

### 3. Family Law

#### 1. A case in which the significance of the period of separation was clearly indicated regarding a guilty spouse's petition for divorce.

Decision by the First Petty Bench of the Supreme Court on November 8, 1990. Case No. (o) 1039 of 1989. An action for divorce. 43-3 *Kasai Geppō* 72.

[Reference: Civil Code, Articles 1(2) and 770.]

#### *[Facts]*

A husband (plaintiff, *koso* respondent, *jokoku* appellant) and wife (defendant, *koso* appellant, *jokoku* respondent) married on May 7, 1958 and two children were born. The husband helped with the business of his wife's father (a maker and seller of rope and sheets) after their marriage. Three years later, he began doing the same business on his own. The husband and wife, however, frequently disagreed with each other regarding its management and quarreled constantly. Therefore, he requested that she end her participation in the business and devote herself to the duties of a housewife, and she did so in 1969.

In 1972, although the husband planned to rebuild their house, he gave up the idea because of his wife's opposition. In the summer of 1981, he left the marital home, saying to her, "Let me live by myself and think it over for a while. I am tired." At first, he returned home about two days a week for a few months, but later he never came back. The husband had a sexual relationship with a woman before separation, and after the separation, he cohabited with her. Thereafter, he separated from her, but he kept his address secret from his wife and children, who contacted him through his office. Though the husband wished to be divorced, his wife kept refusing to do so.

The husband continued sending money to his wife for living expenses. The amount was 600,000 yen per month until February 1986, and after then 350,000 yen per month. He stopped payments

for more than one year from January 1987 because he got angry that his wife had applied for a provisional injunction against the sale of her half of their house under his name. As mediation was concluded at family court that he should share marital expenses, he sent 200,000 yen per month from May 1988. The wife gained 60,000 yen from month to month by sewing at home. The husband offered that he would dispose of their (titularly his) land and house in which his wife had lived so as to divide their marital property on divorce, and that he would divide the proceeds from sale into halves after taxes and fees were deducted. As the land and house were under mortgage, he conceded and proposed that he should repay the debt from his half. Under this proposal, he would gain little money, while in contrast, she would gain 100 million yen.

At the closing of oral proceedings in the appellate court (on January 18, 1989), the husband was 52 years old and the wife was 55 years old. The elder son, who had completed graduate school and was staying in France as a student at the expense of the government, was 29 years old. The younger son was 24 years and was at college. They wished their mother to do as she pleased, concerning whether she would divorce or not.

On June 20, 1988, the court of first instance (Tokyo District Court) allowed the husband's petition for divorce, and the wife appealed. On the premise that he was a spouse guilty of marital breakdown, she asserted as follows: (1) the period of their separation was not "considerably long"; and (2) their children had not yet become economically independent.

The appellate court (decision by the Tokyo High Court on April 26, 1989, 1317 *Hanrei Jihō* 82), finding the husband guilty of marital breakdown, held that the children were not immature even though they had not yet become economically independent, and that even if the divorce was granted, the wife would not be in a worse situation socially and financially, because the husband showed good faith by making a definite and reasonable offer concerning the division of marital property on divorce. On the other hand, the court held that as compared with the ages of the husband and wife and twenty-three years of their cohabitation, the eight years

of separation was not long enough to disregard the husband's responsibility and the wife's desire to continue marriage. Therefore, the court dismissed the original decision and rejected his petition for divorce.

The husband appealed to the Supreme Court on such a ground that the court of second instance erred in its interpretation of the considerably long separation.

### *[Opinions of the Court]*

Original (Tokyo High Court) decision reversed and remanded.

The marital relationship has already been irretrievably broken down and the husband is solely responsible for the marital breakdown.

When the court decides whether a petition for divorce sought by the guilty spouse should be granted or not, it has to consider whether the period of separation is considerably long or not, as compared with the ages of the spouses and the duration of their cohabitation. The purport of this consideration lies in that the court should examine the influence which the passage of time has on such circumstances that both parties are put in, because those circumstances change through long separation and their social meaning and estimation have to change accordingly (see the decision by the Grand Bench of the Supreme Court on September 2, 1987, 41 *Minshū* 1423). Therefore, in order to judge whether the period of separation is considerably long or not, the court should not only compare it with the ages of the spouses and the duration of their cohabitation quantitatively but also consider the influence which the passage of time has on the circumstances of the parties.

Though the husband and wife were separated for about eight years, the husband bore the living expenses for his wife and children during the separation and he stopped cohabiting with his mistress soon after the separation. Moreover, when the husband asked his wife for divorce, he showed good faith by making a definite and reasonable offer concerning the division of marital property on divorce. On the other hand, the wife applied for a provisional injunction against the sale of their house under his name after five

years of separation, notwithstanding her assertion that she desired to continue the marriage. The adult children wished their mother to do as she pleased, concerning whether she would divorce or not. Therefore, unless there are special conditions, it seems that the circumstances of both parties as well as their social meaning and estimation have changed with the passage of the period of the separation.

The original decision shall be reversed because it dismissed the husband's petition for divorce without sufficient examination of the aforementioned points, and it shall be remanded for further inquiry.

**[Comment]**

On September 2, 1987, the Supreme Court held that the petition for divorce by a spouse guilty of marital breakdown should be allowed, unless the divorce action would be against the principle of good faith as mentioned in Article 1(2) of the Civil Code (8 *Waseda Bulletin of Comparative Law* 44). The Court held that a divorce action brought by 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 cohabitation; (b) they have no immature children between them; and (c) there are no special circumstances in which granting a divorce would be unjust, e.g., where the innocent spouse would fall into mental, social, or financial difficulties. Since that decision, granting of divorce has depended mostly upon the first factor, that is, the period of separation. In this decision of 1990, the Supreme Court gave a new judgment regarding the period of separation.

In the aforementioned Supreme Court decision of 1987, the spouses had separated for thirty-six years in contrast with actually living together for eight years. Since then, the Supreme Court has shortened the period of separation to allow divorce actions. In a series of cases in which the Supreme Court granted divorce, the periods of separation were thirty years in contrast with living together for a little less than four years (decision by the Supreme Court on November 24, 1987, 40-3 *Kasai Geppō* 27), twenty-two years in contrast with living together for sixteen years (decision by the Supreme

Court on February 12, 1988, 40-5 *Kasai Geppō* 113), and sixteen years in contrast with living together for a little less than ten years (decision by the Supreme Court on April 7, 1988, 40-7 *Kasai Geppō* 171). Then, the Supreme Court granted divorce in an action brought by a guilty childless wife where the period of separation was ten years and three months in contrast with living together for a little less than one year (decision by the Supreme Court on December 8, 1988, 41-3 *Kasai Geppō* 145), although later the Supreme Court rejected divorce in a case where eight years of separation was held not considerably long, as compared with the ages of the spouses (the husband was sixty years old and the wife was fifty-seven years old) and the duration of living together (twenty-six years)(decision by the Supreme Court on March 28, 1989, 1315 *Hanrei Jihō* 61). In this decision of 1990, on the contrary, the Court held that eight years of separation, the shortest period ever, is “considerably long” in contrast with living together for twenty-three years.

The significance of this decision lies in that the Supreme Court held that the period of separation should be compared not only quantitatively with the ages of the spouses and the duration of living together but also qualitatively with the influences which the passage of time had on the circumstances of both parties. The “circumstances” are those that the Grand Bench of the Supreme Court held to be considered in 1987, that is, the type and extent of the guilty spouse’s responsibility, the innocent spouse’s intent to continue their marriage and feeling towards the guilty one, the mental, social, or financial difficulties that the innocent spouse would fall into if a divorce action were granted, the conditions of the custody, education, and welfare of their children, if any, the living circumstances formed after the separation, and so on. In this decision of 1990, the Supreme Court judged that the “circumstances” had changed under the influence of the passage of time, paying its attention to such factors as the husband’s attitudes manifested in that he bore almost all living expenses, that he dissolved the cohabitation with a mistress whom he had lived with after separation, and that he made a sincere offer concerning the division of marital property on divorce, and the wife’s attitudes manifested in that she

applied for a provisional injunction against the sale of their house under his name, notwithstanding her desire to continue the marriage, and their adult children's wishes that their mother do as she pleased, concerning whether she would divorce or not.

By this decision, a period of separation might be held "considerably long" when "circumstances" changed through the passage of the period, even if it would not be considered quantitatively long. Therefore, it seems the period of separation would be judged more relatively than before. A problem awaiting solution is how to relate the period of separation with the other two factors raised in 1987, because the circumstances over children and the innocent spouse after divorce would be considered in judgment of the period.

**2. A case in which it was held that an illegitimate child could not bring an action for confirmation of the father-child relationship without relying on acknowledgment.**

Decision by the First Petty Bench of the Supreme Court on July 19, 1990. Case No. (o) 772 of 1989. An action for confirmation of a father-child relationship. 43-4 *Kasai Geppō* 33.

[Reference: Civil Code, Articles 779 and 787. Article 779 provides: A child who is not legitimate may be acknowledged by his father or mother. Article 787 provides: A child, any of his lineal descendants or the legal representative of any of them can bring an action for acknowledgment; however, this shall not apply after the lapse of three years from the time when the father or mother died.]

**[Facts]**

X (plaintiff, *koso* appellant, *jokoku* appellant) was born on June 25, 1945. Although she was A's illegitimate child, she was registered as a legitimate child of Mr. and Mrs. B. On August 25, 1945, A, the biological mother of X, adopted X. X was reared by A since X was born, and was never reared by Mr. and Mrs. B. In 1988, X brought an action for confirmation of the father-child relationship with C. C died on January 2, 1959, and X was married in 1974. On July 25, 1977, the family court gave a judgment that there were no parent-child relationships between Mr. and Mrs. B

and X.

X's action was dismissed in the first instance (Hachioji Branch of the Tokyo District Court) and in the second instance (Tokyo High Court). The reasons were: (1) as a father-child relationship in law should be established for an illegitimate child only by acknowledgment, an action for confirmation of a biological father-child relationship should be rejected as unlawful; and (2) if one were allowed to bring an action for confirmation of a father-child relationship after the three-year limitation applicable to the actions for acknowledgment has run, that limitation which was prescribed by statute in order to avoid the legal instability involving the status of persons would not make sense. X appealed to the Supreme Court on the ground that as compared with the fact that an illegitimate child could bring an action for confirmation of a mother-child relationship without limitation, the interpretation of the relevant laws in the original decision was an "unreasonable differentiation" and, thus, violated the equal protection of the laws provided for under Article 14 of the Constitution of Japan.

### *[Opinions of the Court]*

As a parent-child relationship in law should be established between an illegitimate child and his father only by acknowledgment, the child cannot bring an action for confirmation of the parent-child relationship with his father without relying on acknowledgment.

### *[Comment]*

The parent-child relationship involves two meanings, that is, biological and legal relationships. They are usually consistent with each other, but on occasion this is not so. That is, there are cases where a man is a biological parent but not a legal parent and *vice versa*. This decision treats the former case. The legal parents have rights and duties to maintain their children and to be maintained by them reciprocally, to succeed to their children's estates and to be succeeded to reciprocally, and to rear and have the custody of their minor children. The biological parents, unless they are also legal parents, do not have these rights and duties. In Japan, although the

biological parents have been made to be also legal parents as much as possible, it is considered that there can occur inevitably cases of parent and illegitimate child where a biological parent is not a legal parent, especially cases of father and illegitimate child.

In Japan, there is inconsistency between paternal and maternal relations concerning how to establish legal parent-child relationships with an illegitimate child. According to Articles 779 and 787 of the Civil Code, a parent-child relationship is legally established with an illegitimate child if either the father or mother makes a voluntary acknowledgment or if an action the child brings for compulsory acknowledgment is allowed. Japanese law originally had no different treatment between the father and mother with regard to the establishment of legal parenthood. However, the Supreme Court made a great change in this scheme. On April 27, 1962, it held that the legal parent-child relationship between a mother and her illegitimate child, in principle, springs naturally from the fact of delivery without her acknowledgment (16 *Minshū* 1247). Thereafter the mother-child relationship, in which the parent-child relationship is clear due to the fact of delivery, has been treated differently from the father-child relationship.

In the case of paternal relations, on the contrary, without marital relations, the legal parent-child relationship with an illegitimate child does not spring without a voluntary acknowledgment or involuntary judicial acknowledgment. If father does not make a voluntary acknowledgment, an illegitimate child can bring an action against him for compulsory acknowledgment at any time during his life. It was held that the action for acknowledgment was lawful which an illegitimate child brought after more than fifty-seven years from his birth but just before three years passed since his father's death (decision by the Supreme Court on March 19, 1971, 623 *Hanrei Jihō* 75). However, an illegitimate child cannot bring an action for acknowledgment after three years have passed since the death of the father (Civil Code, Article 787).

At the time of the enactment of Civil Code in 1898, an illegitimate child could bring an action for acknowledgment as long as the father was alive. In 1942, during World War II, actions for ac-

knowledgment after the parent's death were permitted by a wartime statute. The reason for the three-year limitation as a measure of time within which the actions for acknowledgment must be brought was to avoid unclearness of evidence, instability of succession, and abuse of bring an action, which would occur if there were no limitation. On whether that limitation is constitutional or not, the Supreme Court held that it is not unconstitutional as it is not against the personal respect provided for under Article 13 and the equal protection of the laws provided for under Article 14 of the Constitution of Japan (decision by the Grand Bench of the Supreme Court on July 20, 1955, 9 *Minshū* 1122).

On June 21, 1979, the Supreme Court held that it is not unconstitutional under Articles 13 and 14 of the Constitution that the legal parent-child relationship between a father and illegitimate child should be established only by acknowledgment (31-11 *Kasai Geppō* 84). On the other hand, there were in lower courts decisions in which the action an illegitimate child brought for confirmation of the father-child relationship before being acknowledged was allowed. In practice of family registration, however, applications for having the name of father entered in the family register, which were based on those decisions (Family Registration Act, Article 116), were rejected. There was also a lower court decision in which a complaint against the rejection of such entry was dismissed (decision by the Nagoya High Court on July 3, 1974, 766 *Hanrei Jihō* 72). Therefore, this Supreme Court decision of 1990 is significant in that it made it clear that an illegitimate child can not bring an action for confirmation of the father-child relationship without relying on acknowledgment and in that it unified the diversities in lower courts.

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