse remarries. Some scholars believe that China's legal validity model after declaration of death and its revocation is similar to that of Germany. During the period from the declaration of death to the remarriage of the surviving spouse, the original marital relationship is in a dormant state. During this period, based on the consideration of legal value, the surviving spouse has the freedom to remarry. This is essentially a privilege of the surviving spouse.

4.2. Spouse Has Remarried

As mentioned earlier, after the declaration of death judgment is made, the surviving spouse has the freedom to remarry, and in practice, there are cases where the surviving spouse remarries. After the spouse remarries, if the declared dead person reappears and the declaration of death is revoked, what is the validity of the original marital relationship? The Italian Civil Code stipulates that as long as the declared dead person appears or is confirmed to be alive, the original marital relationship revives, and the subsequent marital relationship is invalid from the beginning. Unlike Italy's protection of the original marital relationship, China's Civil Code stipulates that if the spouse remarries, even if the declaration of death is revoked, the original marital relationship is not restored. Comparatively, Italy provides more comprehensive protection for the rights of the declared dead person, but it does not respect the marital rights of the surviving spouse and their new spouse. Since the revocation of the declaration of death has absolute retroactivity, this puts the marital status of the subsequent marriage in an unstable state, and the corresponding social order is also disrupted. China places more emphasis on protecting the stability of the subsequent marital status, but to protect the original marital interests of the declared dead person, it distinguishes the subjective intentions of the parties to the subsequent marriage and emphasizes that different subjective intentions should produce different legal effects.

4.2.1. Both the Surviving Spouse and the Other Party Are in Good Faith When Entering into the Marriage

Good faith means not knowing that the declared dead person is still alive. In this case, even if the declaration of death is revoked, the original marital relationship does not revive. This is because granting the surviving spouse in good faith the freedom to enter into a new marriage is one of the legislative purposes of Article 51 of the Civil Code, and when the other party to the subsequent marriage is also in good faith, maintaining the stability of the subsequent marital relationship is the side to which the legal balance tilts more, even if the declaration of death is revoked. In practice, there is another situation where the spouse remarries a third party in good faith before the declaration of death. How is the status of the subsequent marriage determined? According to Article 10 of the Supreme People's Court's Interpretation on the Application of the Marriage and Family Section of the Civil Code of the People's Republic of China (I), after the declaration of death judgment is made, the statutory invalidity disappears, and the subsequent marriage becomes valid. In summary, after the declaration of death judgment is made, as long as both parties to the subsequent marriage are in good faith, the subsequent marriage is valid, regardless of whether the declaration of death is revoked or when the subsequent marriage is entered into.

4.2.2. The Surviving Spouse and the Other Party Are in Bad Faith When Entering into the Marriage

Bad faith includes two situations. The first is that both parties are in bad faith. In this case, the subsequent marital relationship is invalid, and the original marital relationship remains valid. According to the prevailing view, even if it is known that both parties to the subsequent marriage are in bad faith, the validity of the subsequent marriage cannot be denied, which allows the parties to the subsequent marriage to prevent the retroactivity of the revocation of the declaration of death by entering into the marriage. The parties to the subsequent marriage knowingly enter into the marriage while the declared dead person is still alive, which is no different from the act of a married person marrying someone else or knowingly marrying a married person, constituting the crime of bigamy as stipulated in China's Criminal Law. The subjective bad faith of such acts is even stronger than the "knowing" stipulated in the crime of bigamy. The second situation is that one party is in bad faith, meaning that when entering into the subsequent marriage, the surviving spouse or the other party knows that the declared dead person is still alive. Whether such a subsequent marriage can oppose the original marital relationship is quite controversial in academia. The essence of the controversy is whether to protect the marital interests of the declared dead person or the marital interests of the party in good faith in the subsequent marriage. In theory, it is impossible to set more specific conditions to determine which side is more worthy of protection, so in practice, it is left to the judge to decide based on the specific case.

5. Conclusion

The prevailing view in China is that "declaration of death immediately and absolutely terminates the marital relationship," but this view cannot completely and appropriately handle disputes arising in practice and needs to be revised and supplemented. The provisions of the declaration of death system include the situation where the declared dead person can enter into a new marriage with others within the scope of application of the declaration of death system, which is a legal loophole. The application of this situation should be excluded through purposive restriction: declaration of death does not immediately terminate the marital relationship, but only grants the surviving spouse the freedom to remarry, which is an exception based on the special identity of the surviving spouse. If the declared dead person enters into a new marriage with others after the declaration of death, it constitutes bigamy;

when the surviving spouse remarries, only if both parties to the subsequent marriage are in good faith can the subsequent marriage oppose the original marital relationship.

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