4. Family Law

(I) X v. Higashi Chofu Shinkin Bank and Y
Supreme Court 2nd P.B., March 28, 2003
Case No. (*O*) 1630 of 2002
(II) X v. Bank of Tokyo Mitsubishi and Y
Supreme Court 1st P.B., March 31, 2003
Case No. (*O*) 1963 of 2003
1820 HANREI JIHO 62; 1120 HANREI TAIMUZU 87

Summary:

Article 900 (4) of Civil Code providing that the share in the succession of a child who is not legitimate shall be one half of that of a legitimate child does not violate Article 14 of the Constitution.

Reference:

Civil Code, Article 900 (4) proviso.

Facts:

Both cases (I) and (II) are the same kind of disputes regarding the succession of deposits left by the same deceased between two legitimate children and two illegitimate children. The reason why these cases were separate was because the deceased deposited the money in two different banks.

A (father, deceased) died in 2000. A married Y1 and had two children Y2 and Y3 between them. Also, A had two illegitimate children X1 and X2 with B. With the death of A, five persons, Y1 to 3 and X1 and 2, became co-successors. According to the provision of the Civil Code, each share of successors would be as follows: Y1 has 1/2; Y2 and Y3 have 1/6 respectively; and X1 and X2 have 1/12 respectively.

As A had deposits in the two banks (hereinafter, bank C and D), Y1 to 3 claimed a payment of money counted by their statutory share in the succession against the bank C and D. The claim against the bank C is the case (I) and the claim against the bank D is the case (II). In these cases, X1 and X2 intervened with the each litigation and claimed confir-

mation that they were entitled equal shares to those for Y2 and Y3. They argued that the provision of the Civil Code providing that the statutory share of a child who is not legitimate is one half of that of legitimate child violates Article 14 of the Constitution providing equality under the law.

Neither of the District Court nor the High Court affirmed Xs' claims in both cases. The courts held that the deposits should be paid out according to the statutory share. Therefore, Xs filed Jokoku-appeals to the Supreme Court.

Opinions:

In the both cases, the Jokoku-appeal was dismissed.

Opinion of Court in Common with the Cases

"There is a established precedence of this Court that Article 900 (4) proviso of the Civil Code providing that the share in the succession of a child who is not legitimate shall be one half of that of a legitimate child does not violate Article 14 of the Constitution (Supreme Court G.J. July 5, 1995, Case No. (Ku) 143 of 1991, (49) 7 MINSHU 1789)."

However, there is a dissenting opinion in case (I), and there are one concurring and two dissenting opinions in case (II).

Dissenting Opinion in case (I) (Justice KAJITANI and TAKII)

At present, we cannot recognize the constitutionality of Article 900 (4) proviso of the Civil Code. Because the domestic and international change of the social environment tends to a course of diminishing discrimination between the legitimate child and illegitimate child and, in the circumstance of developing diversification of families, it is more difficult to find the specific rationality to make a difference in their share in the succession based on the situation as to whether the parents took on an appearance of marriage that the child cannot decide for him/herself.

Concurring opinion in case (II) (Justice SHIMADA)

Considering the changes of social circumstances and feelings after the decision by the Grand Jury in 1995, at least in this time, the provision may not be unconstitutional clearly, but extremely doubtful in its constitutionality. But, I would hesitate to decide the provision as unconstitutional, because doing so would immediately cause some great confusion. However, I hope strongly that the legislature will reform this provision in

order to equalize the share in the succession as soon as possible.

Dissenting Opinion 1 in case (II) (Justice FUKAZAWA)

I think that, although the Constitution requests the laws relating to the matters of families to consider our history, traditions, customs, social conditions and feelings, on the other hand, it also requires to regard the dignity of individuals without following such social factors in vain. Then, making the share of the illegitimate child one half of that of the legitimate on the ground that he/she is illegitimate itself means discrimination against the illegitimate child based on his/her social status and goes beyond the purpose of the legislation that intends to respect and protect the marriage at law. Thus, there is no substantial relationship between its purpose and its measure, so that I cannot find rational reasons for such discrimination there. In addition, after the enactment of this provision and the decision by the Grand Jury, Japanese society has continued to change greatly as well as the estimation for the factors that have founded the rationality of this provision, while this provision is subject to international criticism.

In this regard, I think that, at the present, this provision has lost a substantial relationship between its purpose and its measure, so that it is invalid for its violation of the Constitution providing for the respects of individuals and equality under the law.

Dissenting Opinion 2 in case (II) (Justice IZUMI)

Although this provision is based on the purpose of the legislation to respect and protect the marriage at law and the purpose is reasonable in itself, I think that the measure that this provision adopts does not contribute so much to encourage the purpose and that the rationality of this provision is comparatively weak. On the other hand, the sacrifices that the child who is not legitimate is compelled to suffer regarding to some constitutional values such as equality, the respects for the individual and the dignity of the individual are very serious. Thus, it is difficult to find a strong enough rationality in this provision to justify such sacrifices.

Editorial Note:

The Civil Code of Japan distinguishes a legitimate child born to a legally married couple and an illegitimate child born out of wedlock

(Art. 772 and 779). Although both the "legitimate child" and the "illegitimate child" are a kind of legal status, the illegitimate child receives various different treatments in the Civil Code such as the measure to decide paternity and the surname. One of these treatments is the problem as to the share in the succession of the illegitimate child. Article 900 (4) provides that, where there are two or more children, their respective share in the succession shall be equal. However, the Proviso of the Article provides that the share in the succession of a child who is not legitimate shall be one half of that of a legitimate child. An issue of the present cases is whether or not this provision violates Article 14 of the Constitution that declares equality under the law and prohibits discrimination based on social status.

In Japan, there already existed a difference between the share in the succession of the legitimate child and that of the illegitimate in ancient law, but the law had been comparatively tolerant towards the illegitimate child in comparison with other countries and given the child legal protection to some extent. Therefore, even when the present Constitution that declared the individual dignity and the essential equality of the sexes was established in 1947 and the Civil Code was reformed according to the new Constitution, the problem as to the share in the succession of the illegitimate child was not made an issue in particular. However, in the 1970s, people gradually had concern about the unconstitutionality of this provision in the background that a movement of equalizing the illegitimate child made a breakthrough in Western countries and the Japanese government ratified the International Covenant on Civil and Political Rights. In the 1990s, the cases contesting the constitutionality of this provision began to appear, and eventually, in 1993, the Tokyo High Court granted the first judgment that declared the provision to be unconstitutional and it attracted public attention. In addition, in 1994, the Government ratified the Convention on the Rights of the Child, so that a conflict between this provision and Article 2 of the Convention came into question and concerned people made an effort to reform this provision. The tentative report for the essential points of the reform of the Civil Code that the Council for law reform published in that time displayed a plan to equalize the share in the succession of the illegitimate child with that of the legitimate.

In spite of these social trends, in 1995, the Grand Jury of the Supreme Court in the case which the opinion of court of the present cases cited held in a majority opinion of ten judges out of fifteen that the distinction as to the share of the illegitimate child did not violate the Constitution. The majority opinion led the decision for constitutionality on the following grounds: (i) although Article 14 provides for equality under the law, it does not prohibit rational distinctions; (ii) since the provisions regarding the statutory share in the succession works as the supplementary provisions in situations such as the intestate, all cases will not always follow these provisions; (iii) because the legislature has reasonable discretion how to prepare a succession system, the provision is not found as unconstitutional until its purpose loses a reasonable basis and such a distinction is clearly unreasonable; (iv) since the Civil Code adopts a doctrine to respect the marriage at law, the legal treatments for the illegitimate child inevitably make some difference from those for the legitimate and (v) the purpose of the legislation of this provision does not lack its rationality clearly or go beyond the limitations of the discretion of the legislature.

With regard to ground (v), the majority opinion stated as follows:

"The purposes of this provision are construed that, while it respects the position of the legitimate child who was born between legal spouses on the one hand, it also gives certain protections to the illegitimate child who is also a child of the deceased by means of allowing him/her one half of the share of the legitimate, having regards to its position, on the other; namely, it intends to harmonize the respect for the marriage at law with the protection of the illegitimate child.... Since the present Civil Code adopts the policy to respect marriage at law, we should consider that such purposes of this provision also have reasonable grounds, and that the fact that this provision makes the share of the illegitimate one half of that of the legitimate is neither clearly unreasonable in relation with its purposes, nor goes beyond the reasonable discretion given to the legislature. Therefore, in our opinion, this provision does not provide discrimination without reasonable grounds and violate Article 14 of the Constitution."

As opposed to the majority opinion, the other five judges stated intimate dissenting opinions and decided that this provision is unconstitutional. The dissenting opinions mainly stand on the following grounds:

(i) since this provision concerns the dignity of the individual, the standard for the constitutional scrutiny of this provision should require the existence of a more positive rationality as to the rationality of the purposes of the legislation itself and the relationship between the purposes and measures; (ii) the discrimination on the ground of the birth of the illegitimate child who has no responsibility for that rejects the purposes of this provision and lacks the rationality of a substantial relationship between its purpose and measure; (iii) the existence of this provision may become one of the causes of social prejudice; (iv) as the social circumstances have changed after the enactment of this provision, the facts forming the basis of the enactment have also changed and (v) social confusion can be avoided by denying the retrospective effects of the judgment as unconstitutional.

The majority opinion of the Grand Jury has been sustained since. However, the council for the legal system made a bill to reform the Civil Code including the equalization of the share in the succession in January 1996, about six months after that decision. Moreover, in 1998, the Japanese government received a recommendation from the Human Rights Committee that the government should take the necessary measures to amend this provision because it violated the Covenant. In addition, the opinion considering this provision as unconstitutional was upheld by a majority of scholars, although a few scholars took prudent attitudes for equalizing the share in the succession. As mentioned above, it seems that the circumstances surrounding the discrimination in the share of illegitimate child has taken a course to request the equalization after the decision in 1995.

In this situation, these two judgments were granted. The majority opinion also sustained its precedent that the provision is constitutional at this time. However, in these judgments, the dissenting opinions should be focused upon rather than the majority. The majority merely stated, citing the decision of the Grand Jury, that the provision was constitutional, whereas the dissenting opinions included deeper considerations based on the changes in the social circumstances after that decision. Referring to the changes in our society regarding the family and the marriage, these dissenting opinions demonstrated that the public thought that only the marriage at law should be protected was also changing at that time,

and stated that the rationality of this provision had become extremely doubtful under such a change in public opinion and the criticisms from international society. While the dissenting opinions considered that it was desirable that the legislature settle this problem, they also expressed a view that the time had already come when the judiciary should provide remedies for this problem, having regard to the dignity of the individual protected by the Constitution.

Although these are cases that decided that the discrimination of the share in the succession of the illegitimate child was constitutional again, the dissenting opinions are quite persuasive because these are expressed in the situation that the settlement by the legislature is still pending. Considering these cases as a chance, it is hoped that they will take immediate legislative measures for this problem.

X v. Y (Prosecutor)

Matsuyama District Court, November 12, 2003

Case No. (*Ta*) 25 of 2003

56 (7) KASAI GEPPO 140; 1840 HANREI JIHO 85; 1144 HANREI TAIMUZU 133

Summary:

When the mother attempts an in vitro fertilization using frozen sperm after the father died, the child who was born by the in vitro fertilization can not bring an action for acknowledgment.

Reference:

Civil Code, Article 787

Facts:

In 1997, A (mother) was married with B (father). Although A and B continued to receive the medical treatment for infertility and attempted artificial insemination (hereinafter called the AI) from the early period of their marriage, A could not conceive. On the other hand, B had suffered from leukemia before the marriage, but, in 1998, B was to have an operation for a marrow transplant because a donor was found for the transplant. Because they were afraid that B would develop azoospermia

by having the operation, they preserved his sperm in the expart hospital for such preservation.

On their preservation, the doctor of the hospital explained to them that the purpose of the preservation was in preparation for azoospermia after the marrow transplant operation and the period of the preservation was limited to when the donor survived because the sperm belonged to the donor. A and B gave consent for the explanation, signed a written request for the preservation and offered them.

The operation for B succeeded and he recovered his health. Although they restarted the medical treatment for infertility thereafter, B was admitted a hospital again in 1999 and died of varicella unfortunately.

After B's death, A decided to reattempt in vitro fertilization (hereinafter called the IVF) after consulting B's parents. She received B's sperm and certification assuring that the sperm was from B from the hospital without the notice about B's death. After that, she attempted IVF by using the sperm and the certification and gave birth to X in 2001.

And then, A notified X as a legitimate child to an official and asked for registration, but the official did not accept the notification. Therefore, she made an application to the Family Court, but the court also dismissed the application. In 2002, although the official accepted the registration of the birth for X, the registration leaves a blank in a space of the father. In such a situation, A represented X and asked for the acknowledgment of X to the prosecutor in the Matsuyama District Court.

Opinion:

Dismissed.

A suit for acknowledgment as prescribed in Article 787 of the Civil Code is one that makes a request to the court to establish the legal relationship between a child out of wedlock and a person related to him/her by blood. When the Civil Code was legislated, the meaning of "father related by blood" was clear. However, at present, fertilization and conception without sexual intercourse are possible because of the development of Assisted Reproductive Technology (hereinafter called the ART). As a result, the concept of the father may alter in meaning. In other words, traditionally, it was sufficient to understand that the father related

by blood means the biological or genetic one objectively, but now, we have to decide what is the father intended in the law, considering socially accepted ideas as well as intentional elements.

Essentially, it is desirable to create statutory remedies for the paternal relationship between the father and the child born through the ART. However, even if they are absent, we cannot ignore ART under the law completely. Therefore, we have to decide whether or not to recognize the legal paternal relationship in ART cases after considering various factors, such as the security of the welfare of the child, harmonization between the ART and the system of family law and succession law, the similarity between ART and natural reproduction, whether or not accepting ART is common and so on.

Considering this case from the viewpoint mentioned above, we find following the facts in this case. Firstly, if the ART is carried out by using preserved sperm after the sperm donor has died, that fertilization would become estranged from the course of natural fertilization and conception. Secondly, the putative father had not given consent to the artificial reproduction after his death. Thirdly, although the child may receive not a little social disadvantage, it is not always in the best interest of the child to acknowledge the legal relationship with a person who can never take care of, bring up and support the child. Fourthly, there is neither the clear consensus about the ART, nor social recognition that the child who was born by IVF after the father died will be considered as the child of the father. Fifthly, once we allow the use of frozen sperm after a donor's death, difficult problems will derive from this such as how long the recipient can use the sperm after the donor's death or what conditions should set out for using the sperm.

Considering all these facts, we conclude to dismiss the plaintiff's claim for acknowledgment.

Editorial Note:

Recently, because of the rapid development of ART, many children have been born by means of AI or IVF in Japan, too. However, our country is behind in preparing legal rules to regulate ART and the status of the children born by it, so that there is no legislation for such regulations. In recent years, the Councils organized in the Ministry of

Justice and the Ministry of Health, Labour and Welfare have published the report and the tentative plan for such legislations, and so our society is making efforts to establish legal rules for matters concerning ART. Thus, in fact, the ART is operating merely under the self-limitations of concerned academic bodies, such as the Japan Society of Obstetrics and Gynecology and the Japan Society of Fertility and Sterility at the present time. For example, the Japan Society of Obstetrics and Gynecology has prepared guidelines that allow the AI and the IVF for a married couple and prohibits gestational surrogates and embryo transfers, on the other hand. However, since the deterrence of the guideline is not enough, occasionally, there are reports that IVF for unmarried couples or gestational surrogates are curried out in spite of such guidelines.

If the ART contrary to the guidelines is carried out and a child is born as a result, the court will face the difficult task in deciding the legal status of the child in accordance with the present law that is not anticipated problems that the technology causes. And, one of the difficult problems is that of the use of frozen sperm. In the present ART, it is possible for a wife to conceive and give birth to a child after the husband has died, using frozen sperm for ART. Thus, the Japan Society of Fertility and Sterility provides guidelines regarding the cryopreservation of the sperm. Although the guidelines allow it in some situations, it also instructs that the preserved sperm will be discarded immediately, if the man preserving them expresses the intention to discard them or he dies. If a child were to be born by ART after the father has died, against the guidelines, how will his/her legal status be in the law?

At present, the legal status of such a child will necessarily be decided according to the provisions of the Civil Code. The Civil Code of Japan has the provision as to the paternity of a legitimate child that a child conceived by the wife during marriage is presumed to be the child of the husband (Art. 772, Para. 1), and that a child born two hundred days or more after the day on which the marriage was formed or born within three hundred days from the day on which the marriage was dissolved or annulled, is presumed to have been conceived during the marriage (Art. 772, Para. 2). On the other hand, with regard to a child who is not legitimate, the Code prescribes that the father and mother may acknowledge the child (Art. 779), and that if the putative parent does not acknowl-

edge the child voluntarily, the child or his/her legal representatives can bring an action for acknowledgement (Art. 787). And the Code also provides that, if the putative parent of the child has already died, the child can bring an action for acknowledgement to the prosecutor as a defendant within three years of the father's death (Art. 787, proviso). According to these provisions, if the wife conceives and gives a birth to a child by ART using frozen sperm after her husband has died, the child is not presumed as the legitimate because the child had not been conceived during the mother's marriage. Therefore, in such a case, the problem is whether or not the child can acquire the status as the illegitimate child of the deceased father on the ground of the biological relationship with the father by means of the action for acknowledgement.

This case is the first judgment of the court with regard to this problem. This decision stated the general analysis of the provisions of the Civil Code: although the "father" prescribed in Art. 787 simply meant related by blood at the time when the Code was enacted, it should be construed as "father recognized by the law" at the present time, when ART is developing, and the father should decide individually, considering some factors such as the similarity to the natural reproduction, the intention of the putative father, the welfare of the child, the social acceptance of ART and the harmony with the present legal system and so on. And then, the court dismissed the suit for acknowledgement in this case after considering each factor respectively.

The comments for this case divide into the pros and cons of the decision. The comments for this decision argue that the Civil Code did not expect the case like this at all in the time of enacting it and the approval of such a suit will cause a variety of problems and confusions in the legal relationship, and that, at the present time when a social consensus has not been established, it is better that the court dismisses the suit for acknowledgement in order to inhibit the carrying out of similar operations. On the contrary, the comments against this decision argue that the suit for acknowledgment should be permitted because there is a blood relationship between the child and the father, and that, since the child exists actually and is accepted in the father's family, at least in this particular case, the suit should be affirmed. However, the criticizing commentators also consider that the consent of the father while he was alive is required

in order to affirm the suit.

Usually, in a suit for acknowledgement, the judicial issue is almost entirely the existence of a blood relationship between the child and the father. However, at the present, when people can use ART, there is some possibility that, while the father gives no information at all, the child who has a blood relationship with him may be born. In such case, it is not appropriate to recognize the paternity based on only the biological facts. Therefore, it may be proper that this decision holds that the father prescribed in Article 787 should read as "father recognized by the law".

However, in my opinion, there are some problems in this decision. Firstly, it seems inappropriate that the court brought some factors other than the intention of the father and the welfare of the child into its considerations and made a balance among the factors. It is true that the usual meaning of a father, namely the question of who is recognized as a father in the legal or social sense, largely depends on common sense. Nevertheless, in the scene that the particular relationship between the child and the donor (father) is contested, these social factors should not be preferred to the personal factors, such as the intention of the donor and the welfare of the child, until enough of a consensus is established to refuse the recognition of the legal relationship. Secondly, although this court stated that it was not always in the best interest of the child to acknowledge the relationship with the donor, who could never take care of, bring up and support him/her, this reasoning is not so persuasive, since the Civil Code prepares a system for acknowledgement after the putative father has died. Thirdly, although this court found an absence of the father's consent for IVF after his death, there may be some room to find consent, depending on the facts in this case; for example, the father and mother consistently made an effort to have medical treatment for the sterility.

In these regards, there may be some possibility to give a particular remedy if the father's consent is found. Therefore, in this decision, it seems that the court took a prudential attitude to affirm the suit for acknowledgement from the child who was born by the ART after the father's death, considering the social influence of its decision in this transitional period when the legislation regarding to the ART is expected.

As mentioned above, although the comments on this decision were

split, both positions agreed that it is desirable that this problem be settled by legislation soon. At present, legislation concerning ART is strongly required anyway. The Council in the Ministry of Justice has already finished examining the problems in order to draw up legislation as to the legal relationship with the parent of a child who is born by ART and published a tentative report in July 2003. The report also pointed out that there was a problem with regard to the utilization of frozen sperm after the donor's death. Unfortunately, although the Council paid some attention to this problem, it avoided examining it deeply. The reasons why the Council took such an attitude were that this issue needed careful examination from viewpoints such as the welfare of the child and the concern for the intention of the parents after considering what the legal system regarding medicine should be for this issue, and that it was not appropriate to make independent rules regarding the legal system of the relationship between the child and parents while the legal policies in the field of the medicine remained uncertain. Thus, the council excluded this issue from the subjects of its examination.

In addition, this case is pending in the High Court. So the expected judgment of the Court is attracting considerable attention.

P.S. According to the Japanese newspapers, the High Court granted judgment in this case on July 16, 2004, affirming the claim of the plaintiff.

5. Law of Civil Procedure and Bankruptcy

Hakusuitekku v. Tani
Supreme Court 1st P.B., July 3, 2003
Case No. (*jyu*) 1873 of 2002
1835 HANREI JIHO 72; 1133 HANREI TAIMUZU 124

Summary:

On the requirements for asking for a change to the dividend table (*haitohyo*) based on the true relationship of right, which differs from the statement of the collateralized claim in an auction-filing-document