MINSHŪ 268). In this case, the precedent is altered to acknowledge the creditor's claim because of an abuse of the rule for a short-term lease.

KATSUICHI UCHIDA
TAKAHIRO FUJITA

4. Family Law

1. Supreme Court 2nd P. B., August 31, 1998

Kono v. Kono

51 (4) KASAI GEPPŌ 33, 1655 HANREI JIHŌ 112, 986 HANREI TAIMUZU 160

When a child was born about nine months after the day on which the father and mother came to separate, it is illegal for the husband to bring against the child an action to confirm the absence of parenthood, rather than an action for the denial of legitimacy.

Reference:

Civil Code, arts. 772, 775

Facts:

X (husband, plaintiff) and A (wife) were married in 1987. Y (the daughter of X and A, defendant) was born on July 27, 1989. X and A broke up soon after they married and they haven't had sexual intercourse since around February, 1988. Finally, they separated on October 12, 1988. On November 22, 1988, however, they had sexual intercourse once. X was told by A on December 20, 1988 that A had conceived.

In June 1989, A made an application for mediation to the family court and X and A effected agreements that X and A will separate for the time being, X has to pay 70,000 yen per month to A as costs to

share the expense of married life from September 1989 and costs for the delivery on only the end of July 1989.

As soon as X knew the fact that Y was born, he made an application for mediation to the family court in order to deny the legitimacy of Y. This mediation failed to reach agreement and terminated on November 21, 1989. On November 15, 1990, after the expiration of period provided in Article 26, paragraph 2 of the Law for Adjudgement of Domestic Relations, X filed a suit for the denial of the legitimacy of Y to the District Court. In November 1991, however, X withdrew the suit.

Subsequently, X made an application for mediation to the family court in order to confirm the absence of parenthood between X and Y. After the mediation failed to agree, X filed a suit confirming it in February 1992.

On October 29, 1993, the Kawasaki branch of the Yokohama District Court dismissed X's claim. In the first instance, although X offered a DNA test of Y by an expert as evidence, Y and A rejected and did not accept it. When X appealed to Tokyo High Court, the court also dismissed X's claim. Although X offered the DNA test in the second instance as well as in the first instance, Y and A rejected it again. Finally, X appealed to the Supreme Court.

Opinion:

Appeal dismissed.

Y is a child born 200 days or more after the day on which the marriage between X and A was formed. X has separated from A nearly 9 months before Y's birth. Although X has already come not to have sexual intercourse with A before their separation, he had an opportunity of sexual intercourse with A for a period from the separation to Y's birth. In addition, X agreed to share the expenses of their married life and to pay costs for the delivery of Y on the mediation, premising that X and A remain married. Therefore, it is difficult to say that the essential parts of their marriage were clearly lost between X and A. Otherwise, the court does not find any facts that mean we should consider this suit as legal.

Editorial Note:

Article 772 of the Civil Code provides that, a child born 200 days or more after the day on which the marriage was formed or born within 300 days from the day on which the marriage was dissolved or annulled, shall be presumed to have been conceived during marriage, and that a child conceived by wife during marriage shall be presumed to be the child of the husband. Consequently, a child born in this period is presumed to be the child of the husband even if he is not actually. The Civil Code lays down that the presumption of legitimacy may be overridden only by "an action for the denial of legitimacy", and does not accept other ways of contesting the legitimacy beyond this (Art. 775). This article was enacted for the purpose of ensuring the peace of the family and the suitability of a child's status. The action of the denial of legitimacy can be brought by the father within 1 year from the birthday of the child.

However, when a child falls under the presumption formally and the fact that he or she is not the child of the husband is clear, for example when parents have already separated, or when the husband has stayed abroad for a long term or been in prison, it is improper to prohibit the denial of legitimacy by applying the provision strictly. And so, an action to deny the legitimacy without depending on Article 775 has been conceded in the case law. This action is called "an action to confirm the absence of parenthood". This action is a usual civil procedure and has no restriction concerning the person to be a party and the limitation of the action.

As mentioned above, Article 775 has strict requirements in order to ensure the peace of the family and the suitability of the child's status and can not be applied to all cases. On the other hand, an action to confirm the absence of parenthood may put the status of the child at risk. Therefore, the question is what kind of circumstances would justify excluding the presumption of legitimacy in practice.

This question is also argued in this case. With regard to this question, three major positions are discussed by lawyers and scholars at present. First, there is the position that, in the view of respecting the peace of the family and the privacy of the couple, the exclusion of pre-

sumption is justified only if it is apparently clear that the wife can not conceive the child of the husband at all; secondly, the position that, in addition to the case of the first position, it is justified if the fact that it was impossible for the wife to conceive the child of the husband is proved by evidence in the light of science, such as sterility or a difference of blood type; thirdly, the position that, balancing between the first and second positions, the parties are permitted to seek the truth if the family has already broken down, on the contrary, if there the peace of the family still exists, they can not challenge any more the existence of parenthood from the point of view of respecting the privacy and interest of the child. In the view of pursuing the truth, the second position may be most understandable. However, it is usually understood in Japan that the DNA test cannot be ordered compulsorily in the civil procedure. So this question becomes more difficult.

The Supreme Court has taken the first position in the past. At present, however, some inferior courts are taking the third position, remarkably. In this circumstance, this decision confirms that the Supreme Court takes the first position. The court held another decision as to the same question on the same day in which this decision was granted (August 31, 1998, Case No. (*o*) 2178. 51 (4) KASAI GEPPŌ 75, 1655 HANREI JIHŌ 128, 986 HANREI TAIMUZU 176.). The decision also takes the first position, as in this case, and, in its concurring opinion, Justice Hiroshi Fukuda stated that the person able to bring the action should be limited to the father, mother, child and the person alleged to be the father in principal. From now on, this question will also need to be discussed.

2. **Supreme Court 2nd P.B., June 11, 1999**

Hayashi v. Syonan Sinkin Bank

53 (5) MINSHŪ 898, 51 (11) KASAI GEPPŌ 85, 1682 HANREI JIHŌ 54, 1008 HANREI TAIMUZU 117, 1560 KIN'YŪ HŌMU 26, 1074 KIN'YŪ SHŌJI 10

The partition of estate by agreement can be avoided as a prejudicial juristic act.

Reference:

Civil Code, arts. 424 & 907, para. 1

Facts:

A had a building on a leasehold and lived with his wife (B) and children (Y1 and Y2) there. On February 24, 1979, A died, and B, Y1 and Y2 became the successors. Subsequently, although Y1 and Y2 respectively married and have lived apart, B has still been living in the building.

On October 29, 1993, X loaned 3,000,000 yen to C and D and they became obligators jointly and severally liable. B promised X that she, as a surety, assumed the obligations of the loan jointly and severally with C and D on the same day.

While A was still an owner of the building in name only, after the payment by C and D based on their obligations was delayed and the benefit of time was lost, X required B, in October 1995, to perform her suretyship obligation and the registration of transfer of ownership based on the ground of the succession.

B, Y1 and Y2 effected the partition of estate by agreement by which B didn't acquire her share of the building while Y1 and Y2 each acquired one half of it. Y1 and Y2 completed the registration of transfer of ownership in accordance with that agreement. Despite the fact that B had mentioned to X that she intended to perform her obligation in installments over a long term, she nevertheless petitioned for voluntary bankruptcy on March 21, 1995.

Ys claimed that a partition of estate by agreement cannot be subject to the right to avoid a prejudicial juristic act. However, both the first instance and the second instance of the court did not agree with Ys' argument and granted X's claim. Thus, Ys appealed to the Supreme Court.

Opinion:

Appeal dismissed.

A partition of estate that is effected by agreement between co-successors can be subject to the right to avoid a prejudicial juristic act.

It seems that an agreement for partition of an estate is a way to determine the allocation of estates, shifting the properties of the estate that co-successors have owned commonly from the time of opening of the succession, wholly or in part, to a solo ownership or new relationship of co-owning it. On the view of this nature, the partition of estate by agreement is considered as a juristic act which has a property right for its purpose.

Editorial Note:

A successor inherits all rights of property which belonged to the deceased from the time of the opening of the succession. When several persons are the successor, the estate is owned by co-successors jointly at first, and afterward, divided to each successor based on their agreement (Civil Code, art. 907). When the agreement for the partition of the estate is effective, individual properties of the estate are regarded as belonging to each successor retroactively as from the time of the opening of the succession (Art. 909). In the partition of estate by agreement, the agreement that a certain successor inherits nothing of the estate is valid.

By the way, Article 424 of Civil Code provides that the obligee can apply to the court for the avoidance of any juristic acts effected by the obligor with the knowledge that it would injure him or her. So, if the agreement as such formed for the purpose to avoid a claim by the obligee of the successor, can the agreement of the partition be covered by the right to avoid provided by Article 424?

However, when a juristic act does not have a property right for its purpose, such as marriage, adoption and acceptance or renunciation of succession, Article 424 is not applied (Art. 424, para. 2). Because it seems improper to allow a third party to intervene in acts related to a person's status, even if the financial condition of the obligor is worse as a result of these acts.

The partition of estate by agreement is a juristic act based on the right of succession, which concerns a person's status in this sense. Therefore, in the case mentioned above, the question is whether or not it is covered by the right to avoid a prejudicial juristic act.

This case is the first case in which the question has been argued in

the Supreme Court. Some decisions by lower courts and academic theories agree at large that the agreement in this case is covered by the right to avoid.

One of the important issues in this case is the difference between the case of the partition of estate by agreement and the case of the renunciation of succession. Because the agreement in this case is that a particular successor inherits nothing of the estate, in fact, it seems not to be different from a case where the successor performs a renunciation of succession. With regard to the renunciation of succession, there is a precedent in which the Supreme Court held that it is not covered by the right to avoid a prejudicial juristic act (Supreme Court 2nd P.B., September 20, 1974, 28 (6) MINSHŪ 1202, 756 HANREI JIHŌ 70). Its reasoning is that the act covered by the right is required to be an act that decreases the properties of the obligor actively, and excludes an act that does nothing more than prevent an increase of property passively.

In consideration in detail, however, while inherited properties divided by an agreement of the partition of estate belong to each successor retroactively under Article 909, substantially, it could be said that the agreement seems to be a judicial act in order to divide the inherited properties which co-successors once acquired jointly as a way to transfer some part of the share of the estate among the co-successors. A renunciation of succession must be done within three months after the succession is opened (Art. 915, para. 1), though a partition of estate has no prescribed time limits. In addition to this, there are some other differences between the partition of the estate by agreement and a renunciation of succession. Thus, it would be difficult to say that the agreement for the partition of estate seems similar to the renunciation of succession.

For these reasons, this decision affirmed that the partition of estate by agreement is covered by the right to avoid a prejudicial juristic act. This decision is valuable in this point, but further discussion concerning its requirements, such as the degree of prejudicial intent, will be necessary in the future.

3. **AIDs decisions**

In the family law area, there were the following two remarkable cases regarding artificial insemination by donor (AID) in this period.

(1) Tokyo High Court, September 16, 1998 [Takada v. Takada] 51 (3) KASAI GEPPŌ 165, 1014 HANREI TAIMUZU 245

A child born by the way of AID is a legitimate child to which is applied the presumption of legitimacy if the AID was performed under the husband's consent and the wife can not contest the absence of parenthood between the husband and child.

(2) Osaka District Court, November 18, 1998 [Yamabe v. Yamabe] 51 (9) KASAI GEPPŌ 71, 1017 HANREI TAIMUZU 213

The court admitted the avoidance of legitimacy alleged by husband based on the finding that neither the husband gave the wife the comprehensive consent to reproduce the child through AID, nor recognized the legitimacy of the child after her birth.

MASAYUKI TANAMURA
HIROSHI NARUSAWA

5. Criminal Law and Procedure

1. **Supreme Court 1st P.B., Feb. 17, 1999**
Tanabe v. Japan
53 (2) KEISHŪ 64, 1668 HANREI JIHŌ 151, 997 HANREI TAIMUZU 169

Police use of a gun against a suspect with a small knife in his hand is not justified as self-defense.

Reference:

Penal Code, art. 36; Law concerning Execution of Duties of Police Officials, art. 7