59 (6) MINSHU 1783; 1906 HANREI-JIHO, 3;
1188 HANREI-TAIMUZU 213

4. Family Law

X v. Y (Prosecutor)
Supreme Court 2nd P.B., September 4, 2006
Case No. (*jyu*) 1748 of 2004
60 (7) MINSHU 2563; 1952 HANREI JIHO 36;
1227 HANREI TAIMUZU 120

Summary:

The question of the legal parentage of a child posthumously conceived by *in vitro* fertilization using the cryopreserved sperm of the child's father should be settled through legislation dealing with the question—providing whether or not legal parentage between such a child and the deceased father could be established, and if established, who are eligible and what kind of legal effects arise, after contemplating various elements such as (a) the problem of bioethics arising from using the sperm of a deceased individual; (b) the interests of the child born in this way; (c) what those who are concerned feel by establishing legal parentage of such a child; (d) the public's attitude toward such a problem.

Under the current situation which lacks such legislation, we could not establish the legal parentage of a child posthumously conceived by *in vitro* fertilization using the cryopreserved sperm of the child's father.

Reference:

Civil Code Art. 787

Facts:

A (husband) and B (wife) got married in 1997. A had suffered from chronic myelogenous leukemia before his marriage, and decided to undergo bone marrow transplant after their marriage. They also began infertility treatment, but it did not succeed. In 1998, for fear of the

azoospermia which could have been caused by the radiotherapy for A, his semen was withdrawn and cryopreserved in C hospital. At that time, they signed the document provided by the hospital which requires that (a) contact be made when A passed away; (b) A's semen be destroyed as the semen belongs to A; (c) assisted reproduction using the cryopreserved semen not be performed after A's death. On the other hand, in advance of A's bone marrow transplant, A told B that even if he died, he wanted her to have his child if she did not remarry, and after the transplant, he also told his parents, brother and aunt his intention as same as he told B. In May, 1999, as the operation for A was successful, they decided to restart infertility treatment and were allowed to use the cryopreserved sperm, but A died suddenly in September.

After A's death, B decided to have a baby by *in vitro* fertilization using the cryopreserved sperm of A on talking with A's parents. B went to C hospital accompanied by A's parents and received A's sperm and a certificate assuring the sperm was A's. B underwent *in vitro* fertilization in D clinic and she gave birth to X in May, 2001.

On May 23, 2001, B notified X as a child born in wedlock to the authority. On September 10, the authority, however, decided not to accept the notification on the ground that X was posthumously conceived. Soon after, B filed a petition to the family court that the authority's decision should be revoked, but the court dismissed it, and the appellate court dismissed her appeal. In 2002, the authority accepted X's birth notification and registered it without the father's name.

Therefore B, as a statutory representative of X, brought an action for posthumous affiliation between X and A to the prosecutor pursuant to Civil Code Article 787 which provides that "a child...or the statutory representative of the [child] may bring an action for affiliation if three years have not passed since the day of the death of the parent."

On *koso* appeal, Takamatsu High Court reversed Matsuyama District Court's ruling[1] that legal parentage between A and X cannot be established because X is a posthumously conceived child *i.e.* X did not exist while A was alive, and affirmed B's claim ruling that A's consent to

[1] The details of the District Court's decision are given at 23 WASEDA BULLETIN OF COMPARATIVE LAW 82-88.

posthumous insemination was presumed.

Prosecutor made *joso* appeal.

Opinion:

Reversed and dismissed.

Current provisions in Civil Code regarding legal parentage of a natural child provide, being basically based on blood ties, that the legal parentage of a child born in wedlock is established by birth *per se*, and that of a child born out of wedlock is established by affiliation.

Nowadays, however, artificial reproduction using assisted reproductive technologies (hereinafter refered as "ART") is not only an alternative to normal reproduction, but also makes it possible to obtain new ways to conceive a child beyond the normal reproduction. A posthumously conceived child is a good example of a new way of conception. It is also apparent that the current provisions do not assume the establishment of the legal parentage of the posthumously conceived child.

In case of a posthumously conceived child by ART, as the child's father died in advance of conception, he cannot enjoy parental rights, or owe duties to his child, and such a child cannot be supported by his or her father. By the same reason, that child cannot be an heir of his or her father, or an heir per stripes.

Putting these things together, the relationship between a posthumously conceived child and the deceased father leaves no room for the establishment of a legal relationship which current provisions provide.

Indeed, the question of the legal parentage of a posthumously conceived child by *in vitro* fertilization using the cryopreserved sperm of the child's father should be settled through legislation dealing with such a question— providing whether or not legal parentage between such a child and the deceased father could be established, and if established, who are eligible and what kind of legal effects arises from that, after considering various elements such as (a) the problem of bioethics arising from using the sperm of a deceased individual; (b) the interests of the child born in this way; (c) what those who are concerned feel by the establishing legal parentage of such a child; (d) the public's attitude toward this problem.

For these reasons, under the current situation which lacks such legislation, we could not establish the legal parentage of such a posthumously

conceived child.

Justice Takii and Justice Imai respectively delivered a concurring opinion:

What was in common in the concurring opinions is that legislation dealing with this problem should be made as soon as possible after careful consideration from various viewpoints. Justice Takii also points out the facts that (a) the problem of the posthumously conceived child cannot be left any more to the self-regulations of the medical field; (b) we cannot leave the fait accompli named medical conduct undone any more.

Editorial Note:

1. In Japan, the number of children born through ART, such as artificial insemination, *in vitro* fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer and so on, has increased gradually year by year. According to the report of the Japan Society of Obstetrics and Gynecology (hereinafter referred as "JSOG"), in 2005, 116,608 treatment-cycles were performed, and the number of children born through *in vitro* fertilization-embryo transfer (using either fresh or cryopreserved embryos) or intracytoplasmic sperm injection reached 18,168 consequently. A total of 135,757 children have been born in this way since 1989.

Although ART artificially intervenes in the process of human reproduction, and causes ethical, legal, or social problems, there is no legislation which regulates the performance of ART except self-regulation without force issued by JSOG, or the establishment of the legal parentage of a child born through it.

Under this circumstance, the Japanese government has made preparations for legislation on ART from two directions. One direction is taken over by Ministry of Health, Labour and Welfare, and concerns to what extent ART is allowed: the other is taken over by Ministry of Justice, and concerns the legal parentage of a child born by ART. The former considered ART using gamete or zygote which a thirdparty donates, so posthumous conception using the sperm of the deceased husband like the present case is out of consideration. And the latter basically discusses the legal parentage of a child born by ART which the former would allow, so the legal parentage of a posthumously conceived child is also out of consideration. Their discussions, however, are suspended, and legislation is

not likely to be passed in near future.

2. As Civil Code Art. 787, which provides that "a child...or the statutory representative of the[child]may bring an action for affiliation if three years have not passed since the day of the death of the parent," assumes that a child is conceived while his or her father is alive by normal reproduction, it could be said that this provision does not apply to a posthumously conceived child like X. On the other hand, considering the disadvantages which such a child, who is not responsible for his birth, may suffer, it also could be said that a relief—establishment of the legal parentage—should be granted. The problem, however, is that the posthumously conceived child does not fall within Civil Code Art. 787 under its current construction.

Therefore, considering whether or not the legal parentage of a child posthumously conceived by ART could be established, it should be considered whether or not the lacuna could be filled, and if it could be, what justifies it. In this regard, some argue that the notion of the "interests of the child" could fill the lacuna. What consist of the child's interests are, for instance,(a)to have a legal parentage above all;(b)to be supported by relatives;(c)to be an heir per stripes;(d)to have one's identity and family tie. To the contrary, some doubt that the establishment of the legal parentage of such a child really could be the interest of the child because the child is conceived by the deceased father's sperm under the circumstance that the father does not exist anymore, and also argue that it is an ellipsis of construction of Civil Code Art. 787 to apply to such a child, as it assumes the normal reproduction.

3. Regarding this problem, the Supreme Court reaffirms the current provisions' constructions—it assumes normal reproduction, and chose a resolution by new legislation. Surely if the Court granted X's action, it could be said that the judiciary gave approval to an unsettled issue in ART ignoring influences which may be exerted upon the public or medical field. In one sense, X is a victim of the development of reproductive technologies as well as a beneficiary of that.

Anyway, new legislation should be made as soon as possible.

5. Law of Civil Procedure and Bankruptcy

X v. Y
Supreme Court 2nd P.B., January 23, 2006
Case No. (jyu) 1344 of 2005
60 (1) MINSHU 228; 1923 HANREI JIHO 37; 1203 HANREI TAIMUZU 115;
1779 KINYU HOMU JIJOH 87; 1247 KINYU SHOJI HANREI 24

Summary:

1. A bankrupt person can pay arbitrarily to a bankruptcy claim out of his after-acquired assets and exempted assets during a bankruptcy proceeding.
2. To say that payment for loans which a member of a Local Government Officials Mutual Aid Association owed to the association out of retirement benefits which belong to after-acquired assets and exempted assets by means of the Act of Local Government Officials etc. Mutual Aid Association Art. 115 Para.2 during his bankruptcy proceeding is at his own discretion, it is necessary that he pay the above loan in the above way at his free discretion, recognizing that he is not forced to pay to a bankruptcy claim from his after-acquired assets and exempted assets after a bankruptcy declaration.

Reference:

Previous Bankruptcy Act Art. 6 and Art. 16; Bankruptcy Act Art. 34 and Art. 100; Act of Local Government Officials etc. Mutual Aid Association Art. 115 Para. 2

Facts:

X was a local government official and borrowed in total 12,000,000 yen from Y (Tokushima Mutual Aid Associations for Municipal Personnel). X was declared bankrupt at Tokushima District Court in June 10, 2002, 10 AM and a trustee in the bankruptcy was elected. And then X retired from his job on December 31, 2002.