The decision has its English text at the website of the Supreme Court. Since the Summary and Opinion in this Note are the extracts from it and the Facts are summarized with reference to it, please see the website at http://www.courts.go.jp/english/judgments/text/2010.06.17-2009.-Ju-.No..1742.html for the details of the decision.

3. Family Law

X v. Y
Tokyo High Court, March 10, 2010
Case No. (ne) 1828 and 3247 of 2005
1324 Hanrei Taimuzu 210

Summary:

Both the clause for a statutory share in inheritance which provides that the share of a child born out of wedlock (Civil Code, the proviso to Art.900, Item 4; hereinafter referred to as the clause in question) and the provision of mutatis mutandis application (Civil Code, Art.1044 based on which the clause in question shall apply mutatis mutandis to the legally reserved portion: the portion of a child born out of wedlock becomes one half of the portion of a child born in wedlock.) do not violate Art.14, Para.1 of the Constitution. The clause in question, however, violates it and shall not be effective if the clause in question shall be applied mutatis mutandis to this matter where a child born out of wedlock conflicts with an adopted child and which does not relate to the legislative purpose of the clause in question, that is respect for the legal institution of marriage.

Reference:

Civil Code, Art.809, 900, Item 4, 1028 and 1044; Constitution, Art.14, Para.1

Facts:

Z (decedent) supported totally the livelihood of X (appellee)'s mother;

he provided her house and supported her living expenses. Nine years later, although she delivered X, Z had never married her or anyone else in his life. Z devoted a lot of attention to X, taking part in the activities of X's school, gifted one hundred million yen to X before death; Z did not affiliate X voluntarily but compulsorily in an action for affiliation brought by X at the age of eighteen. On another front, Z adopted Y(appellant), a child of his sister, and Y's child, gifted five hundred million yen to Y and four hundred million yen to Y's child before death, and made a comprehensive testamentary gift to Y and passed away.

X, a child born out of wedlock, claimed to Y to be given a comprehensive testamentary gift of Z's entire property for the abatement of a testamentary gift based on the same ratio of legally reserved portion as Y by asserting(1)that the clause in question violated Art.14, Para.1 of the Constitution and should not be effective and(2)that at the minimum, if it was applied to this case where Z had never married anyone, which did not relate to the legislative purpose, respect for the legal institution of marriage, this application itself violated it.

The first instance(Tokyo District Court, March 3, 2005, undisclosed) admitted X's claim for the abatement of a testamentary gift based on the same ratio of legally reserved portion as Y by saying that the clause in question violated Art.14, Para.1 of the Constitution and should not be effective; Y appealed to Tokyo High Court by asserting that the abatement should be made at the rate of one half of the legally reserved portion of Y according to Art.1044 and Art.900, Item 4.

Opinion:

The judgment in the prior instance shall be modified.

The legislative purposes of the clause in question are respecting the status of a child born in wedlock, considering the status of a child born out of wedlock and protecting him or her by admitting one half of the statutory share in inheritance of a child born in wedlock; that is balancing between respect for the legal institution of marriage and protection of a child born out of wedlock. In other words, the Civil Code provides the statutory share in inheritance in favor of a spouse and child in matrimonial relationship so long as it adopts the principle of the legal institution of marriage; it protects a child born out of wedlock, too, by admitting a cer-

tain ratio of statutory share in inheritance. The said legislative purposes of the clause in question has a rational basis so far as our Civil Code adopts it; it is hard to say that the clause in question which provides that the share in inheritance of a child born out of wedlock be one half of the share of a child born in wedlock is extremely irrational in relation to the above legislative purposes and surmounts the border of rational discretion given to a legislative body. For that reason, the court cannot hold that the clause in question makes a discrimination without rational reason and violates Art.14, Para.1 of the Constitution (the Supreme Court, Grand Bench, July 5, 1995).

And in Art.1044 of the Civil Law, the clause in question shall apply mutatis mutandis to a legally reserved portion. On the point that Art.1044 makes the clause in question to apply mutatis mutandis to a legally reserved portion and makes that of a child born out of wedlock one half of a child born in wedlock (hereinafter referred to as the distinction in question), the legally reserved portion cannot be set down freely by the intention of the testator and be viewed as supplementary like the share in inheritance: the share in inheritance is firstly functioning at the time of intestacy, to be sure; but the legislative purpose balancing respect for the legal institution of marriage and the protection of a child born out of wedlock applies, with no change, to the institution of the legally reserved portion. For that reason, the court cannot hold that the distinction in question is extremely irrational in relation to the said legislative purposes and goes beyond the border of rational discretion given to a legislative body. Consequently Art.1044 does not violate Art.14, Para.1 of the Constitution.

But, in considering the fact in question, Z had never married anyone. Y is his adopted child and legitimate based on Art.809 of the Civil Code, which provides that an adopted child gets the same status as a child born in wedlock; Y is not his real child born in wedlock. For that reason, reducing X's portion to one half of a child born in wedlock and increasing Y's portion by the clause in question applying mutatis mutandis to the legally reserved portion does not relate to the legal institution of marriage at all. That is to say, there is not any direct relevance between the distinction in question by the clause in question applying mutatis mutandis to the legally reserved portion and the said legislative purpose in the case where Z is not in a matrimonial relationship; it is impossible to explain that rationality

with the said legislative purpose. The clause in question is provided too broadly in nature in the light of its legislative purpose. We have to draw a line somewhere uniformly and practically, to some extent, as long as it is a legal institution, to be sure, but the disadvantage suffered by X is never small; X not only suffers significant financial disadvantage that X's legally reserved portion is one half of the portion of a child born in wedlock (if the court found X legitimate, the portion would be 1/6; if not, 1/10), but undergoes mental torment by suffering such a discriminative manipulation based on the fact that X was born to parents out of wedlock, not changeable with X's intention and effort. It relates to the constitutional philosophy: the principle of equality, respect as an individual, individual dignity. And compared with the legislative time, the subsequent social situation, the actual circumstances of family life or parent-child relationships and international surroundings, etc. of our country are changing (public knowledge); we have to consider that the social conditions or public sentiments which were a justifiable reason of the clause in question and the distinction in question led to the situation that was believed to already have faded out at this time of commencement of inheritance in 1995. And that is, our consciousness about family life and parent-child relationships including the way of conjugal living together is becoming diverse in association with the change in the social and economic circumstances in our country; it is common knowledge that the reality of family life and matrimonial relationships is changing and becoming diverse at the commencement of inheritance, too: the change of family structure because of the falling birthrate and the aging population, the increase in the number of single life and *de facto* marriage or non-marriage, and the increasing tendency of the proportion of children born out of wedlock to the number of live births, etc. And in many European countries, the increase in the number of children born out of wedlock had led them to revise the legislation that the share in inheritance of a child born out of wedlock should be the same as that of a child born in wedlock until just about the 1960's; in our country, too, since the clause in question had problems in the light of the principle of equality under the law, a draft of the outline of revision was published to the same effect about 1995, and the Legislative Council of the Ministry of Justice submitted a bill for partial amendments to the Civil Code to the Minister of Justice in February 1996, shortly after this com-

mencement of inheritance. Art. 2, para.1 of the Convention on the Rights of the Child ratified by our country in 1994 provides: States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's ... birth or other status. In this regard, the social conditions or public sentiments which were a justifiable reason of the clause in question and the distinction in question led to the situation that was believed to already have faded out at this time of commencement of inheritance in 1995.

From a comprehensive standpoint for the various factors, even though the clause in question and the provision of mutatis mutandis application are not necessarily unconstitutional and void on their face; so long as they apply to this case, so they shall be.

Consequently, the main clause of Art.900, Item 4 shall apply mutatis mutandis to this matter; the ratio of X's legally reserved portion shall be one sixth (1/2 x 1/3) of Z's property.

Editorial Note:

In regard to the constitutionality of the clause in question, the Supreme Court held that the clause in question did not violate Art.14, Para.1 of the Constitution in 1995. And the decision has been followed by subsequent similar judgments as a precedent; some supporting and dissenting opinions were added to all the judgments, there is ongoing debate as to its constitutionality. In point of the equalization of children born in and out of wedlock, the Supreme Court held that the pre-revised Art.3, Para.1 of the Law of Nationality violated Art.14 on June 4, 2008 on the ground that the clause which admitted a child born in wedlock to get Japanese nationality but did not do so for a child born out of wedlock though his father was Japanese, set a discrimination without rational reason; after 6 months, the Art.3 led to an amendment; on the following year, a judgment on September 30, 2009 sustained the constitutionality of the clause in question. In such a process, this court, despite the lower court, questioned the constitutionality of whether or not the clause in question should apply mutatis mutandis to the legally reserved portion.

Originally, a decedent has a right to dispose freely of his or her property by gift or testamentary gift. But, in considering the function of succes-

sion: the life security of the bereaved family and the liquidation of potential shares, the arbitrary disposition of property by a decedent may be limited from the political standpoint of the protection of some bereaved family needing support; that is the institution of the legally reserved portion. In Japan, Art.1028 of the Civil Code provides that heirs other than siblings shall receive an amount equivalent to the ratio: (i) in the case where only lineal ascendants are heirs, one third of the decedent's property, (ii) in cases other than that referred to in the preceding item (i), one half of the decedent's property. And Art.1044 provides that Art.900 shall apply mutatis mutandis to the legally reserved portion; a claimant, a child born out of wedlock may claim for abatement of testamentary gift or gift before death at the rate of only one half of a child born in wedlock. In this case, X claimed the facial or as-applied challenge of both the clause in question and the provision of mutatis mutandis application; X argued that a child born out of wedlock also should have the same ratio of a legally reserved portion as a child born in wedlock by the main clause of Art.900, Item 4 applying mutatis mutandis to a legally reserved portion in exchange for its proviso.

The court held that both the clause in question and the provision of mutatis mutandis application were constitutional; the extent of mutatis mutandis application should be limited to a matter where a legitimate, i.e., a real child born in wedlock was involved on the grounds that the clause in question applying mutatis mutandis to this matter where an illegitimate and adopted child who got the same status as a child born in wedlock, i.e., not a real child born in wedlock, compete with each other was too broad in the light of its legislative purpose: balancing respect for the legal institution of marriage and protection of a child born out of wedlock; the clause in question applying mutatis mutandis to this matter was unconstitutional as-applied. If the clause in question applies mutatis mutandis, X's portion shall be: 1/2 (Art.1028, Item 2) x 1/5 (X : Y : Y's child = 1 : 2 : 2) = 1/10, X's actual portion is 180 million minus special benefit; if not, X's portion shall be: 1/2 x 1/3 (X : Y : Y's child = 1 : 1 : 1) = 1/6, X's actual portion is 2.82 billion minus special benefit. To be evaluated that the balance of 26.4 billion suffered by X on the mutatis mutandis application of the clause in question was a 'significant financial disadvantage' and 'never small' was the biggest reason why the court held it to be unconstitutional as-applied.

The other reasons were almost equivalent to the dissenting opinions in the precedents which called on the correction of discriminative manipulation based on the facial challenge.

But in this matter, we may not forget that Z mentioned his intention of disposal of his property in his testament. Unlike the case of non-testamentary succession, in this matter, the substance of Z's intention should be considered as well as the equalization between a child born in and out of wedlock. Z adopted Y (Z's nephew or niece) and Y's child, gifted more than 400 million yen per each before death and made testamentary gift of all his property to Y; Z gifted 100 million yen to X before death, and led to negative affiliation of X in the action for affiliation brought by X and did not marry X's mother despite X's birth; from the said facts, we can guess easily that Z had intention of making Y and Y's child his successor of property. I cannot decide clearly, though the facts in detail are not disclosed, that Z is a wealthy man and well-acquainted with the law, and prepared before death for the legal effect pursuant to the law of succession; if a claim for abatement of testamentary gift has been brought by X after Z's death, Z would not have forecasted that the ratio of X's legally reserved portion was the same as Y.

The institution of legally reserved portion is a compulsory provision which admits limitation of disposal of his or her own property exceptionally to the extent of the ratio designated by law, although originally a decedent can dispose of it freely based on the principle of private autonomy; therefore, the nation is not allowed to tear up the intention of a decedent who calls on its disposal in accordance with the Civil Code. And Art.809 of the Civil Code which admits the adopted child to get the same status as a child born in wedlock is interpreted as a compulsory provision, there is a fact that more than half of normal adoptions are established for the purpose of transfer of property. Consequently, a 'child born in wedlock' of Art.809 should be interpreted unambiguously. If the clause in question does not apply to this matter as the court said, a child adopted by a decedent never married has a different status to a child born out of wedlock of a decedent from a child adopted by a decedent in a matrimonial relationship; such an interpretation is open to question.

I think that the discriminative manipulation between children born in and out of wedlock should be corrected, generally and more positively, the

judiciary should make an unconstitutional judgment in order to protect the rights of the vulnerable. In that sense, I sustain the conclusion of this judgment. It is, however, logically hard to draw the conclusion on the premise that the clause in question and the provision of mutatis mutandis application are held to be constitutional; especially in a claim for abatement of a gift or testamentary gift, in the nature of the institution of the legally reserved portion, it is also hard to interpret the terms. I would say that the judge already had a desired conclusion of equalization between a child born in and out of wedlock; he seems to have construed the clause in question and the provision of mutatis mutandis application without ample consideration of the general structure of the part of relatives and succession. The next judgment is noted in the final appellate instance.

4. Law of Civil Procedure and Bankruptcy

Xs v. Ys
Supreme Court 3rd P. B., April 13, 2010
Case No. (ju) 1216 of 2009
12 Saiji 1505

Summary:

The plaintiffs (Xs) insisted that the defendant (Ys) gained the Supreme Court judgement by fraud at the last suit, and claimed damages. But the Supreme Court dismissed the appeal, because the evidence that the parties presented was basically the same as the last suit, and just changed the valuation of the evidence at this time.

Reference:

Art.709 of Civil Law
Art.338 of Civil Procedure Act

Facts:

1. At the last suit

Ys have bought the real estate (the land and the house). But Ys said,