such facts, the truth of such articles are not highly trusted in our country, and then the credibility for the articles as the premise of this doctrine does not exist. And, according to the case law concerning the defamation, when it concerns the public interest, aims at the public interest and the truth of the fact which is described in it is established for the principal part, the illegality of the defamation is denied, and when there is considerable reason to believe that the fact is true, even if the truth is not established, the intention or negligence for defamation is denied. Based on this case law, the judgment decides that since such credibility does not exist, there is no such considerable reason and then Y1 and Y2 are responsible for defamation to X.

However, the judgment admits in obiter dictum that it is possible to adopt the doctrine of wire service defense about credible articles which concern other categories. And this is very important for the development of this doctrine.

4. Family Law

Sapporo High Court, October 10, 2002
Case No. (ra) 84 of 2002
54 (6) KASAI-GEPPO 97
In re Murakami

When the mother died after she has been determined to be the sole-exerciser of parental power over the children in a divorce by agreement, an application for the transfer of the parental power to the survivng father should be dismissed, on instead a guardian for the minors be appointed.

Reference:

Civil Code, Arts. 819 & 840.

Facts:

X (applicant, father) married A (mother) in 1981 and they had three children, B, C, D. However, X and A divorced in 1992, since X failed in his business and got into heavy debt. When they divorced, they agreed that A should become the sole-exerciser of parental power over their children. X lived with his family after divorce, but he moved out of their house in 1998. Thereafter, X was declared bankrupt. The children made their lives depending on A's income after their parents' divorce and their grandmother (A's mother) was left to take care of them while A was working.

In 2000, A died in a traffic accident. After her funeral, her relatives discussed how to take care of the children. They agreed that the grandmother would continue to take daily care of the children and that E (A's brother) would manage their properties as a guardian for the minors. E visited an attorney and entrusted him with the proceeding for appointing a guardian for the minors after he explained to X this arrangement and obtained understandings of the children. X agreed at that time that E should become a guardian of the children, but he had it in mind that he should take care of the children himself.

Finally, X filed an application to the Family Court in order to change the person exercising parental power to himself. In turn, E also filed an application to have himself appointed as a guardian for the children.

At present, B is a University student and lives alone while C and D are high school students and live with their grandmother. And there are prospective estates which the children will obtain and inherit on the ground of A's death: family home as real estates, one hundred and sixty million yen from the life insurance policy on their mother, thirty million yen from the automobile insurance, the right to claim compensation for damage in a traffic accident and so on as assets and, on the other hand, forty one million yen for a home loan as debts.

The Hakodate Family Court dismissed X's application and appointed E as the guardian of the children. After that, X filed a *Kokoku-appeal* to the Sapporo High Court because of his dissatisfaction with the adjudication of the first instance.

Opinion:

Kokoku-appeal dismissed.

The Court cited the adjudication of the first instance concluding that a guardian for minor should be appointed for the children, while adding the following comment.

Although X argued that he should be designated as the person exercising parental power on behalf of the children primarily based on his natural blood relationship to the children, we affirmed the adjudication of the first instance, considering the intentions and the living conditions of the children and their circumstances that they need special care and supervision to manage their property, as the first instance found. The court concluded that the guardianship should be made use of in order to protect the children rather than changing the person exercising parental power, even giving full respect to X's feeling as their father, since a guardian for minors is under the supervision of the Family Court or the supervisor of the guardian.

The reasons of the first instance are as follows:

In this case, it is necessary for the court to decide which person should exercise the parental power or become a guardian for the children from the viewpoint of the welfare of the children themselves. In such the judgment, although it is clear that the existence of a natural parent-child relationship is a significant factor in many cases, it is not the only issue, and the intention of the minors, the relationship between the minors and the applicant, his ability and fitness for custody and the property management of the applicant and so on are also significant. Therefore, we must judge which course is better after balancing up the particular factors in a particular case.

We found the following factors in this case.

(1) With regard to the children's intentions, they wish for E to be appointed as their guardian; on the other hand, they reject the person exercising parental power being changed to X. Since the children are a university student and high school students, they have the abilities to grasp and appreciate properly the persons around them.

(2) C and D have led their high school life under their grandmother's care without any problems and rejected clearly living together with X.

With regard to their custody, it is better for their welfare to attach importance to the relationship between their grandmother, E and them.

(3) The children need special care to manage their property because they have heavy debt, and at the same time they will obtain or inherit a large amount of property.

Considering the factors mentioned above, we dismiss X's application and appoint E as the guardian for the children.

Editorial Note:

In Japan, the Civil Code provides that the parents have the right and incur the duty of providing for the custody of and the educating of the child (Art. 820), and such rights and duties that the parents have are called 'Shin-ken', or parental power, all together. The parental power is jointly exercised by father and mother while they are in a matrimonial relationship — the principle of co-exercising parental power (Art. 818 (3)). On the other hand, the Civil Code also provides that if a father and mother have effected a divorce by agreement, they shall determine one of them to have the parental power by agreement — the principle of the sole-exercise of parental power after divorce (Art. 819 (1)). In addition, if no agreement is reached or is possible between the parents, then the Family Court will determine which parent should have the parental power from the view point of the welfare of the children. Although the relationship between a child and either parent who loses the parental power over the child is not necessarily cut off, the parent cannot interfere to exercis parental power, but the other parent is the sole-exerciser of it.

By the way, the Civil Code provides that the guardianship for a minor commences if there is no one to exercise parental power over the minor (Art. 838 (1)). For example, if both parents of a child have died, a guardianship is started for the child. Here is a problem. If one of the parents dies after being determined as the sole-exerciser of parental power pursuant to the Article 819 (1) and the other parent, who lost the parental power by the divorce, survives, does the guardianship for a minor commence for the children or does the surviving parent regain parental power once more? In other words, the problem is whether such a case is included in "if there is no one to exercise parental power over a minor" provided for in Article 838 (1).

The law sets out nothing about this problem. The attitude of legal theorists also varies and divides largely into following four opinions: (1) the guardianship for a minor commences with the death of the sole-exerciser of parental power; therefore, there is no room for changing the person exercising it to the surviving parent (although the surviving parent might be the guardian); (2) if the sole-exerciser of parental power dies, the surviving parent who qualifies to be the exerciser of parental power regains the power as a matter of course, therefore there is no room for commencing a guardianship; (3) if the surviving parent is an appropriate person to take custody of and to manage the properties of the children, the Family Court can render adjudication for changing the exerciser of parental power, whether or not there is an appointed guardian; (4) follows (3) opinion basically, but argues that the Family Court can render adjudication for changing the exerciser of the parental power only before appointing a guardian. Formerly, opinion (1) had been the common opinion. However, although opinion (1) is faithful to the terms of the provisions of the Civil Code, the guardianship is originally a supplementary system, and that the father and mother will wish to take custody of their child as long as they are surviving, is common sense in our society. Therefore, the Family Court has adopted opinion (4) and treated this problem in the way that in principle, the surviving parent will be designated as the exerciser of parental power again. It makes no difference either to the exercising of parental power or guardianship for a minor that they are for the welfare of the children. In general, we may consider that it is good for the welfare of minors to be under their parent's custody, but it is not always true and commencing the guardianship may also be needed, depending on the circumstances. Particularly, in giving parental power to the parent who once lost it by divorce, more careful thought must be given to factors such as the prior parent-child relationship, eligibility of the parent and the intention of the children and so on, because it means that once changed, the children's life-style will be changed again.

This case concluded, as held by the first instance, that commencing the guardianship for minors is better from the viewpoint of the welfare of the children. Therefore, this case may be understood as following the practices as usual of the Family Court and adopts opinion (3) or (4) of the legal theories. And its findings about the welfare of the children may

also seem proper.

After the High Court decision, this case was transferred to the Supreme Court by X's appeal and the Court also dismissed his appeal. As for this case, the point should be also noted that the Supreme Court affirms the practices as usual of the Family Court, too.

Sendai High Court, June 6 2001
Case No. (ra) 60 of 2001
54 (5) KASAI-GEPPO 125
In re Shindo

Only a father and mother can make an application to the Family Court to decide the person to take custody of their child, while a third party dose not have the right to make such an application.

Reference:

Civil Code, Art. 766.

Facts:

Y (mother) gave birth to A (daughter) in 1993. However, since her living conditions were unstable at that time, she had A admitted to a public nursery after consulting with the Child Guidance Center. Although B was a A's father and in a de facto marriage with Y, he had not acknowledged A.

After then, the Child Guidance Center came to treat A's case. In 1995, Y submitted a written consent to the Child Guidance Center that she consented to the placing of A with a foster family. Although the Center also asked her to consent to A's adoption at the same time, contact with Y was lost before she gave a clear answer. Therefore, the Center considered that her answer was not necessarily negative to such adoption and placed A to Xs (a couple, foster parents) for her foster care. This placement operated on the condition that A would become X's adoptive child by a special adoption in future (the special adoption means to cut the relationship between Y and A).

Around 1999, however, Y changed her attitude and came to want to take custody of A strongly. In the investigation by the Child Guidance

Center, she told the investigator that she was to marry B and her living conditions were stable at present. As a result, the Center thought that the placement for foster care of A should be canceled and asked the foster parents to return A. On the other hand, Xs wished to continue to take custody for A as foster parents. It came to be difficult to accommodate them by returning A.

So, for the purpose of the future returning of A, the Center canceled the placement of A, started a temporary custody for A and designated Xs as persons in charge of the temporary custody.

In this course, Xs made an application to the Family Court and required that the court appointed Xs as persons to take custody of A.

Yamagata Family Court held that Xs, who are the de facto custodians, also have the right to make an application for deciding the person to take custody of a minor and designated Xs as the person to take custody of A, since changing the present condition would not be in the best interest of A. Therefore, Y appealed to Sendai High Court.

Opinion:

Reversed and dismissed.

According to the provisions of the Civil Code and the Family Adjudication Law, it stands to reason that only the father and mother are the parties who can make an application to the Family Court for the adjudication to designate a custodian of children, because they can make an agreement about matters concerning the custody of their children. And only if no agreement is reached or possible between them, the Family Court will decide the custodian of the children, as it were, on behalf of the parents.

In this case, Y is a mother of A and the exerciser of the parental power over A, but she gave birth to A without marrying A's father and he has not acknowledged A (thus, he has no power). There is no provision of the Civil Code permitting the Family Court to designate a custodian other than the person exercising parental power in such a circumstance. As a matter of course, Xs, who are the third parties, can not have the right to make an application for decision on the custodian. The first instance held that after interpreting by analogy the implication of Article 766 of the Civil Code and allowing Xs as the de facto custodians the right to

make such an application in this case, the court has jurisdiction over such an application. However, because the implication that the Family Court should decide the custodian in the case of Article 766 is as mentioned above, the Article lacks a base to interpret by analogy and to be applied in this case. That is, in this case, the right to take custody cannot be separated from the parental power that Y has. Therefore, Xs' application is unlawful and dismissed.

Editorial Note:

As noted in the editorial note for the former case, the Civil Code provides that parents have the right and incur the duty of providing for the custody of and the educating of the child and they jointly exercise the parental power while they are in a matrimonial relationship. The Law also provides that if the father and mother have effected a divorce by agreement, they shall determine one of them to have parental power by agreement. Although the sole-exerciser can take custody for the child by him/herself after the divorce, the Law also allows the parents to determine a caretaker, or custodian, other than the exerciser of the parental power, eventually meaning themselves, if they decide to divorce. Article 766 (1) provides as follows:

"In cases where the father and mother effect a divorce by agreement, the person who is to take the custody of their children and other matters necessary for the custody shall be determined by agreement, and if no agreement is reached or possible, such matters shall be determined by the Family Court."

"The person who is to take custody of their children" provided in this Article means the one that exercises the right and duty of personal care included in the parental power as a part and actually takes care of the child.

As mentioned initially, since the parents have the parental power to take custody of their children, essentially, it is not necessary to determine such a caretaker other than the exerciser of the parental power if one of them can take care of the children by him/herself. Because they are able to choose one of them as appropriate to take care of their children as the exerciser of the parental power. Why has the Civil Code prepared such a custodian system?

There are two major reasons. Firstly, there is a historical reason. The Civil Code of Japan prior to World War II provided that the person who exercises the parental power during the marriage is limited to only the father and that the exerciser of it after divorce is also the same. Therefore, under the old Law, a divorced mother could not have the parental power over her children. As a result, the Law recognized that there were cases in which the mother was the proper person to take care of her children, particularly if the children were infants, and needed a system where the parents could determine the mother as the caretaker of their children by agreement. In other words, the custodian system had a special need under the prior Civil Code in order that the father could control their children as the exerciser of the parental power and, on the other hand, the mother could actually take custody of the children as the father's assistant. The custodian system that has such a historical background was also left in the present Civil Code after the law's reform, even though it now allows the mother to be the exerciser of the parental power. And the system has gradually become independent.

Secondly, there is a practical reason. When the condition of jointly exercising the parental power is dissolved by the divorce of the parents, there is no problem if one of the parents has sufficient ability to take care of their children. However, if neither of the parents has such an ability, there is a need that an appropriate person other than the parents should be designated as a custodian and be in charge of protecting the stable life of the children.

Since the custodian system is not based on a contractual agreement but a kind of status, the person once designated as a custodian cannot be deprived of his/her status unless the Family Court changes or cancels the custodianship. Therefore, if the parents are not able to exercise the parental power for any reason, the parents or the Family Court can ensure the stability of the custody of the children through the custodian system while keeping the parental power in one of the parents. In this point, there is some merit to the present custodian system. As a result, there are three options in Japan when parents decide to divorce: the case that the exerciser of the parental power (usually one of the parents) takes care of their children for him/herself, that the parent who lost the parental power by divorce takes care of the children as a custodian, and that a suitable

third party other than both of the parents (often a relative of the children) is put in charge to takes care of the children as a custodian.

Although the Civil Code prepares three options about child custody for parents who decide to divorce, there are cases where children are taken care of by the third party virtually, since legal proceedings are not carried out; for example, if grandparents take care of their grandchildren that are involved in a parents' divorce dispute, or if a foster family takes care of such children (in Japan, foster parents does not have a legal status, therefore they are de facto parents based on agreement or administrative order). In such cases, can the third party as de facto caretaker make an application to the Family Court in order to have the court designate him/herself as a custodian based on Article 766? This is the problem in the present case.

With regard to whether such a third party has the right to make such an application, in legal theory, the opinion in favor is contrary to the one opposed that is in a majority. The opposed opinion bases itself on the historical background of Article 766 and the fact that the Article is provided in the section on divorce in the Civil Code, meaning it is thought of as a kind of effect of divorce. The opinion explains that the applicants concerned with matters of child custody are limited to only the father and mother that are direct parties of the agreement for child custody, and the third party who is entrusted by the parents and virtually takes care of the children never has the right to make such an application. In recent years, however, the opinion in favor is also pressed strongly. It understands that the de facto custodian also has such a right based on the Article. It explains that when the Court designates a custodian for children based on the Article this is considered as not instead of an agreement between the father and mother, but as based on the independent authority of the Court from the viewpoint of protecting the children's welfare. In this opinion, the parties who seek to have the Court put into effect the authority do not only include the father and mother, but also the suitable third parties, as long as they are suitable, such as fostering parents (psychological parents).

In light of the purport of Article 766, the reasons for the opposed opinion are very persuasive. Nevertheless, if applications from a third party are completely denied, some cases may be less in the interests of

children than allowing it. Particularly, if very strong ties have been created between a child and a de facto custodian, the custodian may have strong concerns about the welfare of the child and know best the circumstances surrounding the child. In addition, since the Family Court has designated a third party as a custodian in practice, this fact provides a certain room for reviewing whether the third party should be allowed to have the right to make an application. In light of the considerations above, it seems possible to give a third party the right to make an application for being designated as a custodian, although very strict requirements must be met for safeguards to protect against impingement on the parental power.

Anyway, the root of this problem is that the law regarding the parent-child relationship of Japan is still under the influence of the system centered on not the rights of children but on those of parents. Although it is important to make up for its defects by interpretations, the time may come when we should review the parent-child relationship law of this country thoroughly, including legislative reform.

Supreme Court 1st P.B., November 22 2002
Case No. (o) 989 of 1998
54 (6) MINSHU 87, 1775 HANREI JIHO 41, 1085 HANREI TAIMUZU 189, 1642 KINHO 56, 1143 KINHAN 3
Shinozaki v. Ishihara

The right to demand abatements for a legally secured portion on estate cannot be an object of the right of subrogation by the obligee.

Reference:

Civil Code, Arts. 423 (1) & 1031.

Facts:

B (X's father) had engaged in agriculture and possessed much farmlands as well as premises for his house. B has ten children including X (plaintiff, male). Since around 1975, X came to engage in agriculture as the successor to B's business. Also, he had lived together with his parents and supported his father who was physically handicapped. In this

situation, B made a will by notarial document in 1976 that he would have X inherit most of his estates. In 1996, B died and his ten children became successors.

By the way, Y (defendant, company) is a moneylender and, in 1981, Y lent A (B's third son) three hundred thousand yen. Thereafter, Y took an action for collecting the loan against A and won in that action. Although Y negotiated with A for his payment around 1991, A asked Y to wait the payment until he had inherited estates from his father who was a ripe age. In the same year B died, Y took the same kind of action against A in order to interrupt prescription and won in that action again. For the compulsory execution based on the winning decision, Y registered the transfer of ownership of the land in question on the ground of the succession by subrogating A. The land was registered as the property in co-ownership of B's ten children. After that, Y made an application to the court for compulsory execution to the land. As a result, Y registered one tenth of the shares of the land as A's share.

This case is an action for the objection to execution by a third party which X took against Y in order to exclude the effect of the execution proceeding by Y. Contrary to X's claim, Y argued that Y had declared an intention to demand abatements for the legally secured portion on the estate by subrogating A so that the effect of the execution still may continue to the extent of one twentieth of the share of the land.

Both the Family Court and the High Court held that Y can not exercise A's right to demand abatements for a legally secured portion on the estate in the way of subrogating A and dismissed Y's claim. Y made a *Jokoku-appeal* to the Supreme Court.

Opinion:

Jokoku-appeal dismissed.

The right to demand abatements for a legally secured portion on the estate can not be an object of the right of subrogation by the obligee unless it is a specific case in which the person entitled to the legally secured portion manifests his/her settled intention to exercise the right externally, such as transferring the right. The reasons are as follows.

The system of the legally secured portion is the one that harmonizes the freedom of disposing the properties of the deceased and the benefits

of the successors based on their status. In order to respect the freedom of disposing the properties of the deceased, the Civil Code permits to come into effect the will according to the intention of the deceased even if it invades on the legally secured portion unless the person who entitled to the legally secured portion expresses his voluntary intension to regain such a portion invaded by the will. And so, the right to demand abatements has a nature as the strictly personal right on its exercising unless it is a specific case as mentioned above, and thus, it is included in "rights that are strictly personal to the obligor" provided in Article 423 (1) of the Civil Code. Therefore, a person other than one entitled to the legally secured portion cannot be allowed to interfere with the decision-making of the entitled with regard to whether or not to exercise the right. Article 1031 of the Civil Code allows the successor of the originally entitled to exercise the right but this merely implicates that this right does not have the nature of a strictly personal right with regard to belonging. Furthermore, it is very uncertain whether the successor who is an obligor will inherit some of the estates in the future and the obligee of such a successor should not expect the estate as a security for his loan. Therefore, the interpretation mentioned above does not infringe upon the obligee unreasonably.

Editorial Note:

The subrogation by obligee provided in Article 423 of the Civil Code is a system that, if an obligor does not exercise his own rights for him/herself, the obligee is allowed to exercise such rights instead of the obligor in order to secure his/her claims to the obligor by keeping the obligor's properties. For example, assuming that B borrows a million yen from A and has a claim amount of eight hundred thousand yen to C on the other hand. In this case, if B does not try to collect money from C, despite the fact that B does not have any other property with which to pay the money to A, A can collect money from C instead of B. This subrogation by obligee may aim at almost all property rights as long as it is enforceable (Art. 423 (1) of the Civil Code). However, it cannot aim at "rights that are strictly personal to the obligor" (Proviso of Art. 423 (1)).

Such strictly personal rights usually mean the ones that depend on an intention of the obligor whether or not to exercise it. The rights purely

related to the family law are such examples, such as the parental rights and the right to divorce and so on. In addition, those also include such claims as to avoid a contract between spouses, to support among relatives, to compensatory damage for the infringement of personal rights and so on, although these rights have financial values. It is necessary to give attention to the fact that such rights in the Article include "the strictly personal right on its exercising", meaning the right needed to depend on the intention of the claimant as to whether or not he/she exercises it, but not "the strictly personal right on belonging", meaning the right belonging just to the claimant, such as a claim with a special agreement to restrict transfer.

In this case, the parties contested whether the right to demand abatements for a legally secured portion on an estate can be exercised by the obligee through the subrogation system, in connection with the terms of Article 423. In other words, the problem is whether the right to demand abatements is included in "the strictly personal rights" provided in that Article.

By the way, the legally secured portion on an estate means a portion of estates that the law particularly allows a certain range of successors priority in acquisition. The Civil Code of Japan adopts the principle of the private autonomy, which means that a person is free to control his/her private life by his/her own intention. Therefore, a person to be succeeded is free to dispose of his/her own properties by contract or by will. On the other hand, the successor also has a certain expectation on the estates of the deceased, such as support. So, the succession law gives a certain range of successors a legally secured portion on the estate for that purpose in order to harmonize the freedom to dispose of his/her properties of the deceased and the expectation of the successor on the estates. For example, if a deceased donated all his/her estates by will to a third party despite the fact that there is a successor elsewhere or donated all his/her estates to just one of the children by contract and/or will, the successor who was able to receive nothing can deny the effect of the disposition of the properties or estates by the deceased to the extent that his/her secured portion is invaded. The right which is exercised by such a successor to deny the disposition by the deceased is called "Iryu-bun", meaning the right to demand abatements for a legally secured portion on an estate.

However, the disposition invading the secured portion is not always void. Depending on the intention of the successor as to whether or not he/she exercises the right, the disposition by the deceased is completely valid until the successor exercises it.

Thus, the right to demand abatements has not only an aspect linked to a person's status in the meaning that it is given to the person in a certain status and depends for its exercising upon the intention of the successor, but also a financial aspect in the meaning that it gives priority to acquire a certain portion of the estates. Therefore, it is likely to be a problem whether the right is included in the strictly personal right in the terms of Article 423.

This problem is very complicated and controversial one. In academic theories, the positive opinion that the right would be an object of the right of subrogation by the obligee is acutely opposed to the negative one. This case is worthy of note, since the Supreme Court first solved this problem in such circumstances.

The positive opinion regards the right to demand abatements as one of the property rights separated from a person's status and denies its nature as a strictly personal right. Therefore, it concludes that the right can be an object of the right of subrogation by an obligee, based on the fact that the right to the legal secured portion can be transferred or inherited, namely a person other than the one originally entitled can also exercise it. On the contrary, the negative opinion considers that the fact that the disposition of the property invading the secured portion is valid unless the right to demand abatements is exercised means that whether or not to exercise the right depends on the intention of the successor, and therefor it could not be an object of that.

Finally, the Supreme Court has shown its position by adopting the negative opinion in this case. However, this case does not mean that the right to demand abatements is not the object of the subrogation by an obligee at all. As mentioned in the decision, there is room that it could be subject to the subrogation in specific cases. This point is also worthy of note in this case.

In the academic theories and jurisprudences of Japan, the understandings about the legal secured portion on estate are very complicated. This case will give an opportunity to review such understandings.