Editorial Note:

This Supreme Court decision finally settled a series of disputes concerning the use of the DialQ2 service from 1990 to 1991.

Besides, from the theoretical point of view, this decision has significance as follows; the decision limited X's claim for the charges for the telephone call, which was based on that article, to 50%, comparing the public enterprise's social responsibility with the telephone contractor's responsibility as the administrator of a telephone. In this way, this decision gave a flexible and appropriate function in disputes settlement to the principle of *bona fide*, and thus has considerable significance.

However, some questions are posed to this theory with regard to the function of the principle of *bona fide*. Besides it is possible to think that the fact that Supreme Court 2nd P.B., December 15, 2000 accepted NTT's claim on a similar dispute at a similar time presents a division of opinions in the Supreme Court with regard to the principle of *bona fide* or the sense of equity.

By the way, after this dispute, NTT improved the DialQ2 enterprise, and then this decision's range is limited to disputes before that improvement. And the telephone contractor's use of that service is also out of its range.

4. Family Law

Supreme Court 1st P.B. May 1, 2000, Case No. (kyo) 5 of 2000
Kono v. Kono
54(5) MINSHU 1607, 52(12) KASAI GEPPO 31, 1715 HANJI 17

When a father and mother whose marriage has broken down are living apart, the Family Court may order visitation and contact between child and the parent who is not living with the child.

Reference:

Civil Code, Article 766.

Facts:

"X" (father) and "Y" (mother) were married in 1987, and they had a son "A". Their marriage suffered a break up due to X's adultery. They have been living apart since Y moved to a new house along with A.

In 1994, X and Y made applications for mediations to the Family Court respectively and, from then, they started visitations between X and A one or two times per month. In May 1995, the Family Court was unable to reconcile the marriage, as a result, their mediations both are failed. But X and Y virtually agreed that X would visit A two times per month thereafter.

Although Y brought a divorce action on the ground of X's adultery in June 1994, visitations between X and A based on the de facto agreement continued without particular problems until May 1996. In the course of their divorce action, however, X rejected Y's suggestions for reconciliation in their discussion. As a result, Y began to refuse visitations between X and A and the visitations had stopped since then.

So, in September 1996, pending their divorce action, X made an application for mediation regarding visitation and contact with A. However, Y took a strong attitude to refuse the visitation and contact by X because of negative feelings against X. The mediation ended in failure and moved to a decree proceeding in May 1997.

The Fukuoka Family Court and Fukuoka High Court both held that X was allowed visitations and contacts with A once a month. Then, Y filed a permitted *Kokoku-appeal* to the Supreme Court. In that appeal, Y argued that the Civil Code does not provide for visitation and contact rights explicitly and that there is a High Court case ruling that the court should not interfere in the issue of visitation and contact with a child when the parents are living apart, etc.

Opinion:

Kokoku-appeal dismissed.

While father and mother are in a matrimonial relation, they jointly exercise parental power. A person who exercises parental power has

the right and incurs the duty of providing for the custody of and of educating the child (Art. 818 (3), 820 of the Civil Code). Even if the matrimonial relation is breaks down and parents are living apart, the authority of child custody includes that of the parent who does not live together with the child having visitations and contacts with the child. And if no agreement is reached or possible between the father and mother who are living apart, the Family Court can apply the Article 766 of the Civil Code by analogy and, based on the Article 9 (1) Otsu class (4) of the Law for the Adjudgement of Domestic Relations, order dispositions as may be appropriate for visitations and contacts between a parent and child.

Editorial Note:

In the Civil Code of Japan, parental rights and obligations to a minor are called "*Shin-ken*", meaning the parental power or parental authority. While father and mother are in matrimonial relation, they jointly exercise the parental power. When parents are ready to divorce, they have to determine one of them to have the parental power (Art. 819). Otherwise, when a father or mother who is to take the parental power is not to exercise that power, they may determine a person who is to take the custody of their child, independent of the person exercising the parental power (Art. 766). In Japan, therefore, when parents who have a minor are ready to divorce, the parent who is to take the parental power or the custody usually takes care of the child. Nevertheless, it is important for the benefit of the child to consider how the child and non-custodial parent have communications.

In the old days, people believed that a non-custodial parent should not communicate with a child after divorce. So, the Japanese Civil Code does not have any provisions for it. In 1964, however, the decree of the Family Court that allows such communications between a parent and child appeared. Since then, the right to communicate with child is called as "visitation and contact rights" and is being recognized as a legal right. Such a tendency of judicial practice was acknowledged by the Supreme Court in 1984 and it is now established in case law that the visitations and contacts after divorce are allowed unless they are contrary to the child's welfare and interest. The courts and legal the-

ories have recognized the visitation and contact rights on the basis of Article 766 of the Civil Code, providing for the custody of a child after divorce. Article 766 (1) provides as follows: "In cases where a father and mother effect a divorce by agreement, the person who is to take custody of their children and other matters necessary for the custody shall be determined by their agreement, and if no agreement is reached or possible, such matters shall be determined by the Family Court".

However, because the visitation and contact rights have been formulated in case law, their nature and concept are ambiguous. What is discussed in this case is the issue that, if a father and mother are living apart and not yet divorces formally, whether the non-custodial parent can legally request the visitations and contacts with the minor who is living apart. In a case like this, the situation resembles the visitation case after divorce. However, while a non-custodial parent after divorce does not have the authority of custody, such a parent who is living apart has the authority as of right because that parent is a co-exerciser of the parental power. Therefore, this leaves a place for considering that it is not necessary that the court particularly set up such authority. Prior to this case, the judgments of inferior courts in terms of the visitation and contact rights were divided in their opinions in the cases where the father and mother are in living apart. There is also the issue of whether Article 766 may be applied to the case of visitation while parents are living apart because that article provides only for the custody of a child after divorce. This case deserves attention since the Supreme Court had treated the issue and rendered an opinion for the first time.

The High Court case cited by Y in this case held that visitations and contacts while living apart should be left to the voluntary agreement of parents and the court should not make any particular intervention (Takamatsu High Court, October 7, 1992, Case No. (ra) 14 of 1992). However, there is also strong criticism of that case and most family courts have permitted an application for the visitation and contact with child on the basis of Article 766, even if a spouse is merely living apart.

Now, most authors agree on the importance of visitation and con-

tact with children after divorce. Therefore, even if the parents are living apart and not yet divorced, when the non-custodial parent is prevented visitation and contact with the child without any lawful reason, having the court grant visitation and contact with the child is not only necessary for the parent, but also for the child. The value of this case is that the Supreme Court acknowledges the mainstream of past family court practices.

Tokyo High Court February 9, 2000
Case No. (ra) 1979 of 1999
In Re Kono
1718 HANJI 62, 1057 HANTA 215

When a person has received sexual reassignment surgery as medical treatment for "gender identity disorder," rectification of the stated sex in the family-register cannot be permitted.

Reference:

Family Registration Law, Article 113.

Facts:

"X" was born as the second child of his father and mother, given a male name and recorded at the registration office as "first son". Although X grew up as a male and graduated from high school, he gradually built up an aversion to his body being virilized and developed an increased sense of incompatibility with his sex during adolescence. When X was 25 years old, he heard through a news story that a certain foreign country had carried out sexual reassignment surgery. He quickly went to the country and began to receive hormone therapy. X also had continued to take prescribed hormone drugs after he returned from the country.

After that, X gave up receiving the sexual reassignment surgery and decided to work as an office worker for a time. However, X had suffered from living as a male and began to prepare to live as a female. He resigned from his job, went into voice training, wore women's clothes, and received psychotherapy and hormone therapies. When he was 38 years old, he finally received sexual reassignment

surgery in the foreign country. According to the diagnosis by doctors, X has suffered from "gender identity disorder". And, although X's chromosome number is 46 and his type is XY, X's external genitalia are feminine due to sexual reassignment surgery and castration.

In order to rectify X's sex in the family-register, X made an application for permission to rectify the statement in the family-register from "first son" to "second daughter". The Tokyo Family Court as first instance ruled against X's application. The Court held that X was born as a normal male physically and had subsequently received sexual reassignment surgery. Therefore, this case had not been a case of mistaken original sexual identity that required correction. Then, X made *Kokoku-appeal* to Tokyo High Court.

Opinion:

Kokoku-apeal dismissed.

The present legal system adopts the principle that the sexuality is decided by the biological sex defined genetically. In this principle, the Family Registration Law and the disposition under that law must be established on such a premise. Therefore, when a person was born as an entire male or female biologically and recorded at the registration office as to that purport, even if the person is diagnosed as suffering from gender identity disorder and, as a result of receiving sexual reassignment surgery under a doctor's control, has the internal and external genitalia of another sex in appearance, the court is compelled to say that Article 113 of the Family Registration Law, including the words "any statement in a family-register is legally not permissible or there is any mistake or omission" can not be applicable to the statement in the family-registration about sex in this case. Thus, X's appeal has no grounds.

Editorial Note:

"Gender identity disorder (GID)" is defined as a situation that, despite a person being biologically normal and also clearly recognizing the sex to which his or her body belongs, nevertheless, the person believes that he or she belongs to the opposite sex in terms of personality. There is no law relating to transsexualism in Japan. In recent years,

however, pointing out that there are both "biological sex" based on DNA and "gender" as the psychological and social sexuality in the human sexuality, and there are individuals suffering from incompatibility between his/her sex and gender, some authors discuss medical treatment for such individuals.

In 1995, the Ethics Board of Saitama Medical College stated its opinion that sexual reassignment surgery is a proper medical treatment as a cure of GID and addressed the need to coordinate the condition for medical treatment of transsexualism. Following this opinion, the Japanese Society of Psychiatry and Neurology set up a special committee and discussed this issue. In 1998, the committee issued "findings and proposals for GID" and stated its position to support basically the finding of the Ethics Board of Saitama Medical College. As a result of a show of support from that society, sexual reassignment surgery first carried out in Japan in 1998. Social concern about this issue has since increased.

By the way, in Japan, there is a general system for registering on individual's status, called "*Koseki*". All matters relating to changes of individual status from birth to death are registered in such a family-register. The family registration plays an important role in certifying on individual's status finally in Japanese society. In fact, the family registration is often used in various circumstances in our lives as a means of personal identification. For example, a certificate of residence, a health insurance card, a passport and a driving license are all made on the basis of the statements on record in the family-register. Therefore, even if a person receives sexual reassignment surgery and comes to belong to the opposite sex, the person is treated as having the natural biological sex recorded at birth in the family registration throughout his/her public life. For this reason, transsexual persons are anxious to rectify the statement regarding their sex listed in the family registration.

A provision as to such rectification of a statement in the family-register is Article 113 of the Family Registration Law. The Article provides as follows: "If it is found that any statement in a family-register is legally not permissible or there is any mistake or omission in respect to the statement, any person interested may apply for the rectification

of the statement, with the leave of the Family Court".

In short, the question is whether the "mistake" in the Article 113 includes a change of sex after birth by sexual reassignment surgery. GID occurs when "gender" is different from their original biological sex. So, if we think of "gender" as the true standard for human sexuality, we may regard the statement on record in the family-register as mistake. On the other hand, if we think of biological sex as the true standard for human sexuality, we may conclude that there is not a mistake and its rectification should not be allowed.

Prior to this case, similar cases regarding rectification of statement of sex were requested. Among them, some cases were allowed rectification of statement of sex. However, all cases allowing rectification were those regarding intersex or hermaphrodites. On the contrary, all cases of GID have been refused such rectification. Some authors argue that the court should also allow rectification in cases of GID, while others show a more cautious attitude.

The latter position points out that rectification of a statement in the family-register does not stop rectifying only statements of sex and has significant effects on the present family relationship and the concept of marital and parent-child relationships. Thus they insist that rectification of statements of sex should not be allowed on a case by case basis, but by legislation.

With increasing social concern about GID, this particular case has attracted considerable attention, even though the court rejected the application for rectification of the record of sex statement in this case as a consequence. However, the court mentions in the obiter dicta as follows:

"It is an incontrovertible truth that there are a certain number of individuals who are suffering from GID and are anxious to live as a sex different from their natural biological sex, going to the length of receiving sexual reassignment surgery. However, with regard to sexual reassignment surgery, presently, there is no social consensus that it is regarded as a cure for GID, and we need more discussion in order to reach general agreement. If rectification of the statement of sex is allowed, it may be supposed that significant matters will arise not only in the area of the Family Registration Law but also on the applica-

tion of various laws relating to it and that this will influence extremely our social lives in general. Therefore, to resolve this issue, we have to identify the problems from a broader point of view and deliberate the degree of the influence on our social lives and the ideal state of future society. The issue of rectifying the statement of sex in the family-register should also be included and resolved as a part of this tasks, concluding with some form of legislation."

We may see this case as a case where the court takes a cautious attitude with regard to legal treatment for GID in the transitional period. However, as mentioned in this case, because it is clear that there are individuals suffering from GID, we have to enact legislation regarding GID as soon as possible.

5. Law of Civil Procedure and Bankruptcy

Supreme Court Second P.B. March 27, 1998
Kitazawa v. Akabane Concrete
Case No. (*o*) 1681 of 1996. 972 HANREI TAIMUZU 147

Reference:

Commercial Code, Article 257 (3); Code of Civil Procedure Article 40.

Facts:

The case asked for the rejection of an action nothing that this action, which aims at the removal of a director, is a peculiar required joint litigation which should make both the company and the director concerned the common defendant, and because X had not made A the defendant and had only made Y company the defendant, based on Commercial Code, Art. 257, para. 3, the litigation is unlawful. Based on the opinion that the action of removal of a director is a peculiar required joint litigation which should make both the director and the company concerned a common defendant, it was held making that