

effect at all. In this sense, we regretfully recognize a vast difference in pace between social and judicial changes.

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### **3. Family Law**

Three cases regarding application for special adoption.

#### **1. A case in which the application should be granted. [②]**

Order by the Sapporo Family Court on March 18, 1988. Case No.(ka) 116 of 1988. An application for a special adoption order. 40-7 *Kasai Geppō* 185.

[Reference: Civil Code, Articles 817.6 to 817.8; Domestic Relations Adjustment Act, Article 9 (1) *kou* 8.2.]

#### **[Facts]**

The applicants married on August 9, 1977. The husband (34 years old) is a policeman and the wife (35 years old) devotes all her time to housekeeping. They are both healthy and sincere. They are happily married and financially stable. Since they had no children, they decided to bring up a foster child with the idea of adopting in the future. They were registered as foster parents at the Child Consultation Center in November 1986. On December 12, at the request of the Child Consultation Center for foster placement they started taking care of a six-month-old girl who had been brought from an infant home (an institution where children who are under two years old and in need of care and protection are placed). Since then, they have continued looking after the child for a year and three months.

The girl was born on June 3, 1986, by a woman who had gone to the hospital on that day as an emergency case. The girl was deserted two days later when the mother disappeared from the hospital without

telling where she was going. Thereafter, the Child Consultation Center was informed that the child had become dependent and the child was placed in an infant home. The news of this child deserted at the hospital by her mother was reported in the newspapers. Although every possible means has been used to search for the mother, she is still missing. The father of this child is unknown.

The applicants had known that the special adoption system would be established. They looked forward to the start-up of the new system which would allow them to adopt the child. They desired this because the special adoption formed a relationship between adoptive parents and child as strong as that between natural parents and child.

The applicants love the child as their own, and show zeal for bringing her up positively. The Child Consultation Center, which put her with the applicants as a foster child, concluded through its observation of the parents' upbringing of her that the special adoption is best because they seem fit to be adoptive parents and are suitable for her.

### ***[Opinions of the Court]***

This girl was a deserted child. Since she couldn't be taken care of at all by her father and mother, she was put with the applicants as a foster child under their care and upbringing. It appears that in order to serve her interest, that is, to promote her sound upbringing, what is needed in particular is to assure her a stable home and status by means of establishing a relationship between the applicants and the child as strong as that between natural parents and child. The applicants seem to have sufficient zeal and ability to care for her; evidence to the contrary has not been found at all. It goes without saying that the consent of the natural father and mother are not needed because they are missing.

## **2. Two cases in which the applications should be dismissed.**

### **(1) Application by relatives. [10]**

Decision by the Osaka High Court on October 27, 1988. Case No. (ra) 381 of 1988. An appeal to complain about the dismissal of

a special adoption application. 41-3 *Kasai Geppō* 164.

[Reference: Civil Code, Articles 817.2 and 817.6; Domestic Relations Adjustment Act, Article 9 (1) *kou* 8.2.]

**[Facts]**

The applicants married on July 20, 1973. They had no children. On the other hand, the father and mother of this boy married on April 7, 1976. They gave birth to a girl on June 2, 1977, and the boy (the proposed adoptee) November 15, 1981. Thereafter their marriage broke down because the wife had borrowed money without telling her husband. The wife left the home, and they divorced on March 19, 1984; the father took custody of the two children.

After separating, the father placed the two children with his sister and her husband. From March 1984, only the boy had been placed with another sister of the father and her husband (the applicants), and at present he lives with them under their care. The applicants filed the adoption arrangement with the custodian's (father's) consent and with the family court's permission on May 8, 1984. The boy attends elementary school at present, and sometimes the natural father, posing as an uncle, visits the boy. On the other hand, the boy's sister has been reared by her uncle and aunt and has not been adopted. The father lives a single life now, but it is possible that he will remarry and care for his daughter in the future.

The mother is single and has no intent to remarry. She has been working and her financial condition has gradually become stable. She started saving money to use for her children in the future, and doing this has been of psychological support to her. She doesn't want to dissolve the ordinary adoption because the applicants love the boy but she opposes terminating the relationship between parent and child by consenting to the special adoption.

The Osaka Family Court dismissed the application because of a lack of the mother's consent (July 17, 1988). The applicants appealed on the grounds that (i) with the special adoption, it appears that the adoptive parents are the only parents in the family register and the adoptive parents and adoptee are free from any interference by natural relatives and free from any conflict regarding the child's

maintenance and legal succession; and it is expected that the relationship between the adoptive parents and child would be steady and stable; and (ii) because of her malicious desertion, it is an abuse of right for the mother not to consent.

### *[Opinions of the Court]*

The mother has not consented to this special adoption. We cannot say that she has no affection for the boy, and we cannot find that she has deserted him with malicious intent. Therefore, in this case, there is no consent of the mother of the proposed adoptee, and it is found that there is no condition provided in Civil Code, Article 817.6 (“where the father and mother are unable to declare their intention or where there is cruel treatment, malicious desertion by father and mother, or any other cause seriously harmful to the benefits of a person to be adopted”). After mature consideration that the relationship between the boy’s sister and the mother will continue, we cannot hastily conclude that termination of the parental relationship is in the boy’s best welfare. We cannot say that it is an abuse of right for the mother not to give consent.

This court affirms the family court’s order that since there was no consent of the mother, the application should be dismissed without considering other requirements.

#### (2) Application by a step-parent. [13]

Decision by the Nagoya High Court on December 9, 1988. Case No. (ra) 112 of 1988. An appeal to complain about the dismissal of a special adoption application. 41-1 *Kasai Geppō* 121.

[Reference: Civil Code, Articles 817.2 and 817.7; Domestic Relations Adjustment Act, Article 9 (1) *kou* 8.2.]

### *[Facts]*

On June 1, 1987, the applicant married the mother of a two-year-old boy and simultaneously filed the adoption arrangement. The boy’s father had died in October 1985. For more than one year, the applicant and the boy’s mother have continued to take care and have custody of the boy. When the mother became pregnant, the applicant applied for special adoption under which the word “adoptee” would

be eliminated from his family register so that the boy might not worry about his status as an adoptee in the future. Although his mother consents to and strongly desires the special adoption, the parents of the dead father are unwilling to give consent.

The Nagoya Family Court dismissed the application because of no special circumstances (September 1, 1988).

### *[Opinions of the Court]*

Although either of the spouses may specially adopt the legitimate child of the other spouse (Civil Code, Article 817.3 (2)), the special adoption order should be made only when it is found that it is particularly needed to promote the interest of the child, that is, only when it is found that the child is in need of care and protection. In this case, on the contrary, the child has lived with his step-father (also his adoptive father) and natural mother in peace and calm, and has been under their care and custody.

Therefore it should not be found that the child's care and control is severely difficult or unsuitable. So long as there is no need of care and protection for the child, this application should not be granted even if the child's natural father has died and the natural mother strongly desires that the special adoption order be made.

### *[Comment]*

During 1988, the applications filed for special adoption, which was established by the amended Act of 1987 (See 8 Waseda Bulletin of Comparative Law 17, 17-20), amounted to approximately 3,200 cases. There were 1,758 concluded cases including international adoptions, 733 cases in which the adoptions were granted, and 156 cases dismissing the applications. The reported cases so far have amounted to 14. Six applications have been granted (① Yokohama Family Court, March 11, 1988, 40-7 *Kasai Geppō* 181, ② Sapporo Family Court, March 18, 1988, 40-7 *Kasai Geppō* 185 [*supra* 1.], ③ Yokohama Family Court, April 15, 1988, 40-8 *Kasai Geppō* 94, ④ Kyoto Family Court, June 9, 1988, 40-12 *Kasai Geppō* 39, ⑤ Kyoto Family Court, June 28, 1988, 40-12 *Kasai Geppō* 44, ⑥ Hachioji Branch of the Tokyo Family Court, August 12, 1988, 41-3 *Kasai Geppō* 177).

On the other hand, eight applications have been dismissed (⑦ Hiroshima Family Court, March 12, 1988, 40-7 *Kasai Geppō* 192, ⑧ Uda Branch of the Nara Family Court, March 25, 1988, 40-7 *Kasai Geppō* 188, ⑨ Nagoya Family Court, April 15, 1988, 40-8 *Kasai Geppō* 97, ⑩ Osaka High Court, October 27, 1988, 41-3 *Kasai Geppō* 164 [*supra* 2.(1)], ⑪ Osaka High Court, November 10, 1988, 41-3 *Kasai Geppō* 172, ⑫ Osaka High Court, November 18, 1988, 41-3 *Kasai Geppō* 174, ⑬ Nagoya High Court, December 9, 1988, 41-1 *Kasai Geppō* 121 [*supra* 2.(2)], ⑭ Takamatsu High Court, February 20, 1989, 699 *Hanrei Taimuzu* 235).

At first, we should take a general survey of these 14 cases.

In these cases, there are nine family court orders [① ② ③ ④ ⑤ ⑥ ⑦ ⑧ ⑨], and five high court decisions [⑩ ⑪ ⑫ ⑬ ⑭—all appeals were dismissed]. There are eleven cases where although a child had been adopted ordinarily, the adoptive parents applied to adopt specially [① ③ ⑥ ⑦ ⑧ ⑨ ⑩ ⑪ ⑫ ⑬ ⑭], and only three of these were granted [① ③ ⑥]. On the other hand, where applicants directly applied for special adoptions without having adopted ordinarily, these three applications were all granted [② ④ ⑤].

In these six cases granted, children had been placed with the couples by way of adoption agencies: four through the Child Consultation Center [① ② ③ ⑥], and two through the International Social Service (I.S.S.) of Japan [④ ⑤]. In five of these six cases, the adoptees were illegitimate children. Two were abandoned children, whose parents were unknown [① ②]; two were borne by unmarried high school girls [④ ⑥]; and one was born as a result of rape [③]. None of these children had been acknowledged by their fathers. There was only one legitimate child; the mother had become pregnant by another man while her American husband was visiting the U.S.A. The husband refused to bring up the child, who was then put up for adoption [⑤]. Two of the six are international adoptions in which the adoptive father is foreign and the adoptive mother is Japanese [④ ⑤].

On the other hand, there were eight cases dismissed: one where the proposed adoptee was over eight years old at the time of application [⑦]; three where the prospective adoptive parents were relatives [⑧ ⑩ ⑭]; and four where the prospective adoptive parents were

step-parents [⑨ ⑪ ⑫ ⑬]. It seems that the age requirements for adoptees are strictly enforced. Although a proposed adoptee must be under six years old at the time of application, a child under eight years old may be adopted if the prospective parents have taken care of the child since before the child's sixth birthday (Civil Code, Article 817.5). The court dismissed an application to change from an ordinary to a special adoption because the proposed adoptee was eight years and three months of age, i.e., three months over the statutory limitation [⑦].

Every application by relatives aimed to change an ordinary adoption to a special one [⑧ ⑩ ⑭]. Applicants involved are an uncle and aunt [⑧niece/⑩nephew], and grandparents [⑭grandson]. Where a divorced father had gained custody of his child, the court dismissed an application by the father's sister and her husband to change an ordinary adoption in spite of the father-custodian's consent [⑩ The mother did not consent]. Where grandparents had ordinarily adopted their grandson to whom their daughter had given birth while still a high school student and had brought up the child as the mother's brother (i.e., as their own son), the application to change to special adoption was rejected [⑭]. In Japan, as referred to in 2.(1) above, it seems that there are more than a few childless couples who undertake to look after a related child after consulting with the child's parents, who are not in poverty and still have affection for the child. Under these conditions, an application for special adoption will be rejected because the proposed adoptee does not need the care and protection of adoptive parents [⑧].

As well as the applications by relatives, every application by a step-parent aimed to change an ordinary adoption to a special one. All applications by step-parents were made by step-fathers. Where the proposed adoptee was an illegitimate child, the application for changing to a special adoption was rejected [⑫ The child was acknowledged by the father]. As referred to in 2.(2) above, even if it is unnecessary to consider the termination of the relationship between a non-custodial parent and the proposed adoptee because the parent has already died, an application for special adoption will be rejected [⑬]. Where the natural parents of a proposed adoptee have

divorced, an application by a step-father will be rejected even if the natural father gives consent [⑨ ⑪]. In all four cases, it was found that the children involved were not in need of care and protection because they were fully cared for by their natural mothers.

Secondly, we would like to examine the facts of the above-mentioned three cases.

After considering the applicants' motives, it appears that the applicants expect that the special adoption would establish a strong relationship between the adoptive parents and child, a relationship similar to that between natural parents and child (*supra* 1. and 2.(1)). In the case of 2.(2), the applicant's motive was purported to be that of preventing the step-child from worrying in the future about his status as an adoptee. In a special adoption (unlike an ordinary one), when the adoptive parents list the adoptee's name in their family register, the natural parents' names are not mentioned at all. Thus, because there is no mention whatsoever of the word "adoption," the register appears to be that of a natural family; this is quite appealing to the proposed adoptive parents. This apparently was the motive in 2.(1). Although both applications were dismissed because of the lack of the mother's consent (2.(1)) and because care and protection were not necessary (2.(2)), this fact that the family register would appear to be similar to that of natural parents and child seems to be attractive to the applicants seeking special adoption.

Much importance is placed on the consent of the natural parents because the special adoption terminates the relationship between the natural parents and the adoptee. In the case of 2.(1), because the mother gave no consent and there was no reason to disregard the lack of consent, the application was dismissed "without considering other requirements." Presently, there is no case where depriving a parent of the right to withhold consent might be appropriate. In the existing statute, many scholars exclude a father who has not acknowledged the proposed adoptee from the meaning of "father," i.e., one who can give consent (for example, in [③], the consent of the father who did not acknowledge the child was not called into question). Where a father has not acknowledged the child, because the father would permanently lose any claim regarding the child, some

scholars suggest that we should carefully consider whether we should deprive the father of his right to withhold his consent to the adoption.

In 2.(2), the court found that the proposed adoptee did not need care because the proposed adoptee had been reared by the adoptive father and natural mother. Unlike the case of 1., which is the typical case of special adoption, i.e., that of a deserted child, in the case in which a step-parent wants to adopt a step-child at the time of application, it is inferred that there are many cases in which either natural parent has reared the child by cooperating with the remarried spouse; surely it is hard to say that there is the required condition that it is difficult or inappropriate for the parents to care for the proposed adoptee (Civil Code, Article 817.7). On the other hand, it is true that the Civil Code recognizes one spouse adopting the legitimate child of the other spouse (Civil Code, Article 817.3). In order to know which application to adopt a step-child will be allowed, future reported cases will attract our attention. Indeed, so far as the case 2.(2) is concerned, the dismissal is proper because it does not seem that the termination of the relationship of the grandparents and child falls under “the special condition” which serves “the best interest of the child.”

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#### **4. Law of Civil Procedure and Bankruptcy**

For the year under review, this paper will focus on two decisions in the fields of civil procedure and bankruptcy: the Supreme Court decision regarding the criteria for judging the filing of vexatious action; and the ruling of the Fuji Branch of the Shizuoka District Court on whether a debtor who was adjudged bankrupt and simultaneously granted a ruling for discontinuance of bankruptcy may, after the rul-