

Opinions on Specialized Construction of Family Judicial Organs

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Abstract. Family trial is a kind of very special civil law procedure. Family judicial organs in western developed countries have been very mature and have their own characteristics, while the family trial in our country has not been systematized. In order to construct the family trial system with distinct characteristics of our country, it is needed to construct specialized family judicial organs and actively develop the potentials of grass-roots mediation organizations. This paper elaborates the distinct characteristics of family trial, gives the main procedure of family trial and puts forward the conception of specializing the family judicial organs.

Introduction

Family trial system refers mainly to the system of handling the disputes among couples, parents, children and other family members with the main purpose of maintaining family peace and health as well as enhancing the quality of modern family life, by means of specially established judicial departments, in accordance with various requirements of family relationship, and in flexible and diverse forms such as non-confrontational and non-open trial. The construction and development of family trial mechanism in western countries has quite a long history, but the family trial mechanism in our country is not sound enough yet. It can be said that family trial system is an indispensable constituent part of contemporary judicial system, should not be in the corner long forgotten by people, and is of great significance through researches on it and under the condition of perfecting the family trial legislation and even the whole judicial field.

Distinct characteristics of family trial

Family dispute cases are different from ordinary civil and commercial cases and have very strong sociality and humanity. As a special civil procedure, the family trial system has the following four characteristics compared with other civil procedures: Firstly, the legal theory of procedure it followed belongs to authority doctrine, which is different from legal theory of general civil trial procedures; according to the requirement of party autonomy principle, adversary and disposition doctrines are the important content of the general civil trial; however, in a family trial, the judge is required to participate more actively in family dispute resolution, so as to earnestly maintain family solidarity and stability and also protect the weak in the family. Secondly, there is a very special social relationship between the parties involved, that is, the family relationship. Family trial is a system mainly for handling the disputes among couples, parents, children and dependents; only the disputes among members of a family can be handled through the family trial procedure. Thirdly, family courts are applicable mainly to family trials; such manners as mediation and reconciliation should be fully utilized in handling family disputes; mediation is usually the pre-positive procedure, and the judge of a family trial court should promote the reconciliation between the parties involved through such measures as reasonable investigations, psychological conversations with the parties involved, etc.; in order to practically ease the fierce contradiction between the parties involved, mediation will be often adopted to handle family disputes and avoid litigations. Fourthly, family trial is executed mainly in a

non-open way, so as to satisfy the parties' emotional needs of protecting their family secrets; family trials must be vigorously supported and assisted by relevant institutions, and the effect of subsequent disposition should be fully considered; those minor family disputes should be applicable to the judicial procedure accessible to the broad masses.

Main procedure of a family trial

Family trial procedure mainly includes advanced pilot reconciliation system, mediation system, court hearing, non-litigation case procedure, legal consultation service, etc., and involves the following aspects: Firstly, it involves the establishment of family mediation mechanism. The existing regulations of the Supreme People's Court on applicable summary procedure for trial of civil cases have specified that the court should firstly implement mediation in hearing marriage family and inheritance disputes, excluding those irreconcilable and mediation-unnecessary according to the nature of the cases and the specific conditions of the parties involved. The independent family mediation mechanism to be formed in family trial procedure may include the following contents: the family mediation committee consisting of judges and mediation committee members should be established, and the parties involved may freely select qualified mediators; the scope of mandatory mediation should be stipulated expressly and expanded constantly; the hearing procedure may be started immediately provided that the mediation fails to handle the disputes, and the judge hearing the case should be the one participated in mediation; family mediation is different from ordinary conciliation. Some researchers called the family mediation as judicial ADR, which is more related to emotional maintaining; of course, mediation should run through the whole litigation process. Secondly, it involves the driving force of authority doctrine in the process of court hearing. It is expressly stipulated in regulations of the Supreme People's Court on civil procedure evidences that the self-admission rule is not applicable to status relationship litigation. The driving power of the judge should be strengthened in family trial procedure. According to the characteristics of authority doctrine, the family court rights in court hearing cover the one that the court can investigate and collect relevant evidences more actively to find out the actual situation of the cases but should ask for the opinions of the parties concerned. Thirdly, it involves after-judgment mediation, which is also a distinct characteristic of family trial procedure and is mainly assumed by family court mediators or civilian volunteers. The parties involved may either form a reconciliation agreement or sign the mediation document under the presiding of the judge. After signing of the mediation document, the previous judgment is declared invalid, and the parties involved should not lodge an appeal with the excuse of being dissatisfied with the mediation. Fourthly, it involves trial level and term, litigation fee, relief, etc. The judgment of family trial is of first-instance judgment, and the parties involved have the right of further appeal but should not break the two-instance trial system. Litigation fee in family trial should be collected per case by referring to the summary procedure. Fifthly, it involves positive participation of the government in family trial process. Participation of procuratorial department is fully embodied as below: the law should expressly stipulate that procuratorial organs are public prosecutors and can file a lawsuit; the procuratorial department needs to pay no relevant litigation fee, and the defendant should not raise a counterclaim; however, the defendant has the right to claim for state compensation after winning the lawsuit and having their legal rights and interests aggrieved by the procuratorial organs; in terms of investigation and evidence collection, procuratorial organs as state organs have the right to obtain evidences and summon witnesses that match their authority, but cannot enjoy other privileges in the litigation process.

Conception of specializing the family judicial organs

With increasing growth of family disputes in recent years, especially the marriage family disputes, it becomes necessary to list the family dispute solution into the diversified dispute resolution system so as to practically resolve contradictions in the first place to the greatest extent and restore the emotional confrontation between the parties involved. Specialized family dispute organs shall be

established to promote the specialized and fast trials as well as the trial efficiency in our country, and also embody in a better way the substantial justice of family disputes and earnestly protect the legal rights and interests of the aged and the young. The important basis of family disputes is the identity relationship between family members, and the complicated interpersonal relationship behind it is fundamentally the parental power and emotional relationship that contains a lot of unreasonable elements mainly including unreasonable property and identity relations. The judgment of family dispute cases will not be as clear as ordinary civil property cases and has very strong family affection and sociality. The court will usually select the traditional judicial form, the negative moderate judgment and the previous property confrontational judgment form. Actually, such way of judging family dispute cases will be impossible to effectively ease various family conflicts. Judiciary should equally protect the litigation right of the parties involved; general civil action will be based on the adversary form of the parties' symmetrical information and equals status, and the parties involved should provide written evidences to prove their claims, so as to practically implement the principle of burden of proof borne by claimant. However, in family dispute cases, the aged, the young and the female are in the relatively weak position, and it is difficult to achieve the substantial justice if the debating form is followed strictly. Therefore, it is necessary to incline to the party in the weak position in judging the family cases, so as to produce the substantial equality between the weak and strong parties. As long as the court could only adopt the traditional debating form to implement the negative judgment, its results will probably go against the judicial justice in marriage and family, resulting in failure to really achieve the principle of quality in civil procedure.

In terms of determining the name of a family trial institution, I think it could be called family court, young family court, family collegiate bench, etc. However, in terms of court setting, it is appropriate to adopt round table form just like in the living room of a family, rather than the confrontational isosceles-triangle form that is used in ordinary civil cases. It is also needed to replace the names of "defendant" or "plaintiff" with "husband", "wife", etc., so as to reduce the serious confrontational pressure. On this basis, common living goods such as computer, television and book cabinet, to closely link the inherent seriousness of a court with the warm environment of a family, that is, utilize the rational layout in the court to ease the emotional tension of the parties involved and add thick humanistic care.

With respect to the arrangement of a family trial judge, a more than 35-year-old married female judge should be preferred, because such female judges with relatively rich experience in life can effectively guide both parties involved to re-examine their marriage. Communicate with women and children in the weak position by through language persuasion, conversion, heart-to-heart talk and other warm ways to deeply consider the practical marriage condition of parties involved, and minimize the psychic trauma of parties concerned due to a family dispute by using the psychological counseling. Always insist on the family-centered principle to reasonably restrain the divorce marriage, effectively attack domestic violence and other behaviors, and thus steadily improve and repair the family affection. Differentiate a marriage crisis from the marriage death. Reasonably treat and maximally rescue the former while actively pacify women and children and handle the division of property etc. for the latter.

As for the way of family trial, the authority doctrine form is suitable. Under all legal systems, the civil procedure always covers the oppositions and conflicts between both parties with completely opposite interests. In the set way of adversary system, according to the principle of judicial self-reliance and the convention of market-oriented economy, a judge usually doesn't intervene in the conflict between both parties involved to play the role of neutral, but only legally pre-judge the fact so as to maximally respect the will of the parties involved. The authority doctrine is chiefly that a judge plays a leading role in a lawsuit while the parties involved are in the subordinate position. Besides, during the implementation of procedure, a judge should gather litigation materials and evidences etc. Family cases are usually two-sided. Not only the parties involved in family disputes easily have their emotions intensified, but also both parties usually hold their different opinions. Thus, a contradiction will extend from a family to the court and both parties are likely to make non-rational choices if they

don't make any concession to each other. Meanwhile, family disputes are affected by family affection. Thus, as the time goes by and both parties calm down, the unusual confluences between family members will be eliminated gradually. Because a family dispute is characterized by the non-antagonism in a real sense and family affection, the court can never mediate between two parties to judge a family dispute case in the way of a common civil case and let the parties involved against each other. In an unusually fierce antagonistic lawsuit, the parties involved are very likely to attack each other due to emotional excitement and both parties think that they are victims. For example, if the judge doesn't stop and guide, the underlying reasons for a conflict will still remain hidden. Thus, it is very reasonable to use the authority doctrine. In recent years, after the *Law against Domestic Violence* was put into effect, family disputes have attracted more and more attention. Therefore, when a family court is established, the concept of family trial can be transplanted to the trial of family cases so as to practically protect the marriage safety and stability of pre-adolescent children, women, old people and other groups. To practically prevent aggravating various family conflicts, isolate the relatives or friends, who are likely to aggravate the conflict between the parties involved, among those who attend the court or mediate the case so as to make every effort to avoid the tendency of aggravation of various conflicts. Emphasize the litigation and mediation connection system, actively hire family dispute investigators, obtain the power of attorney by using the organizational advantages of women's federation according to the case need, briefly make a detailed investigation on the family background, psychological status and real conflict etc. of parties involved, and carefully give targeted guidance for personnel as needed.

Conclusion

To sum up, justice is an important defensive line to maintain social justice but needs more color of flexibility in dealing with kinsfolk ethics etc. On the background of judicial reform in China, it is of extremely important significance to carry out the reform in family trial. The specialized construction of judicial organs can better safeguard the legitimate rights and interests of parties involved in a dispute. Due to the development of the current era, family disputes also become more complicated than before. Seen from the outside, family disputes are completely individual affairs of parties involved, but disputes incurred herefrom involving all aspects. Therefore, the whole society's joint participation is in urgent need in the specialized construction of family disputes. Besides, establish specialized family mediation organs, women's federation, primary-level organizations and other dispute mediation settlement systems. Of course, judges can also use the discretion to involve in cases to correspondingly restrain the family subject right.

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