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# Empirical Research on the Protection of the Residential Rights of the Elderly in Judicial Practice

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## Abstract

The establishment of the right of residence in the Civil Code aims to meet the living and residential needs of the right holders, ensuring housing security for specific vulnerable groups, including the elderly, and maintaining social stability. However, in judicial practice, there are still some challenges concerning the establishment methods, rights and obligations, grounds for termination, and applicable conditions of the right of residence. These issues prevent the full protection of elderly individuals' residential rights and the realization of the legislative intent. To address these problems, it is necessary to further clarify the conditions for establishing the right of residence, balance legal provisions with public order and morality, uphold a unified standard in judicial adjudication, and clearly define the boundaries of the rights and obligations of the right holders to provide robust housing security for the elderly.

**Keywords:** Civil code; Right of residence; Empirical research; Protection of the rights and interests of the elderly

The right of residence is a new usufructuary right added to the Civil Code of the People's Republic of China (hereinafter referred to as the Civil Code), which was officially implemented on January 1, 2021. It especially provides legal support in the family fields such as the stability of the elderly in their later age, to meet the living needs of specific people. Before the promulgation of the Civil Code, the right of residence was not clearly stipulated in the law, but it was widely

used in the civil judicial practice, and even common in the judicial judgment. At present, there are only six provisions on the right of residence in the Civil Code, and it remains to be considered whether to reduce the disputes in practice due to the establishment of the system from scratch.

This paper will to the elderly the residence for the special group perspective, widely use of historical analysis, empirical analysis and comparative analysis method involving "the elderly" and "residence" case retrieval, summary, classification, clarify the case in common ground, summarizes the case of specific problems in practice, in view of the difficulties encountered in practice, put forward feasible and effective solution path.

## **1|The Civil Code establishes the theoretical and practical basis of the right of residence**

### **1.1|Theoretical basis for the establishment of the right of residence**

The concept of the right of residence first appeared in the marriage and family relationship in the Roman era. It is a result of the institutional evolution of family ethics, which is closely related to the marriage relationship and property inheritance. It is also a kind of human service right established in the ancient Roman times to obtain support in order to ensure that people who have no inheritance right and lose the ability to work.<sup>i</sup>

The most important embodiment of this system is in the inheritance of family property. The Roman law adopted the general inheritance system, and the establishment of a will was the most ceremonial way of property inheritance at that time. In the traditional custom of Roman society, parents will choose one of their children in the form of will before death, and the heir will inherit all their property. However, to protect the other children the most basic living conditions, provide the most basic material protection, parents will also by bequest, part of the property to other family members, given the housing residence is one of the bequest, gift object is often no inheritance of unmarried woman and widow, but even if the housing of the gift, the ownership

of the property, after the death of the donor heir will have complete ownership of the house.

After the Roman law, other countries in the continental law system inherited the right of residence system and incorporated it into the written codes of various countries, among which the typical representatives were the French Civil Code and the German Civil Code. While inheriting the traditional concept of the right of residence, the two codes made breakthroughs and expanded, gradually breaking through the limitation of "human service", and the characteristics of "use benefit" became more prominent.

It is on this basis that the establishment of the right of residence presents strong practical characteristics. According to article 366 of the Civil Code, "the right of residence has the right to enjoy the usufructuary right of other people's residence in accordance with the contract to meet the needs of living". It can be seen that China essentially defines the right of residence as usufructuary right, which extends the function of the right of residence from a single guarantee to investment, and greatly improves the feasibility of "house for the aged", which is conducive to the comprehensive protection of the rights and interests of the elderly.

## **1.2|The practical background of the establishment of the right of residence**

Since China entered the aging society in 1999, the scale of the elderly population is increasingly large and the degree of aging is deepening. According to the forecast of the National Bureau of Statistics, by 2025, the elderly population over 65 years old will exceed 210 million, accounting for about 15% of the total national population. It is urgent to enhance and increase the attention and protection of the rights and interests of the elderly.

Although in 1996, China issued the Law on the Protection of the Rights and Interests of the Elderly, which clearly stipulated in article 16: "The supporting persons shall properly arrange the housing of the elderly, and shall not allow the elderly to be forced to live or move to the houses

with poor conditions. Children or other relatives shall not occupy the housing owned by the elderly or rented by the elderly, and shall not change the property right relationship or lease relationship without authorization."However, the provision is only based on the children's obligation to support their parents, which belongs to the category of creditor's right, and does not have the effect against the real right, nor can it fight against the third party.

With the development of social economy, the complex evolution of market economy, in 2021, before the civil code, the rights and interests of the elderly present more complex expression, the subject is more diverse, related cases is common, but because of the lack of residence against rights of legal support, against a third person or property right, residency often is relatively fragile. The author found through data retrieval, 2021 years ago in 1510 cases, with the law of the rights and interests of the People's Republic of China on the protection of the elderly as a legal basis for the number of cases, up to 477 pieces, applicable "contract law" marriage law and the property law of the ruling number of cases accounted for about 1 / 5 respectively, the law in handling residential disputes. For example, children without the permission of the elderly, unauthorized house and complete the house ownership transfer registration, in the creditor's rights can not fight the real right, forced the elderly had to move out of the house, displaced.<sup>1</sup> In the "case of property right protection dispute between Liu Jing and Tan Shu and Tan Xingyuan", the defendants Tan Xingyuan and Chen Xiufen were both in their 90 years old. Their daughter Tan Yi privately changed the house to her own name and sold the house. As the third person, the plaintiff bought the house and asked Tan Xingyuan and Chen Xiufen to move out of the house. The court only rejected the lawsuit on the grounds that the housing rights and interests involved in the case should be filed separately, which obviously could not protect the living rights and interests of the parties.

It is precisely because of the above situations, which pose a substantial threat to the residential

rights and interests of the elderly, enhance the protection of the right of residence, and give them the attribute of real right, which are the practical problems that need to be solved in the revision of the Civil Code.

## **2|The Civil Code stipulates the application of the right of residence in practice**

### **2.1|The application of the existing laws in the settlement of disputes over the right of residence**

The experience of the right of residence from the Property Law (draft) (draft) to the Civil Code is to raise the rules of the concept of private law in judicial practice to the standard of civil law, and is a confirmation of the specific judicial practice.<sup>ii</sup>

The author took "elderly" and "right of residence" as the key search, the time was limited to January 1,2021, April 27,2023, filtered out the cases with low correlation, and obtained a total of 244 legal documents. Based on this as a sample, the judicial practice of the right of residence of the elderly after the Civil Code was further analyzed. Among the 244 cases concerning the right of residence of the elderly, the following six cases are maintenance disputes (67); inheritance disputes (46); joint disputes (44); property disputes (39); nuisance exclusion disputes (30); and residence disputes (18). It is worth noting that there were 18 cases before the right of residency in the Civil Code. The main applicable laws of other cases are the Law of the People's Republic of China. These data show that if the right of residence between the parties is agreed through contract agreement, the judge can interpret the right of residence as a right in the sense of real right, but can directly make a judgment in accordance with the relevant provisions of Article 366 to Article 371 of the Civil Code. Moreover, the most important thing is that judges can no longer only judge on principled terms such as public order and good customs, but can really make decisions on a specific legal basis, so as to make their judgment reasons more convincing.

### **3|The right of residence into the "civil Code" in the judicial application of the new dilemma**

Although the inclusion of the right of residence in the Civil Code has brought certain legal basis and basis to the practice of the judicial line, and brought convenience and credibility to the judicial practice to a certain extent, it is still huge for the accurate application of legal provisions and the clever connection between theory and practice. As a brand new usufructuary right system established since 2021, the right of residence will encounter new obstacles in the actual judicial application. First, although the Civil Code clearly states the right of residence as a usufructuary right, it only provides six provisions, most of which are broad principle provisions, so that it fails to fully play its due role in the judgment; second, the situation of practical improvement in judicial practice is only based on the premise between the parties, and the common provisions of the legal residence in judicial practice, which also leads to some difficulties that the provisions of the Civil Code fail to solve.

#### **3.1|The standards for establishing the right of residence are not uniform**

According to Article 366 to 368 of the Civil Code, a contract of residence; it may also establish the right of residence for another person by will. Where the right of residence is established, it shall apply to the registration authority for the registration of the right of residence, and the right of residence shall be established at the time of registration. The parties may agree on the duration of the right of residence; in the absence, if the person dies, the right of residence shall be extinguished.

23In judicial practice, some judges do not adopt the effective doctrine, believing that although the two sides have not registered, they still confirm that their right of residence has been

established. For instance, in the case of "alimony dispute between the plaintiff Yin and the defendant Xu 1, Xu 2, Xu 3 and Xu Ruiling", the judge according to Xu 3 issued "this room is built by parents, now, though the house is in my name, but the old mother is always qualified to live." Permitted the plaintiff to ask the defendant Xu 3 to provide two north and south transparent housing for the plaintiff Yin and the nanny living request, even without residency registration, however, the right of residence has not been established; in the case of "The dispute with the appellee Ge Yunlei", the judge held that, although the right of residence involved is not registered, however, the agreement between the two parties on the right of residence is binding. To maintain the judgment supporting the effective right of residence, the interests are properly balanced, in line with the principles of good faith and public order and good customs. In these two cases, the right of residence was not registered, but the request for the effectiveness of the right of residence was still recognized by the judge, and the establishment of the right of residence was successful. The judge determines that the residence right contract of both parties is established, and thus determines that one party has the right of residence. At this time, the right of residence is a kind of creditor's right established based on the contract, and it is not a creditor's right with usufructuary right as stipulated in the Civil Code.<sup>4</sup> Before the right of residence was included in the Civil Code, the judge could only use the discretion of the judge to judge, but now the right of residence has been clearly stipulated in the Civil Code that the judge can judge according to the specific legal provisions. When the judge applies to the registration of the right of residence, it actually transcends the formal requirements of the registration and directly determines the effective establishment of the right of residence.

### **3.2 | The parties and judges favor the traditional path**

In the case database of the judgment after the promulgation of the Civil Code, although 18 cases were explicitly "residence dispute", but accounting for less than 10% of the total residential

cases for the elderly, And the maintenance disputes, succession dispute, Shared disputes all account for more than 18% of the total proportion, In particular, It accounts for nearly 30%, Including "Guan 1 and defendant Guan 2, Guan 3, Guan 4 support dispute case", "plaintiff Zhou 1 and defendant Zhou 2, Zhou 3, Zhou 4 support dispute case", "plaintiff Wu, Wang 1 and defendant Wang 2, Wang 3, Wang 4 support dispute case" a total of 67 cases, Belongs to the majority of the residential right cases of the elderly.<sup>567</sup>

Since the parties are elderly groups, they generally believe that the residence belongs to the category of child support; Secondly, as a new system in the Civil Code, the system is not well accepted and applied. On the basis of the above two points, the parties mainly the elderly who are not familiar with the legal knowledge obviously lack a lawsuit on the grounds of "dispute over the right of residence", and the parties prefer the traditional path to solve the problem related to the right of residence. In 2020 cases in 2021, according to the Supreme People's Court on the civil code of the People's Republic of China> time effectiveness of the provisions of article 2, part of the case does not apply to the civil code of the relevant provisions of the residence system, and the protection of the law of the People's Republic of China on the relevant provisions. Since the intended right of residence in the Civil Code needs to be based on the agreed meaning of the parties, the prescribed legal right of residence is the right of residence based on the legal obligations, such as the obligation of upbringing, support and assistance, etc. The provisions on the right of residence of the elderly cannot fight against the third party, and the legal right of residence is weak. Only the Civil Code stipulates the relevant provisions of the right of residence according to the right of residence based on the will. In fact, it is necessary to rely on the judge to use the interpretation method in the judicial judgment to be further specific and perfect.

Similarly, when the author sorted out the reasons for judges' judgments on the right of residence after the promulgation of the Civil Code, I found that although 18 judgments were made by judges based on the relevant provisions of the right of residence in the Civil Code, the judgment ideas adopted by judges were not much different from before the right of residence was included in the Civil Code. For example, in the case of the dispute between the plaintiff Chen Chen and the defendants Feng Aixiang, Ma, Gao Peng and Gao ", the judge made a judgment to support the elderly to enjoy the right of residence based on public order and good customs and the most basic socialist core values.<sup>8</sup>

Stand in the point of view of the parties, because residence just into the civil code soon, the parties in a short time to accept residency contract to register for effective requirement is not realistic, plus established both form requirements, and substantial requirements, and a relatively strict conditions, so most of the parties can only take more traditional cause of action. From the point of view of the court, the court can not exceed the scope of the party's lawsuit request. If the parties do not Sue with "the right of residence is infringed", plus the parties do not have the relevant contract, the court can not apply the law on the right of residence. All these are the reasons why the parties and the judge tend to take the traditional path to solve the dispute of the residence right.

## **4 | We will strengthen legal exploration to protect the right of residence of the elderly**

### **4.1 | Adhere to the unified standards for the establishment and recognition of the right of residence**

According to articles 367 and 368 of the Civil Code, the establishment of the right of residence shall be made in writing and the registration of the right of residence shall be completed. However, it should be noted that in judicial practice, signing in writing usually contains two

situations, namely, by contract and by will. If the contract is established through the contract, there may be other terms or terms attached at the time when the contract is signed. At this time, it is necessary to determine the validity of the right of residence in the contract according to the content of the contract. For example, if the effective conditions or termination conditions are attached to the contract, the generation and elimination time of the right of residence cannot be judged solely by the registration time. If it is established by a will, according to article 230 of the Civil Code: " If a real right is acquired due to inheritance, it shall take effect from the beginning of inheritance."Based on this point of view, registration, is no longer the condition of the will to establish the right of residence, the will takes effect, the right of residence is naturally established naturally.

Therefore, in the judicial practice is changeable, the judge need to adhere to the written conclusion and registration principle, on the basis of the specific analysis, grasp the residence conditions and time, on the basis of respecting the parties mean autonomy, in strict accordance with the relevant provisions of the civil code of the referee, avoid deep different judicial loopholes, enhance the persuasion and conviction of the referee case.

In addition to the above two cases, the establishment of the right of residence through the court judgment has also been on the rise in recent years. There are some disputes in the academic circle about whether the establishment of the residence right by judgment by the court violates the principle of legal real right. After the promulgation of the Civil Code, the interpretation book of the Legislative Working Committee of the National People's Congress only affirmed the coercion of the type and the content of real right, and most scholars also support this view. Therefore, the compulsion of the legal principle of real right is limited to the type of real right and the content of real right, and does not include the compulsion of the establishment mode. The way of establishment of real right refers to the factual act of registration of real estate or

delivery of movable property, and the "contract", "will" and "judgment method" mentioned in the previous article belong to the reasons for the establishment of the right of residence, and are not within the scope of the "way of establishment". In other words, no matter whether the principle of legal real right contains the coercion of the establishment method, the act of the court to establish the right of residence by means of judgment does not violate the principle of legal real right. In addition, according to article 229 of the Civil Code, the act of allowing the court to establish the right of residence by way of judgment belongs to the change of real right caused by the effective legal documents of the court, which provides a legal basis for the establishment of the right of residence. To sum up, it is legitimate for the court to establish the right of residence by judgment.

In judicial practice, to the court decided to set up residency generally applies to the following two situations: one is, couples divorce, both sides live together residence belongs to one premarital property or because of the previous agreed property system respectively only belong to one party, in order to ensure the basic living needs of no residential party, the court can, according to the request of no residential party, the party to enjoy part or all of the residence. Another situation is, the house involved is shared by both parties, in the division of the house, the ownership, and the other party to enjoy part or all of the right of residence in the house. The second kind of situation often occurs when the people's court hears the cases related to the support and support disputes, the court may set the right of residence for the support persons or the dependents. The obligation of the support and dependency obligor is not limited to the payment of alimony or alimony, but is also to provide housing for the dependant or dependents to ensure that he has domicile.

Need further clear, however, the referee residence in the written judgment, not registered as the effective standard, therefore, the referee residence only valid between the dispute, not against the

effectiveness of the third person, only in the minority cases of the elderly residential rights protection of creditor's rights sense. Once the elderly are ordered to enjoy the right of residence, the other party can dispose of their property, but it must ensure that the elderly are not displaced. To sum up, in the judicial trial should adhere to the unified establishment and judgment standards, implement the mode of various modes of residence, take into account the right of residence, the legal right of residence and the right of residence, based on the right of residence and the legal right of residence, with the right of residence as the guarantee.

#### **4.2| Clarifying the boundaries of the rights and obligations of the resident holder**

First of all, the right of residence is originally established to meet the basic housing and survival needs of the elderly, rather than to obtain income. Therefore, for the use of the residential also cannot break through the daily life necessary this precondition, the elderly as the right to use the residential ancillary facilities, such as elevator, air conditioning, toilets and other facilities are necessary for daily life, but beyond the needs of daily life of any natural fruits, should belong to the residential owners rather than living. Second, about the scope of the residential sovereignty, in real life to endowment as the basic needs of the elderly, enjoy property services, use of public facilities, but if the owners assembly discussion decision involves the housing reconstruction, relocation or major repairs to the house, the rights should be enjoyed by the ownership and exercise.

Although the Civil Code does not clearly stipulate the rights and obligations between the parties to the right of residence, the author of the right of residence should assume the obligation to properly manage the residence. Whether it is to protect the expected income of the owner, or due to the need of long-term residence, the resident right of course bears the responsibility for the daily proper management of the residence.

In addition, the residence right person should undertake reasonable use to the residence according to the agreement with the owner person, must not change the original use of the residence without authorization. at the same time, The resident holder shall assume the obligation of daily maintenance and repair of the house, Failure to fulfill the relevant obligations or damage or loss of the subject matter due to improper custody of the resident person, Then the resident shall bear the corresponding compensation liability to the owner of the house, yet, The author believes that for the elderly who aim to guarantee the basic needs of life, It should not be too harsh, To increase its burden, The relevant maintenance obligations and costs to be maintained within reasonable limits, For the depreciation of the house caused by the natural aging and loss of the house, The right of residence shall not be liable for compensation, The responsibility of the owner.◦

Based on the fact that the Civil Code does not specify the specific scope of rights and obligations of the resident, according to the principle of consistency between rights and obligations and the provisions on the effectiveness of the right of residence, the rights and obligations of the resident can be further clarified and refined, so as to better protect the residential rights and interests of the elderly.

## **5 | Conclusions**

Residency as a newly established system of the civil code, is the focus of people's extensive attention, to solve the current and the future of the elderly aging society rights problems, to safeguard the housing interests of vulnerable groups, broaden the use of housing form is of great significance, but also to meet the "old, old" people look forward to the important measures.

Although the right of residence, as an "imported system", is not thorough and mature enough in the domestic academic circle, there are only 6 provisions in the Civil Code, and the system provisions are relatively simple and imperfect, which leaves scholars with different

understandings of some provisions and contradictory views.

However, on the whole, the current legal system design is more flexible, which gives it the adjustment space to adapt to the practice. Based on the retrieved data, the author conducts statistical and cause analysis on the difficulties in the current practice, and puts forward the solution idea of setting unified standards and clarifying the boundary of rights and obligations. Due to the limitations of technical reasons and academic level, some views may not be perfect and the analysis is not in-depth, but it is believed that with the deepening of judicial practice and theoretical research, China's legal system will become more and more perfect, higher to meet the people's life expectations, and better protect the legitimate rights and interests of the people.

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