the court in the current case dismissed the claim and such can be termed as too rigid.

By Prof. TERUAKI TAYAMA
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3. Family Law

1. Validity of the adoption in contravention of provisions on joint adoption by husband and wife.

Decision by the Second Petty Bench of the Supreme Court, on Apr. 24. *Jokoku* appeal dismissed. (Case No. (*o*) 1133 of 1980. 442 *Hanrei Taimuzu* 97. 1003 *Hanrei Jihō* 94.)

[Facts]

A man A married his wife X in 1936 (plaintiff, appellee and *Jokoku* appellee) and lived with her and her child (his step child) until 1974 when he separated from X and lived with a couple Y_1 and Y_2 (defendants, appellants and *Jokoku* appellants). As he had already given his resources (a housing lot and stocks) to X and her step-child as a gift, A wanted to adopt Y_1 et al. to help them acquire his agricultural land as a means of appreciation.

In compliance with the intention of A, Y_1 submitted to the city office a notification to make A an adoptive parent and Y_1 and Y_2 adoptees, and another notification to make A an adoptive parent and a couple Y_3 (man) and Y_4 (wife), who was born to Y_1 and Y_2, as adoptees. The two notifications were not accepted, however for lack of a signature and X's seals.

On Aug. 5, 1975, Y_1 submitted the two notifications mentioned above by writing in X's name and affixing her seals without her consent and they were accepted by the city office. A month-and-a-half later, A died, thereupon X filed suit against Y_1 and Y_2 as well as Y_3 and Y_4 contending that the adoptions in the current

case were invalid because they contravened the Civil Code Article 795, and claimed an affirmation of nullity of the adoptions.

The judgment of the first instance (the Sendai District Court) accepted the claim of X in toto. In the second instance, the Sendai High Court dismissed the action for affirmation of nullity of adoption between A and Y_1 but allowed the other claims of X to stand for the following reasons:

"If notification of joint adoption by husband and wife lacks the intention of the other spouse, the adoption is void as a matter of principle as for the spouse who has such intention to adopt. However, this does not preclude interpreting that only adoption between the spouse with no intention to adopt and the other party concerned is void, while adoption between the other spouse with the intention to adopt and the other party is valid when 'special circumstances' that are recognized as not running counter to the spirit of Civil Code Article 795 exist. In the current case, however, it was rather difficult to say that there existed 'special circumstances' making the adoption between A and Y_2, Y_3 and Y_4 valid, and there was nothing else but to conclude that the adoption in question was void."

Because of this, Y_2, Y_3 and Y_4 filed a *Jokoku* appeal.

[Opinions of the Court]

"When a notification of joint adoption by husband and wife was made, if one of the spouses has no intention to adopt, the adoption concerning the other spouse with the intention to adopt is void as a matter of principle.

"But, when there are "special circumstances" in which the establishment of a separate parent-child relationship between the other spouse and the party to the adoption does not run counter to the tenor of Civil Code Article 795, one cannot preclude interpreting that the adoption concerning the spouse with no intention to adopt alone shall be termed void and the adoption between the other spouse with the intention to adopt and the party to the adoption is valid. (Decision by the First Petty Bench of the Supreme Court, on Apr. 12, 1973. 27 *Minshū* 500.)

"The Judgment of the lower court can be considered proper in stating that because the facts were lawfully found by the lower court, there existed no "special circumstances" that made the adoption between decedent A and *Jokoku* appellants Y_2, Y_3 and Y_4 valid.

"Thereupon, the contention couched in the decision of the lower court is not unlawful and the contention presupposing such unlawfulness and terming it unconstitutional is devoid of merits. The tenor of such an argument cannot be accepted."

[Comment]

1. The Civil Code Article 795, states that a person who has a spouse may not effect adoption unless jointly with the spouse. This is the principle of joint adoption by husband and wife. In a joint adoption, a couple may become adoptive parents or adoptees.

The bone of contention in the current case was the validity of the adoption when one of the spouses had no intention to adopt and the other made and adoption under the joint name of husband and wife without the consent of the former. In other words, attention was focussed on whether or not the adoption which violated the provision concerning joint adoption by husband and wife was void in toto, including adoption by the party who has the intention to adopt, and whether or not the adoption should be termed void only as for the party who has no intention to adopt, and the separate adoption by the party who has the intention should be made valid.

The current decision is worthy of attention in that while following the position of a 1973 decision by the Supreme Court on joint adoption by husband and wife, it clarified the concrete content of "special circumstances" illustrated as an abstract standard in the earlier instance.

2. Incidentally, the 1973 decision quoted in the current opinion of the court was epochal in the following points.

In the first place, judicial precedents in the past contended that in the case of joint adoption by husband and wife, the "adoption" relationship is materialized en bloc not as an individual separate

adoption by the husband and wife. (Decision by the Joint Bench, the former Supreme Court, in 1923. 2163 *Shimbun* 8.) It was held that any adoption in want of intention to adopt by either of the spouses is completely void. (Decision by Daishin-in, on May 18, 1929. 8 *Dai-han Minshū* 494.)

Against such a background, the 1973 decision altered those precedents and held that since adoption is a juristic act among individuals, the parent-child relationship can be established individually by husband and wife in the case of joint adoption. Thus, the decision adopted the individual adoption theory.

Secondly, contending that the system of the adoption by husband and wife is projected to maintain the mutual interest of the couple, peace within the family, and welfare of the adopted child, it held that the adoption involving the spouse with the intention to adopt and the party to the adoption can be considered particularly valid so long as there exist "special circumstances" which do not run counter to the tenor of the joint adoption, while adding that if one of the spouses has no intention to adopt, the adoption between the other spouse who has the intention to adopt and the party to the adoption is void as a matter of principle.

In particular, it listed concrete standards of judgment concerning "special circumstances." They were: 1) There should be an intention to establish a parent-child relationship even individually, on the part of the spouse who has the intention to adopt and the other party. 2) Such individual arrangement of adoption should not damage the interest of the other spouse against the latter's will. 3) Peace within the family of the adoptive parent should not be disturbed. 4) The welfare of the adopted child should not be hampered.

Thus, the 1973 case dealing with the structural theory of joint adoption by husband and wife accepted the principle of individuality of the adoption, and admitted that in certain cases even adoption without the intention to adopt on the part of one of the spouses can be valid in relation to the other spouse who has the intention to adopt.

Although the current decision adopted the basic stand of the 1973 decision, it held that there were no "special circumstances"

that made the adoption by the party with the intention to adopt effective, on the ground that because decedent A suddenly separated from his wife X with whom he had lived for many years and lived with Y_1 et al., the other party to the adoption, there occurred a dispute between the families of X and Y_1 et al, and that the decrease in the shares of X's children in succession as a result of the adoption ran counter to X's will, and that there was a possibility of disrupting peace in X's family and that of Y_1 et al.

In the 1973 case, one of the spouses tacitly acknowledged the adoption by the other spouse, and that the couple's marriage had been completely broken down for more than 10 years when the adoption was notified. As the background was thus different from that of the current case, the conclusion was also different.

3. The requirements calling for joint nature in a joint adoption by a husband and wife are today based on tranquillity in the family, peace between the husband and wife, and welfare of the adopted child, but, originally, it was simply the product of the old law based on the then patriarchy family system.

Accordingly, under the present legal system based on individualism, it is next to impossible to strictly maintain the requirement of joint adoption. On the other hand, one cannot say for sure that there is no rationality in demanding joint adoption in the case of a couple. Especially when the adoptee is a minor it is absolutely necessary to maintain peace within the family and bring up the adopted child by the cooperative efforts of the adoptive parents, and joint action in adoption is strongly required in the interest of the child.

It is hoped that the "special circumstances" will be further clarified in concrete terms in future judicial precedents on the basis of the fundamental points above.

2. The forging and alteration of a will and disqualification from succession.

Decision by the Second Petty Bench, the Supreme Court, on Apr. 3. *Jokoku* appeal dismissed. (Case No. (*o*) 596 of 1980. 444

Hanrei Taimuzu 74. 35 *Minshū* 43. 1006 *Hanrei Jihō* 46.)

[Facts]

The testator A died on Apr. 22, 1974, leaving his will in the form of a notarial document dated May, 1973. On the day following his death, his wife X1 (plaintiff, appellee and *Jokoku* appellee) discovered another will in the form of a holographic document dated Apr. 6, 1974, to the effect that the above will should be changed. No seal, however, was affixed under his name on this holographic will. Nor were there any impressions of corrections or tallying.

The wife then affixed A's seals at the necessary places to make it look a valid and completely formal will and submitted it to the family court for probate, thus completing the probate procedures.

In relation to Y, one of the co-successors born to A and A's former wife, (defendant, appellant and *Jokoku* appellant), the holographic will was found to be disadvantageous to X1 and X2, her child born to her and her deceased husband A (plaintiff, appellee and *Jokoku* appellee).

Thereupon, the wife and her child X2 filed an action for affirmation of the nullity of the holographic will.

The judgment of the first instance (the Kagoshima District Court) confirmed that the will in question was null and void. In the lower court (the Fukuoka High Court) Y contended that X1 was in no position to seek affirmation of nullity of the will because she became disqualified to succeed by forging and altering the will.

The lower court in its judgment rejected Y's contention. It held that "forging" as prescribed in the Civil Code Article 891 item 5 means the drawing up of a will by a successor under the name of the person to be succeeded, and that "alteration" means addition, omission and modification by the successor of the valid will drawn up by the testator.

The court then held that X1 did not forge the will in question and that since the will in question, lacking statutory formality, was

void, her tampering with it did not constitute "alteration." Thereupon, Y filed a *Jokoku* appeal.

[Opinions of the Court]

Majority Opinion:

"Items 3, 4 and 5 of the Civil Code Article 891 are purported to impose civil sanctions on a successor by disqualifying from succession for excessive, undue conduct in interfering with a will. In this light, when a decedent's will concerning succession is judged null and void for lack of formality needed for the will of a person to be succeeded to or for lack of formality in correcting the will, the act of the successor to make it look a valid and completely formal will or to make the correction appear valid should be regarded as "forging" or "alteration" of a will as provided for in item 5.

"However, when the successor has only engaged in such an act to complete the necessary legal formality for the purpose of fulfilling the intention of the decedent and testator, it stands to reason that the said successor cannot be considered a person subject to disqualification for succession as prescribed in Item 5.

"According to the tenor of the relevant facts found by the court below, the holographic will in the current case was written by testator A by his own hand and X1 only affixed his seal to complete the formality in the hope of fulfilling the intention of A.

"As such, it should be stated that X1 can not be considered a person disqualified for succession as prescribed in Item 5 of the Civil Code Article 891."

Minority Opinion:

Even if the will or its correction is found invalid for lack of necessary formality and the successor manages to make the will or correction appear valid by completing certain formalities, it should be interpreted that the successor is disqualified for succession as stated in Civil Code Article 891 item 5 regardless of whether he did it for the purpose of fulfilling the intention of the testator or not."

[Comment]

1. A person who forges, alters, destroys or conceals the will of a decedent will naturally be deprived of his right to succession (Civil Code §891 (v)). The Japanese Civil Code stipulates that such are grounds for being disqualified from succession.

In particular, Item 5 is said to have an intention of inflicting sanctions against a successor who tries to obtain, unjustly, an advantageous position in legal succession by denying the decedent freedom of testation.

The question is whether or not the act of a successor who finds a will invalid due to a breach of formality and makes it appear valid by supplementing the lack of formality, should always be considered disqualified from succession as prescribed in Item 5.

The current decision held that as the successor resorted to the act of completing a legal form merely in the hope of fulfilling the intention of the testator, the successor in question cannot be considered disqualified from succeeding. The current judgment is extremely important in that the Supreme Court, for the first time, drew a conclusion on the question of disqualification from succession in connection with the forging and alteration of a will.

2. It must be noted that the lower court held that the act of a successor in completing the formality of a will which is invalid due to a lack of legal formality cannot be regarded as "forgery" or "alteration" of the will itself.

On the other hand, the Supreme Court decision, while concurring with leading academic views, held that although such an act constitutes "forgery" and "alteration" as a matter of principle, the act of supplementing an invalid will due to its lack of formality in the hope of "fulfilling the intention of the testator" provides no grounds for disqualification from succession.

Since the anticipated effect of such disqualification would be very great, both decisions were based on the common idea of interpreting the grounds for disqualification as restrictively as possible. The only difference is that the former holds that even tampering with the content of the will does not constitute grounds for disqualification while the latter holds that only such a pattern of supplementation as in the current case is permissible.

The contention of the majority concerning the current decision should be supported in the light that Article 891 item 5 of the Civil Code is designed to inflict sanctions against the act of distorting the final intention of the testator and by so doing prevent the occurrence of such an act.

The minority view contends that even if the successor wanted to fulfill the intention of the testator, his act of making the will valid in appearance by completing certain formalities which were lacking results in interfering with the "order in the acquisition of property by succession," thus apparently destroying the "cooperative relationship in succession."

However, it is too severe to deprive anyone of his right of succession simply because he has corrected slight flaws in formality, such as the lack of seals and tally impressions, as in the current case, with no intention whatsoever of distorting the content of the will. On this score, however, we cannot take sides with the minority view.

3. Since there have been very few court cases concerning disqualification from succession, the current decision is very significant.

With regard to the relation between disqualification from succession and the forgery and alternation of wills, further studies on how to interpret the intent of the system concerning disqualification from succession and how to interpret the relation between the Civil Code Article 891 items 1, 2 and items 3, 4 and 5 hold the key to solving this problem.

3. Breaches of formality in correcting in writing in apparent errors in a holographic will and the validity of such a will.

Decision by the Second Petty Bench of the Supreme Court on Dec. 18, 1981. *Jokoku* appeal dismissed. (Case No. (*o*) 360 of 1981. 35 *Minshū* 1337. 1030 *Hanrei Jihō* 36.)

[Facts]

Father A (the person to be succeeded to) of X (plaintiff, appellee and *Jokoku* appellant) owned a building, and leased it to Company Y (defendant, appellant and *Jokoku* appellee) managed by the

husband of his fourth daughter B from about 1957, and had been receiving rent from the company.

On Jan. 22, 1974, A bequeathed the building to his eldest son X in a notarized will. As A died on Jan. 31, 1976, X asked company Y to pay him the arrears in rent claiming that he had succeeded to the building in question by dint of the devise as mentioned above. Company Y, however, insisted that the devise of the building to X was void and that X was not the owner of the building because A made a holographic will which revoked the earlier notarized will on Mar. 5, 1974 when he was staying with his fourth daughter B.

The holographic will in question stated: "I do not remember writing any will in the past, but if ever I did I revoke them all."

Despite the fact that there were insertions, deletions and alterations of words in the said holographic will, the formality concerning insertions and alterations prescribed in Civil Code Article 968 para. 2. was not observed. Thereupon, the validity of the holographic will came under dispute as a premise on whether or not X had the right to claim rent.

In the first instance, the Tokyo District Court held that the holographic will calling for revocation of the earlier notarized will was void since it failed to observe the formality regarding insertions and alterations prescribed in the Civil Code, and thus allowed X's claim for the payment of rent.

On the other hand, the Tokyo High Court, in the second instance, held that since Civil Code Article 968 para. 2 is applied to cases where insertions and alterations are made later on a will validly established, it cannot be applied in cases where corrections occur in the course of the testator writing a will as in the current case. Accordingly, the court said, the holographic will in question is valid.

X then filed a *Jokoku* appeal contending that the decision in the second instance misinterpreted the law since Civil Code Article 968 para. 2 can be applied to cases of insertion and alteration in the course of writing a will.

[Opinions of the Court]

"As is mentioned, the formalities prescribed in Civil Code Article 968 para. 2 should be observed in cases of insertion and other alterations in the course of making a holographic will.

"However, with regard to the correction of errors apparent from the statement in the holographic will, it stands to reason that a breach of the said formalities does not affect the validity of the will since there is no trouble in confirming the intention of the testator even if there were breach of formalities as prescribed in Article 968 para. 2. (Reference: Decision by the Second Petty Bench of the Supreme Court, on Mar. 17, 1972. 26 *Minshū* 249.)

"However, according to the relevant facts found lawfully by the lower court, it is apparent from the statement itself in the document that upon deleting a word the testator had miswritten, he had entered the same word or a word having the same meaning. Therefore, it must be stated that the holographic will in the current case cannot be considered void even if there were a breach of formalities as prescribed in Civil Code Article 968 para. 2 concerning the correction of apparent errors."

[Comment]

1. Civil Code Article 968 para. 2 says that "any insertion, deletion or other alteration in a holographic document shall be ineffective unless the testator indicates the place thereof, makes an additional entry to the effect that an alteration has been made, specially adds his signature to such entry and also affixes his seal at the place of alteration."

It is seldom requested that a signature be affixed in addition to the entry to that effect in the insertion, deletion or correction of an ordinary public document or other documents.

In the case of a will, however, such strict formality is said to be required to maintain the true intention of the testator and prevent alteration and forgery.

Criticism has been strong in academic circles that it is too troublesome to demand a signature each time.

The points in dispute in the current case were: (1) Can Civil Code Article 968 para. 2 be applied to insertions and alterations

made in the course of writing out a will? (2) Can it be applied also to small corrections of apparent errors in the statement itself in the will?

The Supreme Court affirmed the Point (1) but interpreted the Point (2) negatively. Since there have been few reported cases on these points, the decision in the current case should be considered significant.

2. The decision of the lower court has set forth a view concerning the Point (1) that Civil Code Article 968 para. 2 can be applied only to insertions and alterations after the completion of the will and does not include insertions and alterations made in the course of making out the will.

On the other hand, the Supreme Court in dealing with the current case accepted the contention of X and made it clear for the first time that the said Article 968 para. 2 can be applied to insertions and alterations made in the course of writing out a will.

For one thing, it is difficult to ascertain whether or not the insertions and alterations in question were made after the completion of the will or in the course of writing it. Besides, if the view of the lower court is adopted, there is a possibility of causing uncertainty about the validity of the will. In this regard, as the Supreme Court held, it should be interpreted that Civil Code Article 968 para. 2 can be applied to insertions and alterations made in the course of making out a will.

Even in the case of a slight correction of apparent errors and miswriting, will the forms prescribed in Civil Code Article 968 para. 2 on insertions and alterations have to be observed? There are two precedents which indirectly refer to this point.

One was a decision made by the Osaka High Court, which held that when insertions and alterations are only "incidental and supplementary parts" of the will and when the "principle tenor of the will" is expressed even if the parts in question are excluded, there is no need to declare the will as a whole null and void and only effective as a will if it is without insertions and alterations. (Decision by the Osaka High Court, on Nov. 17, 1970. 22-8 *Kasai Geppō*

33.)

Another precedent was a decision made by the Supreme Court on Mar. 17, 1972, on a case concerning the will of a person in imminent danger of death in which the wording "leave an estate" was corrected as "leave a will" without going through the formal methods of correction. The Supreme Court held that if it is a correction of simple errors in writing, any defect in the correction procedure shall not affect the validity of the will.

Most academic theories support the two precedents, and the current decision is just an extension of such a trend.

3. With regard to the correction of a apparent error, as in the current case, if the intention of the testator can be confirmed in the absence of such strict forms prescribed by the Civil Code, the will as a whole should not be termed void on the ground of such a slight breach of formality. It depends on the accumulation of such cases in the future, however, as to what extent "de facto insertions and alterations" should be permitted to maintain the validity of a will.

By MASAYUKI TANAMURA

4. Law of Civil Procedure and Bankruptcy

The trend of decisions in the year under review relating to laws of civil procedure and bankruptcy remained more or less stabilized as a whole, and there seemed to be no striking changes in those decisions.

There were, however, important decisions and introduced herewith are some of them, representing the fields of civil procedure, civil execution and bankruptcy.

1 A case in which the procedure of a court of appeal which handed down a decision without reopening the hearing was judged