

3. Family Law

A case in which the court granted a guilty spouse's request for divorce.

Decision by the Grand Bench of the Supreme Court on September 2, 1987. Case No.(o)260 of 1986. Action for divorce. 41 *Minshū* 1423.

[Reference: Civil Code, Articles 1 (2) and 770. Article 770 (1) provides: One of the spouses can file a petition for divorce if (v) there exists any other grave reason for which it is difficult for the spouse to continue the marriage. (Subsections (i) through (iv) allow one of the spouses to file a petition for divorce if the other spouse has committed adultery, deserted, been missing for at least three years, or has an aggravated mental disease for which there is no possibility of recovery.)]

[Facts]

The parties were married in 1937. The husband (plaintiff, *koso* appellant, *jokoku* appellant) went to the front in November 1942 and came back in May 1946. They had no children but did adopt two girls in December 1948. In 1949, the wife (defendant, *koso* respondent, *jokoku* respondent) became aware of the sexual relationship between her husband and the adoptees' mother. This led to discord between the parties. In August 1949, the husband left the marital home and began to live with the paramour. Two sons were born whom he acknowledged.

In February 1950, after receiving the authority to do so from her husband, the wife sold the marital house for 240,000 yen. The parties agreed that the money would be for her living expenses. Thereafter, the wife moved into the residence of her older brother. In 1951, the husband sought a divorce from the wife, but in 1954, the court dismissed his petition, finding that he was guilty of the marital breakdown.

In December 1983, the husband visited the wife to persuade her to accept divorce, but she refused. Therefore, in 1984, the husband applied to the Tokyo Family Court for divorce by mediation but the wife did not agree to divorce, and hence the mediation was not settled. In the course of the mediation, he proposed to provide an oil painting and 1,000,000 yen, but she refused the proposal. Thereupon he brought this action for divorce on the grounds of the irretrievable breakdown of the marriage.

The wife had never been paid separate maintenance by the husband except for the 240,000 yen received from the sale of the marital house. She had suffered from pulmonary tuberculosis for 4 years and had no occupation and no property. On the contrary, the husband was running several companies and was well-off. Over the thirty-six years of the separation they had rarely seen each other. The husband was seventy-four years old and the wife was seventy at the time of this decision.

The petition was denied in the first and second instances (See 7 Waseda Bulletin of Comparative Law 73, concerning the decision of the court of second instance). The following is the *jokoku* appeal from the decision of the Tokyo High Court.

[Opinions of the Court]

Original (Tokyo High Court) decision reversed and remanded.

From the words of and the legislative progress regarding the Civil Code, Article 770, we can not determine that courts should not grant divorce to a spouse guilty of the marital breakdown. On the other hand, our divorce system provides divorce by mutual agreement, divorce by mediation and divorce by adjustment with a view towards respecting the wills of the spouses, and provides a judicial divorce when a spouse refuses to divorce. Under such a divorce system, if a divorce were always granted when the marriage were so irretrievably broken down that the spouses could not be expected to continue, the will of one spouse might be ignored entirely in some cases, to the end that the system of judicial divorce itself might be denied. Therefore, such a divorce shall not be granted.

However, if one or both spouses conclusively lose the will to con-

tinue the marriage, and if the spouses lack a community life as husband and wife to the extent that the marriage has been irretrievably broken, the marriage should be seen as having lost the substantial basis necessary for social life. In addition, a divorce should be granted if the divorce action would be allowed in light of the principle of good faith of the Civil Code, Article 1 (2).

To decide whether the divorce action should be allowed in light of the principle of good faith, courts should consider the state and degree of the responsibility of the guilty spouse. On that occasion, courts should also consider the will of the innocent spouse as to whether to continue the marriage, his or her feelings against the guilty spouse, his or her mental, social and financial conditions when divorce would be granted, the presence of children born to the spouses, especially the state of care, education and welfare of dependent children, and the conditions of the spouse and children following the separation. Moreover, courts should consider the effects of the passage of time on the factors listed above.

Therefore, unless there are special circumstances in which granting a divorce would be unjust, e.g. where the innocent spouse would fall into mental, social or financial difficulties, a divorce action from a guilty spouse should be granted if (a) the period of separation is considerably long, as compared with the ages of the spouses and the duration of their marriage, and (b) they have no dependent children between them.

Though the husband who brought this action is acknowledged as the spouse guilty of the marital breakdown, divorce should, unless there are the special circumstances noted above, be granted because there exists a grave reason which makes it difficult to continue the marriage, over thirty-six years have passed since the separation and there are no dependent children between them.

This case shall be remanded to consider whether there are special conditions, and whether a financial provision is needed.

[There were separate opinions, but they are omitted here.]

[Comment]

A series of authorities concerning divorce actions involving spouses guilty of marital misconduct and comments on the attitude of the Supreme Court have already been mentioned in this bulletin (7 Waseda Bulletin of Comparative Law 73). Therefore, they are omitted here to avoid repetition.

This case became an object of public attention when it came before the Grand Bench of the Supreme Court. Though it changed the rule regarding a divorce request from a guilty spouse, it attached many conditions. Some commentators suspect that the possibility of granting divorce will still be very much limited if those conditions are strictly interpreted and applied. The factors of granting a divorce are that a long time has passed since separation, that there are no dependent children, and that the innocent spouse would not experience mental, social and financial difficulties. In this case, there is no definition of these three conditions. After this decision, the Supreme Court granted a divorce in a case where thirty years had passed since separation and the spouses' child had attained her majority and married (Supreme Court decision on December 24, 1987. 1256 *Hanrei Jihō* 28). Thereafter it reversed the *koso* appellate court decision which dismissed the divorce petition in a case where the parties had lived apart for twenty-two years and their children had reached their majority (Supreme Court decision on February 12, 1988. 1268 *Hanrei Jihō* 33).

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