

# Study on the Validity of Property Donated by One Spouse to the Third Party

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## ABSTRACT

During marriage, the problem that one spouse donates property to a third party due to extramarital affairs has a long history, and there are different views and arguments in practice and academic circles. This paper discusses the validity of the contract and the change of property right of one spouse's gift to the third party separately, starting with the judgment of the validity of the gift contract, and comprehensively analyzes the consideration factors of invalidity of the contract violating the principle of public order and good customs from the angle of the application of the principle of public order and good customs, so as to explore whether the validity of the contract of one spouse's gift to the third party is valid or not; In the behavior of one spouse's disposition of the donated property to a third party, the change of property ownership is taken as the breakthrough point and analysis context, and the issue of ownership and return of the donated property is reorganized based on the different results of the validity judgment of the gift contract, in order to improve the judgment of the validity of the property donated by one spouse to a third party.

## KEYWORDS

Gift of Property; Principle of Public Order and Good Morals; Lack of Authority to Dispose; Joint Ownership.

## 1. RAISING QUESTIONS

Although China's Civil Code expressly stipulates the duty of loyalty between husband and wife, and prohibits married people from living together with others. However, in real life, improper extramarital affairs between one party and the third party in marriage often occur, and in extramarital affairs, one party in marriage often gives property to the third party outside marriage. This has caused serious damage to the stability of the marriage relationship and the property interests of husband and wife. Disputes caused by one spouse giving property to a third party occur frequently. Spouses who find that property has been donated to a third party outside marriage usually sue the court to request the donated third party to return the donated property in order to protect their own and family property interests. However, in this kind of frequent cases related to property interests and marriage relationship, different courts have made different judgments on similar cases. The existence of different judgments in the same case makes it difficult to properly protect the interests of all parties in the dispute, and it is even more difficult to safeguard the fair authority of judicial organs and make correct guidance for both husband and wife to dispose of property in marriage. Besides, there are many theoretical disputes in academic circles on this issue. Therefore, it is necessary to further discuss the property gift of one husband and wife to a third party in marriage.

## **2. THE VALIDITY OF THE GIFT CONTRACT AND THE APPLICATION OF THE PRINCIPLES OF PUBLIC ORDER AND GOOD CUSTOMS**

The validity of property gift by one spouse to the third party has always been a hot issue that scholars pay attention to. There are many debates on this issue in academic circles, and there are different views. Many scholars judge the validity of the gift from the validity of the gift contract, while others judge the validity of the gift from the perspective of the effectiveness of the disposition of the gift property. In recent years, some scholars have analyzed the academic views and different types of cases from whether the donated property can be returned and the scope of the return. However, the problems of whether the donated property can be returned and on what basis of claim can only be clarified after solving the pre-issue of gift validity. Therefore, the judgment of gift validity is still the key to solving the dispute of gift property to third parties.

### **2.1. Introduction of the Principle of Public Order and Good Customs**

In academic circles, there are mainly several viewpoints in the argument about the validity judgment of gift contract: invalidity theory, validity theory and conditional validity theory. Although there are great disputes between different theories and viewpoints on the validity of the gift contract, the basis for judging the validity of the gift contract mainly focuses on the application of the principles of public order and good customs. Known as the first case of public order and good customs, "Luzhou Mistress Case" is the first time in China's judicial practice that a legal act is invalid on the grounds of violating public order and good customs. This judgment result caused extensive discussion and controversy in civil law circles at that time. Most scholars held a negative attitude towards the application of the principle of public order and good customs in this case, and believed that the process of interest measurement in this case was too simplified, and reasoning and argumentation failed to fulfill their obligations[1]. Similarly, scholars who support the theory of effectiveness believe that the gift contract is voluntarily concluded by both parties to the contract. Although there is an improper relationship between the two parties to the contract, the civil legal acts of both parties should be equally protected by law, and the civil subject can freely dispose of its property outside the scope prohibited by law. As long as the gift contract meets the general requirements for contract effectiveness, the autonomy of both parties should be fully respected and the gift contract should be deemed valid. However, the above viewpoint inevitably ignores the great possibility that the act of giving property to extramarital affairs objects violates the general value orientation in society and the inner moral ethics of the people. Moreover, according to the general theory of civil law, the effective requirements of civil legal acts include not only not violating the principle of public order and good customs, but also not violating the principle of public order and good customs. Article 153 of China's Civil Code also stipulates that legal acts that violate the principle of public order and good customs are invalid. To sum up, in addition to testing whether the gift involving extramarital affairs violates the prohibitive legal provisions, it is also necessary to examine whether it violates the legal value system and social value, that is, whether it violates public order and good customs.

On the basis of determining the introduction of the principle of public order and good customs as the criterion for judging the validity of the gift contract, scholars who support the validity theory propose that extramarital affairs should be distinguished from the property gift of one spouse, and believe that property gift is an independent legal act, which is not invalid because extramarital affairs violate public order and good customs and legal provisions; However, scholars who hold the view of invalidity think that the gift of one spouse who has an extramarital affair to a third party should be invalid because it involves improper relationship between men and women. Property gift to a third party not only violates the loyalty obligation between husband and wife, but also violates the basic moral concept of society. Individual autonomy and freedom should also be limited to the framework of basic social order and good customs. However, it is still debatable whether all gift behaviors involving extramarital affairs violate public order and good customs. Therefore, many scholars put

forward the theory of conditional validity, and think that it is necessary to rely on the principle of public order and good customs, and make a differential identification of the validity of gift contracts under different motives by distinguishing the donors' different motives. Extramarital affairs are against ethics and morality. Our country's laws stipulate the monogamous marriage system and the loyalty obligation between husband and wife. However, not all behaviors related to extramarital affairs are not accommodated by the bottom line of ethics and morality. If the gift behavior is to thank the other party for taking care of the daily life for a long time, the motivation of this gift behavior itself is difficult to be classified as violating the bottom line of ethics and morality. The argument about the above academic views is fundamentally due to the different grasp of the evaluation object of the principle of public order and good customs. Because one spouse's property gift to a third party involves the particularity of extramarital affairs, it is easy to translate the negative evaluation of the extramarital relationship between men and women who violate the duty of loyalty into the evaluation of the gift contract when evaluating the gift contract. Based on this, the specific application of the principle of public order and good customs in judging the validity of gift contracts involving extramarital relationships should be analyzed in detail.

## **2.2. Modesty in the Application of the Principles of Public Order and Good Customs**

Although Article 8 of the Civil Code has explicitly stipulated the principle of public order and good customs in the code, the specific provisions related to public order and good customs in the code also include many legal norms such as the effective requirements and invalid reasons of civil legal acts. However, some scholars have pointed out that the principle of public order and good customs has been chaotic for a long time, and there is a phenomenon of misuse and abuse. In the process of applying the principle of public order and good customs, the judge's reasoning is insufficient, and it is easy to make a judgment according to morality. Moreover, the abuse phenomenon and the judge's judgment according to morality are mutually causal, and it is easy to fall into a vicious circle[2].

First of all, the concept and connotation of the principle of public order and good customs are uncertain and vague, and the common misuse in practice is to confuse public order and good customs with morality. The principle of public order and good customs is only a bottom line standard, which cannot be equated with morality. In his works, Medicus pointed out that the "good customs" in the German Civil Code are only the part cut out from the moral order and branded with the legal imprint to a great extent, and the law does not accept some lofty ethical standards. Moreover, the connotation of this standard may also change in different social and historical periods. For example, in German law, sexual relations outside marriage are no longer regarded as violating good customs, while in Japanese law, sexual relations outside marriage are still regarded as violating public order and good customs because of violating the loyalty obligation between husband and wife; From the perspective of historical development, with the prevalence of unmarried cohabitation, Anglo-American law has recognized the property agreement between unmarried cohabitation men and women. Secondly, the principle of public order and good customs itself is general and flexible. Judging from its connotation, it has uncertainty and variability; From the legislative point of view, the purpose of the principle of public order and good customs is not to observe moral standards, but not to make legal norms a tool to violate the moral bottom line[3]. The legislative purpose of the principle of public order and good customs itself is to avoid the application of legal norms from violating the legal value system and social moral order. Therefore, we should properly grasp the modesty in the application of the principle of public order and good customs, and the principle of public order and good customs should be inferior to the application of specific rules in the application of laws, so as to prevent the abuse of the principle and the uncertainty of the judgment result caused by the uncertainty of the connotation and generality of the principle itself. In addition, the evaluation scope and use scenarios of public order and good customs should also be appropriately restricted.

The evaluation object of the principle of public order and good customs should be limited to the legal act itself, and the judgment of the validity of the gift contract involving extramarital affairs should

also distinguish the extramarital affairs from the gift, and should be based on whether the legal act of the gift contract itself violates public order and good customs rather than whether the fact of the improper relationship between men and women outside the gift contract is uncustomary. From the above discussion, public order and good customs should pay attention to modesty in the use, so when evaluating the validity of the gift contract, we should strictly distinguish between the gift contract and the infidelity of the donor in the marriage, and strictly define the scope of the evaluation object. That is, the validity of the gift contract is not affected by immoral extramarital affairs, and the validity of the gift contract only depends on whether the burden itself violates the social moral and ethical standards contained in the legal value system. Based on this standard, the view that the gift contract is invalid confuses the evaluation of the legal act of the gift contract with the fact of extramarital affairs, and it is easy to reduce the judgment of the validity of the gift contract to the evaluation of the donor's morality. The law does not punish the perpetrator's immorality, but only prevents the law from becoming a tool against good customs, which not only violates the legislative purpose of the principle of public order and good customs, but also easily leads to the abuse and misuse of the principle. Although the viewpoint of validity strictly distinguishes the objective facts of gift contract and extramarital affairs, it ignores that gift contract should be the evaluation object of the principle of public order and good customs, and the process of judging the validity of gift contract is not satisfactory. To sum up, it seems preferable for the conditional validity theory of distinguishing the validity of the gift contract by motivation to take the gift contract itself as the evaluation object on the basis of separating the extramarital affairs facts that may affect the judgment of the validity of legal acts.

### **2.3. Considerations for Violating the Principles of Public Order and Good Customs**

Whether a legal act violates public order and good customs, its influencing factors include the content, conditions, burden of the legal act, the motivation of the parties and other factors[4]. Judging the effectiveness of a legal act must be comprehensively considered in combination with various factors. Therefore, the criterion for judging whether the gift contract violates public order and good customs based on motivation alone is relatively thin. The motivation in legal behavior refers to the inner motivation that promotes the parties to do the legal behavior, and it is the inner driving force of the actor[5]. In traditional civil law theory, motivation does not affect the effectiveness of legal acts in principle. Some scholars have suggested that cause is the inner cause of the actor. Based on the principle of autonomy of will in civil law, the parties have the freedom to create legal relations. If the law seeks the reasons for the parties to create legal relations, it essentially violates the principle of autonomy of will. However, freedom in civil law is not absolute and boundless, otherwise freedom cannot be well realized. For example, the principle of good faith and public order and good customs are both restrictions on autonomy of will. If the legal act is still considered to be valid even though the motive violates public order and good customs, it will not only produce the legal effect of violating the legal value system, but also make the law a tool for the actor to achieve the purpose of deviating from customs.

Although motivation is the inner motivation of the actor, it is not impossible to detect. Motivation can be inferred from the legal act itself or directly reflected in the legal act. In the gift contract involving extramarital affairs, whether the donor's motive violates public order and good customs can be judged by combining the donor's purpose and subjective mentality. First of all, there is no doubt that extramarital affairs violate morality, but whether they all violate public order and good customs is worth considering. If the marital status of husband and wife is separated for a long time in name only, or even one spouse has major faults such as domestic violence and gambling, which leads to the emotional breakdown between husband and wife, although the extramarital affairs of the other spouse are morally responsible, it is difficult to define them as possibly destroying social public order and good customs. Extramarital affairs are quite different in individual cases and under different social concepts, so it is difficult to be used as an objective evaluation standard. However, sex-related

transactions violate public order and public moral concepts in most countries and regions. In China, sex trade is explicitly prohibited and severely punished by relevant laws and regulations such as administrative law and criminal law. It is not illegal for one spouse to have sexual relations with a third party outside marriage. However, if the motive of giving property to the third party is to reward or maintain adultery between them, it is obviously against public order and good customs. Therefore, in the validity judgment of the gift contract, the improper relationship between the donor and the third party is not the key to the validity judgment, but the motive of the gift points to this improper relationship, and if it is implicated, it will constitute the invalidity of the motive of legal behavior. On the contrary, if the donor's purpose is to thank the third party for its contribution and long-term care, or to compensate the third party and guarantee his future life when the relationship with the third party is ended, his motive does not violate public order and good customs, and the gift contract is not invalid because of violation of customs.

It is worth adding that there is a view in academic circles that the motive violates public order and good customs to invalidate legal acts, which requires the common motive of both parties[4]. Scholars who hold this view believe that the counterpart who is unaware of the motive of violation of vulgarity will suffer disadvantages due to the invalidity of the legal act. For the protection of the bona fide counterpart, the counterpart of the legal act should be required to have the same motive of violation of vulgarity. However, in the property gift contract to the third party, the third party will not be damaged by the invalidity of the gift contract compared with its own interests before the establishment of the gift contract. Because the gift contract is a single-service contract, the donee only enjoys the benefits without providing treatment payment. After the gift contract is invalid, the donee can't suffer any disadvantage due to the performance of the invalid contract. Even if the donee doesn't know the donor's motive of violating customs, there is no need to protect his goodwill, so the donor's motive does not affect the judgment of the validity of the gift contract.

When the motive is directly manifested through the way of entering the legal act, there is no need to indirectly deduce the motive of the actor, and it is directly transformed into the problem that the legal act itself or the attached conditions violate public order and good customs. Although China's Civil Code does not directly stipulate the validity of legal acts when the conditions attached to civil legal acts are invalid, comparative law generally stipulates that if the conditions attached to civil legal acts are invalid, the legal effect is not that part of the conditions are invalid, but that the whole legal act is invalid. Some scholars in the academic circles have suggested that the treatment that the rescission condition is invalid in legal acts with rescission conditions makes the legal act invalid as a whole may be detrimental to the protection of the rights and interests of the parties. Therefore, they advocate that the legal effects of rescission conditions and rescission conditions should be distinguished when the conditions violate public order and good customs. When the conditions violate public order and good customs, it will be regarded as the conditions cannot be achieved, and the legal acts with rescission conditions are invalid from the beginning, and the validity of the legal acts with rescission conditions will not be affected. The conditions attached to the gift contract to a third party that violate public order and good customs should be the start or continuation of extramarital adultery with the third party, that is, the gift contract will only take effect when the donee meets the above conditions, and the attached conditions should be the cessation conditions. Therefore, no matter what kind of interpretation theory is adopted, when the donor's motivation is externalized as a condition attached to the legal act, the validity of the gift contract can be directly judged by the validity of the conditions. Similarly, the donor's motivation may also be manifested as the burden of the gift contract, that is, the donee must fulfill some obligations stipulated by the donor, but this obligation is not equal to the gift provided by the donor, so it does not affect the unilaterality of the gift contract. Article 156 of China's Civil Code stipulates that civil legal acts that do not affect the effectiveness of other parts are partially invalid. Whether the burden of legal act affects the effectiveness of other parts depends on [ ]whether the burden is the only motivation for the parties to conclude a contract according to the experience of comparative law and academic views, which is linked with the motivation criterion for judging whether the gift of property to a third party violates public order and good customs. Therefore,

when the motivation is externalized into the burden of gift contract, the gift contract can be judged invalid directly by the legal act itself violating public order and good customs. In contrast, if the donor directly stipulates the motive of maintaining adultery relationship with a third party as the treatment and payment of the paid property, the contract is not a gift contract, and it is invalid directly because its main content violates public order and good customs.

### **3. CHANGES IN OWNERSHIP OF DONATED PROPERTY**

In the study of the gift of property to the third party, it is difficult to determine the wavering argument between the validity of the gift contract and the disposal of the gift property in academic circles and judicial practice. Many scholars' views and court judgments do not distinguish the burden of the gift contract from the disposal of the gift property, or discuss it separately or confuse in the demonstration process, which not only leads to the confusion of the judgment process and standards of the gift effectiveness in theory, but also indirectly affects the disunity of the application of legal provisions and the judgment results in the court judgment process. Article 597 of China's Civil Code stipulates the liability for breach of contract when the seller has no right to dispose of the subject matter, which shows that the unauthorized disposition of the subject matter of the contract does not affect the validity of the contract, and because the owner enjoys the right to dispose of the subject matter, the counterparty of the contract can obtain the ownership of the subject matter based on the ratification of the owner. The validity of the contract is not affected by the unauthorized disposition. It is impossible for the owner of the subject matter of the contract to ratify a contract that has already come into effect. Therefore, it can only ratify legal acts outside the contract, that is, the disposition acts of the parties to the contract[8]. Therefore, it is necessary to distinguish between burden behavior and disposition behavior in solving complex civil issues. Only by clearly distinguishing the burden behavior from the disposition behavior in the issue of property gift to a third party can it not lead to the confusion of the argument logic, and then clarify the choice and application of legal provisions, and make a reasonable judgment on the effectiveness of the gift.

#### **3.1. Effect of Disposition of Donated Property**

The key to the analysis of the effectiveness of the disposal of donated property lies in whether the disposer has the right to dispose of donated property, and the right to dispose is one of the powers of ownership. To analyze whether the donor has the right to dispose of donated property, it is necessary to clarify the ownership of donated property at first. Articles 1062 and 1065 of China's Civil Code respectively stipulate the statutory marital property system and the agreed marital property system. According to China's marital property system, the property donated by one spouse to a third party can be divided into two situations. First, the donated property is the donor's personal property, including the donor's personal property before marriage and other than the legal common property after marriage in the legal property system, and the donor's unique property in the agreed property system. In this case, the donor has the complete right to dispose of the donated property; Second, the donated property is the joint property between husband and wife or the property of the other husband and wife, including the exclusive property of the other husband and wife in the above-mentioned personal property and the joint property of husband and wife in the legal property system and the predetermined property system. At this time, the donor has no right to dispose or complete right to dispose of the donated property[9].

Under the premise of recognizing independent disposition, when one spouse gives a gift to a third party as his personal property, the donor has the right to dispose of the donated property, and his disposition should be deemed valid; For the situation where one spouse gives his spouse's personal property to a third party, it is a typical unauthorized disposition, so the relevant provisions of unauthorized disposition should be applied, and the effectiveness of the disposition is to be determined before the spouse ratifies it. In practice, it can be explained from the behavior of the

donor's spouse suing to request the donated third party to return the property that his intention is to refuse to ratify the donation whose validity is to be determined, and the disposition will not take effect.

For the complicated situation that the donated property is the joint property of husband and wife, China's legal marital property system implements the joint ownership of the income after marriage, while the agreed property system can freely agree on the joint ownership of all or part of the property after marriage and before marriage. No matter what property system is adopted, the joint ownership between husband and wife is joint ownership regardless of share. Both husband and wife enjoy equal disposal rights to the common property, but equal disposal rights do not mean that they have the right to dispose of half of the common property. Article 301 of the Civil Code stipulates that the disposal of joint property by co-owners must obtain the consent of all co-owners. However, the gift of one spouse to a third party is often hidden because it involves extramarital affairs, and the spouse of the donor is unaware of the fact of the gift. Therefore, the disposal of the joint property of husband and wife by the donor usually does not get the unanimous consent of all co-owners. During the marriage relationship, the joint property of husband and wife is a whole. Before the joint property of husband and wife is divided and their respective shares are determined, the act of one party giving the joint property to others without authorization should be completely invalid rather than partially invalid[10].

In the legal property system, Article 1060 of China's Civil Code stipulates the right of daily family agency, and the civil legal acts committed by husband and wife due to daily family life take effect for both husband and wife. This article stipulates that whether the disposal of joint ownership requires the unanimous consent of the co-owners can be confronted, which is the basis for recognizing one spouse's disposal of the joint property donated to husband and wife.

Daily family agency is based on the special status relationship between husband and wife. When either spouse exercises family agency, there is no need to express the agency relationship to the counterpart, and the effect of legal act directly belongs to both husband and wife. In practice, the donee often refuses to return the donated property on the grounds that the amount of donated property is small, arguing that it belongs to the category of family agency right. First of all, as far as the amount of the subject matter is concerned, the amount involved in exercising the right of daily household agency is indeed limited to the property things with small amount of the subject matter. If the amount of gift given by one spouse to the third party is small enough compared with the donor's family and the local economic level, the damage to the property interests of the donor's spouse will be small, and the donor's spouse may also give up recovering the donated property with limited loss of property interests for reasons such as maintaining family stability and social evaluation. However, returning to the scope and legislative purpose of daily housework agency, daily housework agency should be limited to meeting the expenditures of family daily life, education and necessary social interaction, and its scope is limited to "daily housework"[11]. The gift of one spouse to a third party is unnecessary and unbeneficial to the daily life of the donor's family. It does not belong to normal human relations, nor does it belong to the gift to maintain the basic social functions of the family. Therefore, it is not within the scope of daily family agency rights[12].

Daily household agency itself is an independent norm based on the marriage relationship between husband and wife[13]. Its purpose is to maintain the normal operation of husband and wife's family life, prevent mutual prevarication of family obligations between husband and wife, and simplify daily family affairs. However, the gift of one spouse to the third party damages the marriage relationship, which is not conducive to the maintenance and stability of marriage and family, and obviously violates the purpose of establishing the daily family agency right. The property gift to the third party does not belong to the adjustment scope of daily family agency, so daily family agency cannot be used as the basis for confronting the provisions on the disposition of common property. Goodwill in daily family agency is based on the counterpart's belief that the legal behavior of the actor does not exceed the scope of family agency, while in the gift to the third party, the goodwill of the third party is the trust in the ownership of property and marital status of the donor, so it can only be decided according to the general provisions of good faith acquisition. On this basis, the third party accepts the

gift without paying the corresponding consideration, so there is no possibility of good faith acquisition, and it is impossible to obtain the ownership of the donated property in good faith.

### **3.2. Return of Donated Property**

In the past research on the effectiveness of gift and whether the donated property is returned, the classified discussion is mostly based on the premise and basis of whether the gift contract is valid. However, it should be noted that, regardless of whether the gift contract is valid or not, if the donor has no right to dispose of it and the disposal act cannot be effective, the ownership of the donated property will not change. Taking disposition and its effectiveness as the research context of the return of donated property can highlight the change of ownership relationship of donated property and facilitate the protection of property.

When the donor has not disposed of the donated property, that is, before the gift contract has been performed, the donor has the right to arbitrarily cancel the gift contract. Because the gift to the third party does not involve public welfare, unless the gift contract has been notarized, the donor can block the transfer of the donated property by exercising the right of cancellation. After the gift contract is performed, it can be discussed separately according to whether the donor has the right to dispose of the donated property.

When the donor has the complete right to dispose of the donated property, that is, the donated property is the donor's personal property, the disposal act is of course valid, and the ownership of the donated property has been transferred to the donee. If the gift contract is not invalid because it violates public order and good customs, the burden behavior and disposition behavior of the gift are flawless, and the gift behavior is legal and valid, so there is no need to discuss it. However, if the gift contract is invalid due to abnormal customs, and there is no legal reason for the donee to obtain the donated property at this time, can the donor request the donee to return the property according to the right to claim unjust enrichment? For this problem, we can learn from the system of illegal cause payment in comparative law. Illegal cause payment is the payment made by the payer based on violating public order and good customs or *jus cogens*[14]. Illegal payment for illegal reasons should be of the nature of serious harm to society, and payment behaviors that only violate general morality should not be subject to the illegal payment system and can be classified as natural debts. This is completely consistent with the aforementioned grasp of the criteria for judging whether a contract is invalid in violation of public order and good customs. The payment system for illegal reasons, like the invalid system of a contract in violation of public order and good customs, is a system design that restricts private freedom to safeguard social public interests[15]. Therefore, when one spouse donates to a third party personal property that he has full right to dispose of, if the contract is invalid because it violates public order and good customs, then the illegal cause payment system can be applied to the donor's disposal of the property. The provisions of civil law countries on payment for illegal reasons are based on the principle that no return can be requested, with return as the exception. Only when the illegal reason only exists on the recipient and the payer has no illegal reason, can the *bona fide* payer claim return. In the case that one spouse donates property to a third party in violation of public order and good customs, the donor must have illegal reasons, and whether the donee knows the marital status of the donor, and then whether there are illegal reasons that violate public order and good customs, does not affect the result that the donor cannot ask the donee to return the property due to the payment for illegal reasons.

When the donor has no complete right to dispose of the donated property, that is, the donated property is the property of the other spouse or the joint property of the husband and wife, as mentioned above, the relevant provisions of no right to dispose should be applied. The effectiveness of the donor's disposal behavior is to be determined, and the ratification or refusal of ratification by the other spouse is required. If the other spouse ratifies the donor's unauthorized disposition, the donor's unauthorized disposition will take effect retroactively, and the ownership of the donated property will be transferred

to the donee. At this time, due to the ratification of the donated property by the other spouse, no matter whether the gift contract is valid or not, the problem of requesting the return of the property should not occur.

What is more complicated and common is that the other spouse refuses to ratify the donor's unauthorized disposition and asks the donee to return the property. When the donated property is the personal property of the other spouse, its refusal to ratify makes the donor's unauthorized disposition determined to be ineffective, the ownership of the property has not changed, and the other spouse is still the owner of the property, so he can request the donee to return the property with the right to claim the original return. Further analyze the influence of the validity of the gift contract on the return of property. When the gift contract is legal and valid, its contractual validity cannot exceed the relativity of the contract against the ownership of the other spouse, and it has no influence on the protection of the property ownership of the other spouse and the request of the donee to return the possession; When the gift contract is invalid, as mentioned earlier, there is no legal basis for the donee to acquire the possession of the property, but the donor cannot request the return due to illegal payment. However, the other husband and wife can request the donee to restore the owner's possession of the property based on unjust enrichment. Therefore, when the contract is invalid, the other spouse can not only claim the right to return the original property, but also protect his own property interests and request the donee to return the property according to the right to claim unjust enrichment.

When the property donated by one spouse involves the joint property of husband and wife, the effect of one spouse's unauthorized disposition is the same as that of the donated property being the personal property of the other spouse, and the subject of requesting the return of property and the basis of the claim right are the same. After the act of unauthorized disposition is determined to be ineffective, if the gift contract is valid, the donor cannot request the donee to return the property due to the constraints of the gift and the contract, and if the gift contract is invalid, the donor cannot request the return of the payment due to illegal reasons. As one of the owners of the property, the other spouse may request the donee to return the property according to the right to claim the return of the original property and the right to claim unjust enrichment under the premise that the contract is invalid. However, it is controversial that China's husband and wife property system is jointly owned regardless of share, and the share of donated property that can be requested to be returned is debatable. If it is dealt with purely according to the relevant provisions of unauthorized disposition, the donee must return the donated property in full, but it is obviously unfair to protect the interests between the donor and the donee to return all the shares of the property. First of all, on the basis of extramarital affairs, although the act of giving property itself is free, the donee has often paid the price in personal and property in this immoral emotional relationship. When the gift contract does not violate public order and good customs, the property gift is often compensation for the donee's daily care and long-term payment of the donor, and even directly used for the daily expenses of the donee and the donor. In the case that the motive or conditions of the gift contract are uncustomary, due to the concealment of extramarital affairs, the third party who receives the donation is unaware of the fact that the donated property is the joint property of husband and wife in some cases. Admittedly, the donated property that violates public order and good customs is not worth protecting, but the donor who carries out this gift is even more unworthy of protection. During the marriage relationship, the donor who donates the joint property of husband and wife to a third party has great subjective malice, and his property can be returned in full by using the unauthorized disposition of the joint property after receiving the donee's contribution. This not only harms the interests of the third party outside marriage, but also may make the donor who cheats in marriage use the rules to enjoy the contribution of the third party outside marriage for free, without having to bear losses or pay the price for his immoral behavior.

If, in order to balance the interests of the donee third party and punish the immoral behavior of the donor, the third party is determined to partially return the donated property, the common property of both husband and wife will inevitably be damaged, and the property interests of the harmful husband

and wife will be partially returned. Under such circumstances, the donor's unauthorized disposal of common property undoubtedly violates the joint right of the other spouse to the joint property of husband and wife. The damaged party can ask the donor to compensate for the loss as the creditor of the tort debt. However, due to the common property system of marriage income in China, it is of no practical significance for one spouse to ask the other spouse to compensate for the loss before the property of husband and wife is divided[16]. Moreover, since the common property of husband and wife in China is jointly owned regardless of share, it is difficult to determine the specific share to be returned. In view of this, it is advisable to use the property division system of husband and wife to fully protect the interests of the no-fault spouse and the third party[17]. Our country's laws have strict regulations on the division of husband and wife's property. Only when the marriage relationship breaks down or Article 1066 of the Civil Code seriously damages the joint property of husband and wife during the marriage, can one husband and wife apply to the court for division of joint property. The behavior that one spouse donates a large amount of joint property of husband and wife to a third party due to extramarital affairs meets the behavior requirements of one spouse transferring, damaging or squandering the joint property of husband and wife in Article 1066. It is advisable to explain this clause with purposeful expansion, allowing the interests of the third party and the innocent husband and wife to be balanced by the system of property division within marriage when one spouse donates property to the third party. Divide the joint property of husband and wife donated by the donee, so that the third party can keep the property belonging to one donor, and partially return the property belonging to the other spouse after division in the donated property to the other spouse, so as to avoid the innocent spouse suffering disadvantages.

#### **4. CONCLUSION**

The gift behavior of one spouse involved in extramarital affairs is a hot issue widely existing in practice, and in judicial practice, judges often use the public order and good customs of civil law principles to settle disputes. The application of the principle of public order and good customs is conducive to the maintenance of marriage and family stability and the respect for the formation of social traditional moral customs, as well as the protection of husband and wife's family property interests. However, the greater discretion in the application of the principle of public order and good customs makes it difficult to reason and decide cases. Moreover, the gift of one spouse to the third party involves the interests of the three parties, and the situation is complicated in practice, so it is even more necessary to dismantle the complicated social facts into interlocking legal acts and legal issues for analysis and decision. In judging the validity of the gift contract, it is necessary not only to maintain the rigor of the application of the principle of public order and good customs, but also to carefully consider which elements affect the judgment of whether it violates the principle of public order and good customs and the judgment criteria of each element. When finally dealing with the issue of property return, it is necessary to correctly judge the current ownership relationship of the property based on whether the disposition has taken effect, so that the legal basis can be accurately invoked to protect the property of the innocent party; At the same time, we should also take into account the third party who may suffer serious damage to their interests, and use the system of joint property division of husband and wife in marriage to take into account the interests of the third party and the innocent husband and wife. In short, the gift of one husband and wife to a third party should be comprehensively dealt with according to the different circumstances of the case by making full use of the principles of public order and good customs, the system of unauthorized disposition and the system of joint property division between husband and wife, so as to fully protect the interests of all parties.

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