

# Jurisprudential Analysis of Applicant Subordination in the Declaratory Death System

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## ABSTRACT

The system of declaration of death leads to a series of changes in civil legal relations, such as the annihilation of marital relations and the creation of inheritance. China's civil code stipulates that can apply for the declaration of natural person's death for the interested party, but have the right to apply for the declaration of death of the order of the interested party is still debated in the academic community, the controversy lies in the applicant should have the order of the applicant. This paper analyzes the jurisprudence on whether the applicant for the declaration of death should have the right of precedence, and finds that the focus of the debate on the right of precedence is on the protection of property rights and interests or identity rights and interests, and finally proposes that the identity relationship of spouses be separated from the property relationship in the declaration of death, and that the declaration of disappearance be made as a pre-procedure of the declaration of death, in order to protect the legitimate interests of the interested parties.

## KEYWORDS

Declare Death; Interested Party; Apply in Order of Priority.

## 1. INTRODUCTION

In order to maintain social order and improve the efficiency of market transactions, China's laws provide for a system of declaration of disappearance and declaration of death for natural persons whose whereabouts have been unknown for a certain period of time. The system of declaration of disappearance refers to the system whereby a person whose whereabouts have been unknown for a certain period of time is declared missing by the people's court upon the application of an interested party. Article 40 of the Civil Code provides that: "If the whereabouts of a natural person have been unknown for two years, an interested party may apply to the people's court for the natural person to be declared missing." Declared missing shall have the following conditions: (1) the natural person's whereabouts must be unknown for two years; (2) the interested party must apply to the court; (3) it must be declared by the court according to the legal procedures, that is, to send out a notice of searching for the person whose whereabouts are unknown, and if there is still no news after the expiration of the notice period, the person shall be declared missing. The system of declaration of death, on the other hand, is a kind of mimetic death, which is different from natural death in which vital signs have ceased. The declaration of death is a legal system whereby a natural person who has left his or her residence and whose whereabouts are unknown reaches the legal deadline is declared dead by the people's court upon the application of an interested party. The biggest difference between the declaration of death and natural death is that the declaration of death is the death of legal fiction, the person who is declared dead may still be alive, still engaged in all kinds of civil activities in accordance with the law, and the civil legal acts carried out by him or her will still have legal effect. Article 46 of China's Civil Code provides that: "If a natural person's whereabouts have been unknown

for four years; if, as a result of an accident, the whereabouts have been unknown for two years, interested parties may apply to the court to have the natural person declared dead." [1].

The purpose of a declaration of disappearance is to maintain social stability for a short period of time and to alleviate the precariousness of the personal and property relations of a natural person whose whereabouts are unknown. For example, it creates an escrow relationship, whereby the escrow agent takes the place of the natural person whose whereabouts are unknown and settles his or her debts and liabilities. The declaration of death, on the other hand, is intended to bring the unstable personal and property relations of a natural person whose whereabouts have been unknown for a certain period of time to a timely conclusion.[2].

## **2. JURISPRUDENTIAL ANALYSIS WITH OR WITHOUT SUBROGATION**

In the development of China's civil law system, there has been considerable controversy in the academic community over the position of the applicant for a declaration of death. A natural person whose whereabouts are unknown for a certain period of time may be declared missing by the court in accordance with legal procedures only upon application to the people's court by an interested party[3]. That is to say, even if the natural person meets the other conditions for pronouncement of death, the court cannot pronounce the death of the natural person without the application of the interested party to the court for pronouncement of death. There are two schools of thought as to whether there should be a relationship of subordination among the interested parties in an application for a declaration of death: one view is that spouses, parents and children have priority in applying for a declaration of death, followed by non-related interested parties, emphasizing the protection of the personal rights and interests of the persons concerned. Another view is that there should be no relationship of precedence between subjects with an interest in the natural person whose death is being sought, and that every interested party has the same right to apply to the court for a declaration of death, which emphasizes the equality of subjects in the sense of civil law and focuses on the property interests of interested parties.

### **2.1. Applicants for Declarations of Death Should Be in Order - emphasis on Personal Interests**

Prior to the implementation of China's Civil Code, China's law stipulated that there should be a sequence of interested parties applying for a declaration of death. The Opinions on the General Principles of the Civil Law, which came into effect in 1987, stipulate that, "The sequence of interested parties applying for a declaration of death shall be: (i) spouses; (ii) parents and children; (iii) brothers and sisters, grandparents, grandchildren, grandchildren; (iv) other people with civil rights and obligations; (v) other people with civil rights and obligations. (iv) other persons who have a relationship of civil rights and obligations." [4]. According to the provisions of the law, it can be seen that before the introduction of the Civil Code, China has very clearly stipulated the order of application of interested persons, i.e., the spouse is in the first order of precedence, the parents and children are in the second order of precedence, the brothers and sisters, grandparents, grandchildren, grandchildren, and other persons with civil rights and obligations are in the third order of precedence. If the interested party in the first place does not apply to the court for a declaration of death, the person in the second place cannot apply to the People's Court.

It can be seen from the above provisions of the law that the first in the order of interested persons applying for a declaration of death are all related to the person declared dead, and according to the relationship of affinity, the spouse is in the first place, whereas the "other persons who have a relationship of rights and obligations" in the bottom clause do not necessarily have a relationship of affinity. This is a reflection of the fact that the emphasis on the priority of the interested party applying for a declaration of death is focused on the protection of the rights and interests of the person. The fact that spouses are ranked first in the list of applicants is mainly due to the fact that one of the legal

consequences of a declaration of death is the validity of the marriage[5]. The General Principles of Civil Law do not provide for the validity of a marriage after death has been declared, and Article 37 of the 1988 General Principles of Civil Law fills this gap by stating: "The marital relationship between a person declared dead and his or her spouse shall be extinguished as of the date of the declaration of death. If the declaration of death is revoked by the people's court and the spouse has not remarried, the conjugal relationship shall be restored on its own from the date of the revocation of the declaration of death; if the spouse remarries and then divorces, or if the spouse dies after the remarriage, the conjugal relationship shall not be deemed to have been restored on its own". First of all, it can be seen from the legislative provisions, China in this period emphasizes the spouse in the first place is to take into account that the declaration of death will lead to the end of the marital relationship between the person who was declared dead and his or her spouse; if there is no restriction in the order of precedence, other applicants who have kinship or who are not kinship to the people's court for the sake of the property interest to apply to the People's Court for the declaration of death, and the court also in accordance with the statutory procedures for the declaration, then the declared The marriage relationship between the deceased and his/her spouse is forced to end (because the spouse has not applied for the declaration of death, that is to say, his/her spouse still wants to continue to maintain the marriage), and this situation may lead to the impact of China's marriage law, which emphasizes the freedom of marriage, including the freedom to get married and the freedom to get divorced. Obviously, the provision of the applicant's subjugation in the system of declaration of death is based on the consistency with our marriage law, that is, to protect the freedom of marriage and the autonomy of marriage between the parties to a marriage.

Secondly, although the system of pronouncement of death is a legal system, it goes against traditional Chinese ethics (public order and morals) to a certain extent. According to China's ethical tradition, the death of a husband and wife does not directly lead to the division of family property, but in the absence of a subrogation, spouses, parents, children, creditors and other interested parties are anxious to inheritance and division of property or to deal with the relationship between debts and claims to the people's court to apply for a declaration of disappearance, which defeats the purpose of the system of declaration of death - - for a natural person whose whereabouts are unknown for a certain period of time to end their unstable personal and property relations in a timely manner, but instead of the original intention of the system. -For the whereabouts of the natural person for a certain period of time in a timely manner to end its unstable personal and property relations, but instead of causing conflicts of interest, resulting in more unstable legal relations. The State did not foresee that the system of declaration of death would be in conflict with traditional ethics, so the impact on traditional ethics should be taken into account while pursuing the legal effect. Emphasizing the applicant's position in the declaration of death, and according to the affinity of the spouse, parents, children in the first place is conducive to the stability of family relations, is the respect and recognition of traditional kinship relations. Moreover, the fact that the interested parties with kinship relationship are more hesitant to declare death also reflects that they are unwilling to break the stable family relationship (the declaration of death may involve the end of the marriage relationship, the right of one parent to decide to send the children alone). Therefore, from the above point of view, the existence of the applicant for a declaration of death is also a reflection of the pursuit of justice[6].

## **2.2. Emphasizing that Applicants for Declarations of Death Should Not Be Subrogated -- focusing on Property Interests**

After the implementation of China's Civil Code, in accordance with the principle of precedence of the new law over the old, the above-mentioned Opinions on the General Principles of the Civil Law have been repealed and have become obsolete, so its provisions on the precedence of the pronouncement of death have also become obsolete. Whether there is a precedence in the system of declaration of death needs to be further considered. The Civil Code does not directly regulate the order of interested parties. Article 1 of the Proceedings of the Working Conference on the

Implementation of the Civil Code by the National Courts mentions that "interested parties who apply for a declaration of disappearance or death include the spouse, parents, children, siblings, grandparents, grandchildren, and any other civil subject who has a relationship of civil rights and obligations with the person whose death has been declared in the application for a declaration." The order of interested parties is not specified here. And after the implementation of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the General Part of the Civil Code of the People's Republic of China (i.e., from March 1, 2022), Article 16: "When the People's Court hears a case of declaration of death, the respondent's spouse, parents, and children, as well as the relatives who have the right of inheritance over the respondent according to the provisions of Article 1129 of the Civil Code shall be recognized as interested persons under Article 46 of the Civil Code." Other close relatives of the respondent, as well as relatives who have the right to inherit from the respondent in accordance with Article 1128 of the Civil Code, shall be recognized as interested persons under Article 46 of the Civil Code if one of the following circumstances applies: (1) the spouse, parents, or children of the respondent are dead or their whereabouts are unknown; (2) the legal rights and interests of the respondent cannot be protected without applying for a declaration of death. The creditors, debtors, partners and other civil entities of the respondent cannot be recognized as interested parties under Article 46 of the Civil Code, except for those whose legitimate rights and interests cannot be protected without applying for a declaration of death[7]. It can be seen here that the Civil Code actually focuses on emphasizing the absence of subrogation, while also taking into account the legal effects of subrogation.

The lack of a strict limitation on the applicant's rank in the Civil Code's provision on the declaration of death is justified by the following:

First of all, traditional Chinese ethics need to be harmonized with social development. Although China has traditionally attached great importance to family ethics, it believes that the family is the foundation of society. Therefore, the closest relationship with a natural person whose whereabouts are unknown is, of course, his or her spouse, and there is nothing wrong with putting the spouse in first place when there is a precedence. With the development of society, the public's awareness of the law, the distinction between the property of family members is becoming clearer, such as the distinction between premarital and post-marital property before the marriage of husband and wife, the distinction between the common property of husband and wife and personal property after the marriage of husband and wife, as well as more and more detailed provisions of the law relating to inheritance, which reflect the gradual rationalization of China's traditional concept of family property. If, according to the argument of subrogation, a spouse maliciously fails to apply for a declaration of death in order to continue to possess the joint property of the couple, the rights of other heirs or other rights and interests of those who have a civil relationship with the person who has been declared dead may be jeopardized. Moreover, in today's society of the rule of law, as people's awareness of the rule of law and rights has been raised, claiming one's inheritance rights in accordance with the law does not touch the bottom line of morality, but rather promotes citizens' awareness of the rule of law.

Secondly, China's civil law is categorized as private law, which regulates personal and property relations between equal subjects, and private law has a very important feature: the subjects involved in civil activities are equal in legal status[8]. That is to say, since the provisions of the system of declaration of death belongs to the content of the civil law, then apply for the declaration of death of the interested party in the law should also belong to the status of equality, each interested party's right to apply for the declaration of death are equal, there is no order of priority, and should not be in order to protect the interests of the interests of the person who was declared dead, and the interest of the interested party of the debt relationship to be placed in the kinship relationship. The interests of those who are in a debt-credit relationship should not be placed after those of those who are in a kinship relationship in order to protect the interests of the declared dead. From the perspective of the result of the declaration of death, whether creditors, debtors, parents, children and other interested parties make an application for the declaration of death, the result of the declaration of death is the same, and

all of them are in accordance with the relevant provisions of the Civil Law for the disposal of property, such as inheritance, the management of the settlement of debts and claims, and so on. With regard to the provisions on precedence, if the person in the first position fails to apply, and the applicant in the second position is unable to do so, this may lead to a crisis in which the interested party faces a loss of property, which may not be in line with the original intent of the legislation on the system of pronouncement of death (to maintain social stability), but rather result in the destabilization of social relations, and at the same time contravene the principle of fairness of the civil law.

Finally, there is a parity is more likely to lead to the abuse of the right to apply. 2014, Wang's whereabouts due to go out to work is unknown for four years, during this period, his spouse cohabited with another person, living externally in the name of husband and wife, and Wang's spouse wants to monopolize his inheritance, so he has not been to the court to apply for a declaration of death, and Wang's parents in order to protect their relevant inheritance, so they filed an application for a declaration of death to the court, and finally the court found that In this case, the court ruled that the application was inadmissible[9]. In this case, the court ruled inadmissible is based on the legal provisions at the time, the first person did not apply, the next in line is not entitled to apply, even if the applicant in line with the latter based on the defense of their legitimate rights and interests, but also not the court's support. Thus, the existence of a line of succession undoubtedly breeds abuse of the right of the first-named heir to apply, which in turn leads to damage to the rights and interests of other interested parties.

### **3. IMPROVEMENTS IN THE SYSTEM OF DECLARATION OF DEATH**

The original purpose of the legislation of the system of declaration of death is to maintain the stability of social relations, specifically, to protect the rights and interests of the interested parties who have legal relations with the person declared dead, the applicant for the declaration of death with or without *pari passu* relationship is to protect the relevant rights and interests of the interested parties, only that they emphasize the protection of the interested parties with different emphasis. As mentioned earlier, with the subrogation emphasizes the protection of personal rights and interests, while without the subrogation emphasizes the protection of property rights and interests. Both in the nature of the protection of rights and interests belong to the protection of the rights and interests of interested parties, and lead to academic controversy on the presence or absence of subrogation from the legal consequences of the declaration of death involves the property rights and interests and identity rights and interests, thus forming the "two opposites". This paper is of the view that: with or without the subrogation has its own existence of legal reasoning, for the future improvement of the system of declaration of death should be towards the combination of with or without the subrogation, so as to better mediate the rights and interests of the interested parties.

#### **3.1. Separation of Property and Status Interests of Spouses**

From the above analysis, it can be seen that the spouse's interest is most closely linked to the declared dead person, not only in terms of property, but also, more importantly, in terms of status. The spouse is in the first position in the declaration of death with the right of succession, if the spouse is unwilling to initiate the declaration of death on the basis of the breakup of the relationship with the declared person, but if the spouse wants to take exclusive possession of the declared person's property, this will result in the rights and interests of the following interested parties being jeopardized[10]. On the other hand, the spouse in the declaration of death without the subrogation, if the spouse and the declared dead person of deep affection, unwilling to give up years of conjugal love, but based on the other interested party's application for the declaration of death, then the spouse "passive widow (husband)", which seems to be in contradiction with the freedom of marriage, and does not respect the person concerned that the spouse's will, but passively become a widow (husband). The spouse's will is not respected and he or she is passively widowed.

Therefore, in order to resolve these two contradictions, separate provisions for spouses in a special position is the best way to get the best of both worlds. Specifically, in the first case, if the other interested party applies for a declaration of death, and the spouse does not make such a declaration, the disposition of property such as inheritance, settlement of debts, etc., is carried out in accordance with the relevant provisions, while additional provisions are made as to whether or not the spouse decides to terminate the marital relationship. If the spouse wishes to continue the marriage, he or she must apply individually, and if he or she fails to do so, the marriage is deemed to have ended. In the second case, if the application for the declaration of death is made directly by the spouse, it is governed directly by the provisions of the law on status and property relations, i.e., the spouse's initiative in applying for the declaration of death indicates the end of the marital relationship, the beginning of the inheritance, and the settlement of the debt claim, among other things.

### **3.2. Providing for a Pre-procedure for the Declaration of Death - the Declaration of Disappearance**

As noted earlier, the point of contention with regard to the declaration of death is whether the focus is on the protection of personal or property interests. In the case of property rights and interests, the risk of damage to the rights and interests of debtors is greatest under the rules of subrogation, and property-related stakeholders can withdraw from the legal relationship of a declaration of death as long as their debts and claims are settled, which is where a declaration of disappearance comes into play. The legal consequence of a declaration of disappearance is the creation of an escrow agent, who, in his capacity as custodian of the property and as his agent, can naturally manage the general debts of the declared disappeared natural person. Therefore, if the declaration of disappearance is made a precursor to the declaration of death, then an escrow agent will be able to solve the general debt problem of a natural person whose whereabouts are unknown. Issues relating to identity rights and interests would be resolved by a declaration of death, and since the legal time for filing a declaration of disappearance is shorter than that for filing a declaration of death, the interested party may be able to minimize certain property losses by filing a declaration of disappearance earlier.

## **4. CONCLUSION**

The question of the primacy of the applicant for a declaration of death has always been a matter of controversy in the academic world. Regardless of whether it is with or without subordination, both points of view have certain jurisprudence, one focusing on the protection of identity rights and interests, and the other focusing on the protection of property rights and interests. In fact, the two points of view have the same purpose, which is to protect the rights and interests of the interested parties. Therefore, this paper puts forward two immature ideas to balance the identity rights and interests protected by the declaration of death and property rights and interests, the first is to separate the property rights and interests of spouses and identity rights and interests, and the second is to provide for the declaration of disappearance as a declaration of death as a pre-procedure. Finally, it is hoped that China's system for the declaration of death will become more and more perfect.

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