

### 3. Family Law

#### 1. The suitability of granting divorce to a spouse who is guilty of separating from his wife for over thirty-five years.

Decision by the Fourth Civil Division of the Tokyo High Court on Dec. 19, 1985. Case No. (ne) 1813 of 1985. Action for divorce. 1202 *Hanrei Jihō* 50.

[Reference: Civil Code, Art. 770.]

#### [Facts]

The parties to this divorce action were married in February 1937. About ten years after the marriage the wife (defendant, *koso* respondent) learned that the husband (plaintiff, *koso* appellant) had sexual relations with another woman and therefore the parties became estranged from each other. In August 1949, the husband left the marital home and moved into the residence of the paramour, and then acknowledged two children by her. Some years later the husband sought divorce from the wife, but in February 1954 the court dismissed his petition, finding that he was a spouse guilty of the marital breakdown in 1949.

For over thirty-five years, from the separation until this proceeding, the husband had lived together with the paramour and never paid separate maintenance to his wife. On the other hand, the wife had stayed with her elder brother and never resorted to any legal remedies. The friction between the parties had remained unresolved.

In 1984, the husband applied for divorce by mediation to the Tokyo Family Court, but the wife refused to agree to divorce and hence the mediation was not settled. Thereupon the husband brought this action for divorce to the Tokyo District Court on the grounds of the irretrievable breakdown of marriage. In her answer the wife contended that the husband was a guilty spouse because of infidelity and desertion on his part.

On June 28, 1985, the district court denied the husband's

claim, concluding that the husband, solely responsible for the breakdown of marriage, could not obtain a divorce from the wife in the absence of exceptional circumstances, even if the marriage had irretrievably broken down.

The husband then filed a *koso* appeal from that judgment.

**[Opinions of the Court]**

*Koso* appeal dismissed.

Indeed, the bare fact of a guilty spouse, as the case may be, will not bar a divorce where, as here, over thirty-five years have passed since the parties separated and nothing remains of marital life now.

However, in the present case, these findings are supported by the record that the husband once failed in divorce action and the decision became irrevocable in 1954; that the wife, residing with her brother, makes a scanty living and she is of no means, financially unstable and must rely on the bounty of her relatives for the rest of life; that on the other hand, the husband, though financially secure, has little intention to provide reasonable property distribution for the wife upon divorce; and that during the separation, he has never discharged his legal obligations for support of the wife nor made serious efforts to settle the broken marital relationship. Therefore, under the special circumstances existing in this case, granting divorce to the husband as a guilty spouse, solely responsible for marital breakdown, should be deemed unjust in light of *bona fides*.

**[Comment]**

Apart from divorce by agreement (Civil Code, Article 763), a marriage may be dissolved against the other's will when it is so irretrievably broken down that the spouses cannot be expected to continue their marriage (Civil Code, Article 770). Nonetheless, the rule is well established that even in a hopelessly disrupted marriage, a divorce may not be granted to a spouse guilty of marital misconduct, as otherwise it would be morally unjust (Supreme Court Decision on Feb. 19, 1952, 6 *Minshū* 110; Su-

preme Court Decision on Dec. 13, 1979, 956 *Hanrei Jihō* 49). Meanwhile, a divorce can be granted to a spouse whose fault is less serious than the other's (Supreme Court Decision on June 7, 1963, 15 *Kasai Geppō* 55) or whose fault is no proximate cause of the marital disruption (Supreme Court Decision on May 21, 1971, 25 *Minshū* 408). In any case, a divorce is not to be granted to a guilty spouse solely or primarily responsible for the breakdown of the marriage.

Many commentators have objected to the attitude of the Supreme Court. The objections may be summarized as follows:

(i) The dissolution of marriage itself is one thing, the effect of divorce another and if the marital misconduct plays a role, it should be considered for purpose of property division.

(ii) Financial protection for wives and children should depend upon more effective means of enforcing post-marital payments rather than upon denial of divorce.

(iii) Refusal of divorce makes it impossible to regularize another family established for many years.

(iv) To begin with, the idea of innocent party in divorce case is only a myth, and it is impossible to assign fault to either spouse in such a complicated relationship as a marriage.

In sum, it seems that the Supreme Court insists upon marital fidelity, while the criticism is based on the realities of life.

On the other hand, in recent years the lower courts have struggled with the moral tone of the Supreme Court. In a case where the parties have lived apart for so long that fault has weathered into blamelessness, even in a divorce action by a guilty spouse, a divorce may be permitted if the court is satisfied that the parties tried to negotiate regarding the divorce itself and its effects in good faith, that the divorce would have no adverse effects on the welfare of the children, and that the divorce would bring about no financial hardship to the other (Tokyo High Court Decision on May 29, 1980, 968 *Hanrei Jihō* 62; Sendai High Court Decision on Dec. 14, 1984, 1147 *Hanrei Jihō* 107; Tokyo District Court Decision on Dec. 24, 1986, 624 *Hanrei Taimuzu* 97). In other words, the stigma of fault is considered to be rele-

vant rather than crucial in such long-term separation cases, ranging from over twenty to thirty-six years. Basically the current decision is in accordance with these criteria, despite of denial of a divorce. Yet it should be noted that the fact of irretrievable breakdown *per se* does not make a guilty spouse morally justified.

Furthermore, it should be kept in mind that even if a divorce may be denied to a guilty spouse in judicial proceedings, the party can obtain a divorce by agreement or a divorce by mediation in a family court, exchanging a large sum of money for the other's consent.

By the way, this case is reported to be pending with the Grand Bench of the Supreme Court on a *jokoku* appeal by the husband. Therefore it is noteworthy to what extent the Supreme Court will depart from its moral tone.

## **2. The validity of a testamentary gift which results from an adulterous relationship with a testator.**

Decision by the First Petty Bench of the Supreme Court on Nov. 20, 1986. Case No. (o) 946 of 1986. Petition for nullification of a will. 1216 *Hanrei Jihō* 25; 624 *Hanrei Taimuzu* 89.

[Reference: Civil Code, Art. 90.]

### **[Facts]**

The wife and daughter (plaintiffs, *koso* appellants, *jokoku* appellants) were the heirs of a man who died testate in October 1975. After eighteen years of married life, the said deceased separated from his wife in 1965 and thereafter he came to have sexual relations with another woman (defendant, *koso* respondent, *jokoku* respondent) and cohabitated with her as well. Before long that became known to the wife.

In August 1974, the man made a holographic will leaving his wife, daughter and the lover one-third of his estate respectively. For the wife, the portion of the estate given to her was equal to the intestate share of the surviving spouse under the inheritance law then in force. Afterwards, while still married, the

husband continued his relations with the lover for one year until he died. Meanwhile, the wife supported herself and the daughter was married and employed.

Six years after the deceased's death, his wife and daughter filed a petition against the woman for nullification of the will, alleging that the will was entirely void because it had purported the continuation of an unlawful sexual relationship which was against public policy. The petition further claimed damages for adultery, which were denied because of the lapse of the three-year limitation period.

Both the Tokyo District Court in first instance (553 *Hanrei Taimuzu* 187) and the Tokyo High Court in second instance dismissed their claim, concluding that the said will did not violate public policy. The wife and daughter then filed a *jokoku* appeal.

### *[Opinions of the Court]*

*Jokoku* appeal dismissed.

In the context of the aforementioned findings of fact, the will herein was not intended to induce the donee to continue the adulterous relationship with the testator, but to support the donee who was being wholly maintained by the deceased, and the disposition of his estate by the said will would not cause the heirs financial hardship. Therefore, the will in the instant case should not be deemed to be void as being contrary to public policy.

### *[Comment]*

Pursuant to the Civil Code, Article 90, a legal act contrary to public policy is void and hence has no legal effect. Traditionally, a promise to give property to the promisee in contemplation of the future nonmarital sexual relations was unenforceable because it tended to defeat public policy. If the promise was made for the termination of the relationship, it did not induce future activities and therefore was not considered illegal. The law will not lend its aid to contracts tending to promote unlawful sexual relations.

The prevailing opinion construes this provision to be applicable to a testamentary act. The question then becomes whether a gift by will, namely, devise or legacy, made conditional on continuing in sexual relationship or in return for the prospective sexual activities, should violate public policy.

In this regard, a testamentary gift to a mistress (so-called *mekake*) upon condition of her continuing sexual relations was held in *dictum* to be void as against public policy (Decision by the Great Court of Judicature on Mar. 19, 1923, 22 *Minshū* 185). The current case followed that leading case in deciding that gift was valid unless it was utilized to promote an unlawful relationship, and yet it is noteworthy in that the Supreme Court itself ruled from this standpoint.

In determining the public policy issue, namely whether a will in question is intended to continue sexual relations, the courts consider the following factors:

(a) If a testator is married, the interspousal amity and the existence of marital breakdown.

(b) The stability of the relationship between a testator and a donee, and the presence of cohabitation.

(c) The nexus between the testamentary act and sexual relations.

(d) The quantum of profit by a donee under a will.

(e) The effect of a will on the needs of the heir upon intestacy, such as a wife or child, if any.

In general, academic reaction to the courts' approach considering all the relevant factors in this kind of case has been favorable. Moreover, one commentator advocates that, although vitiated by illegality, a gift should be valid in part within the limits of reasonable amounts necessary to maintain the donee.

Today it is generally recognized that with changing social mores, the significance of sexual morality is gradually diminished. Therefore, the guideline of sexual immorality could be so vague as to be no standard at all.

By contrast, adulterous relationships have been deemed illegal as being directly prejudicial to marriage and family. This

position regards the mere fact of a testamentary gift involving adulterous relations as being contrary to public policy. Indeed, the action for criminal conversation still remains available to each spouse, without regard to the substance of married life (Supreme Court Decision on Mar. 30, 1979, 33 *Minshū* 303, 922 *Hanrei Jihō* 8).

Nevertheless, a third party, committing adultery with knowledge of the fact of marriage, may be permitted to recover damages against the adulterous spouse for pain and suffering (Supreme Court Decision on Sept. 26, 1969, 23 *Minshū* 1727). Moreover, while a guilty spouse may not obtain divorce from the innocent party even in a completely broken marriage, the adulterous party is entitled to divorce when the causation between adultery and marital breakdown is remote (Supreme Court Decision on May 21, 1971, 25 *Minshū* 408). Viewed in this light, it may be said that the fact of adultery *per se* is not the arbiter of public policy.

On the other hand, the traditional theory that a gift tending to sexual immorality is void has been criticized in terms of testamentary freedom. This criticism insists that, in testaments, the law should interfere with the intention of testator as little as possible. Thus, a gift by will is regarded as valid except to the extent that there exist extraordinary circumstances, such as the testator compelled the donee to have sexual relations, or the gift would endanger a financially insecure wife, if any.

In any event, in this situation the question is which of the factors mentioned above is deemed to be significant. Nevertheless, sole reliance on testamentary freedom will threaten the institutions of marriage and family or, otherwise, overestimation of sexual morality will ignore the adult relationship as an individual choice. The current decision, in seeking the nearest practical alternative to the traditional doctrine, may be considered a proper one.

By KOJI SHINOHARA