

academics have questioned the reasonableness of this provision, there had been no remarkable theoretical study either to uphold or nullify this provision before the Consumer Contract Act was enacted in 2001. As the lower courts have given different judgments on its legitimacy of the provision under the Act since 2001, the academic debate has developed. This is the first decision by the Supreme Court concerning the legitimacy of the provision.

There are two points in the decision. First, the Court finds that the provision satisfies the requirement of aggregation of consumer's duty in the first paragraph of Article 10 of the Consumer Contract Act, because it imposes on the lessee the burden of the maintenance expenses for any natural wear and tear in the contract which the lessee should not bear unless otherwise agreed under the Civil Code. Secondly, the court finds that the provision doesn't satisfy the requirement "impaired the principle of good faith" in the second paragraph of article 10, because, as long as the amount to be deducted from the security deposit is clearly stated to the contracting parties, they reasonably realize the deduction as another form of the rent, unless the principle of good faith is impaired under Article 10 due to the high amount to be deducted from the security deposit is judged to be too high. Under this decision, there exists the only a limited number of cases where such provision could be found to impair the principal amount of deduction, given the fact that the court finds it reasonable to deduct approximately 3.5 times as much as the monthly rent in this case.

The decision has its English text at the website of the Supreme Court. The Summary and Opinion in this Note are the extracts from it and the Facts are summarized with reference to it. For more details, please see their website:

<http://www.courts.go.jp/english/judgments/text/2011.03.24-2009.-Ju-No..1679.html>

3. Family Law

X v. Y

Supreme Court, March 18, 2011

Case No. (jyu) 332 of 2009

1528 SAIBANSYO JIHO 12; 2115 HANREI JIHO 55; 1347 HANREI
TAIMUZU 95

Summary:

It is deemed to be an abuse of rights that a wife demands from her husband child support after divorce in relation to a child with a different biological father who has no father-child relationship with her husband biologically but only legally.

Reference:

Civil Code, Art.1, Para.3, 766, Para.1, 770, Para.1, 772, 774, 777 and 877, Para.1

Facts:

Y (appellee: wife, a former painting instructor) married X (appellant: husband, a doctor, yearly income of around 36 million yen) in 1991 and had three boys: the eldest and third one had blood ties with X, born in 1996 and 1999, but the second one (hereinafter referred to as A) did not have it, born in 1998. Y had never told X the truth about the paternity of A, although Y had known it since a while after giving birth to A.

From about 1997, X had deposited his credit card with Y and let her freely spend money for living expenses from his bank account, too. From about 1999, X started to give her a certain amount of living expenses monthly in cash: about 1.5 million yen between 2000 and 2003.

In the end of January 2004, their matrimonial relationship broke down because of X's multiple extramarital affairs. After that, a family court ordered X to pay 550 thousand yen monthly as matrimonial expenses to Y, and it becoming final and binding.

In April of 2005, for the first time, X learned that there was no blood tie between X and A, and brought an action for declaratory judgment of absence of father-child relationship between them; it was dismissed, becoming final and binding.

In this case, X filed for a divorce from Y base on Art.770, Para.1 and required Y to have parental authority over the three children (not

disputed), to distribute matrimonial property and to pay 150 million yen as damages for mental suffering with a divorce; in a counter claim, Y also filed for divorce and required X to pay 300 thousand yen as child support per child monthly (a total of 900 thousand yen monthly), to distribute matrimonial property, to pay 10 million yen as damages for mental suffering with a divorce and to share his pension.

The first instance (Tokyo Family Court, May 12, 2008) and the second instance (Tokyo High Court, November 6, 2008) decided the divorce and admitted that Y had the parental authority, that X should pay to Y the same amount of child support in relation to A as the other two children on the grounds of the legal father-child relationship between X and A: per child per month, 160 thousand yen (the first instance) / 140 thousand yen (the second instance) and that X should pay to Y 12.7 million yen as a share of matrimonial property. In addition, the Family Court rejected their claims of damages for mental suffering with a divorce, while the High Court ordered X to pay one million yen as damages for it on the ground of X's fault of divorce and Y to pay one million yen as damages for mental suffering with torts on the ground that Y let X owe A's child support without telling the fact that A was not his biological child, born out of wedlock, and that Y let X lose an opportunity to dispute whether the legal father-child relationship between them exist or not in courts.

X appealed to the Supreme Court by asserting that there was some illegality against the rule of reason (*jyori* in Japanese) in the judgment of the High Court ordering X to pay child support in relation to A on the ground of the legal father-child relationship, without the blood ties nor any intention for X to be A's father. And then, This appeal was accepted.

Opinion:

The judgment in the prior instance shall be partly quashed and decided by the Supreme Court.

According to the fact found in the lower instances, Y, despite marrying X, had an extramarital relationship with someone other than X and gave birth to A. Y had not told X that A was not X's biological son although Y had known it since two months after giving birth to A. X learned about it, for the first time, 7 years after delivering A; X lost the opportunity to bring an action rebutting the presumption of the father-child relationship 'within

one year of knowing of the child's birth' provided in Art.777 of the Civil Law. X, in another way, brought an action for a declaratory judgment of the absence of the father-child relationship; but it was dismissed. Finally, X has no way to dispute it in courts.

In contrast, X had deposited his bankbook, etc., to Y and let her freely spend money as living expenses. From then on, X had given Y a high amount of living expenses, of course, including A's child support: about 1.5 million yen per month in cash, for the last four years before the breakdown of the matrimonial relationship. After that, the Family Court ordered X to pay 550 thousand yen monthly as matrimonial expenses to Y, it becoming final and binding. As seen above, the Court finds that X has sufficiently shared A's child support and that, in the light of the development that X has lost any way to dispute the father-child relationship in courts, X would be forced to bear a heavy burden, if X continued paying it after divorce.

In addition, as a high amount of matrimonial property will be distributed to Y in the divorce, the Court does not find that there are some reasons that Y cannot bear A's child support. So, the Court considers that if only Y is ordered to pay A's child support, it is not against the welfare of the child.

In the light of all the foregoing considerations, the Court holds that it is deemed to be an abuse of rights that Y demands A's child support after divorce from X, even in the light of respect for the welfare of children in deciding child support.

Editorial Note:

In our country, the Civil Law admitted two types of legal treatment for children: for a child born in wedlock, a legitimate child and for a child born out of wedlock, a 'not legitimate' child. With regard to the former, 'A child conceived by a wife during marriage shall be presumed to be a child of her husband' (Art.772, Para.1); in order to rebut this presumption, the father shall bring an action of denial of child in wedlock (Art.774 and 775), 'within one year of knowing of the child's birth' (Art.777). In addition, in another way, we have the last resort to dispute it: an action for declaratory judgment of absence of a father-child relationship. However, our authorities have a tendency to admit the action only if it is objectively

obvious that a wife impossibly conceived a child of her husband. In this case, X lost the opportunity to bring the action of denial within one year, because Y had not told him the truth. And the next action for a declaratory judgment was dismissed because of its restrictive admissibility. Eventually, between X and A, a father-child relationship has been legally established, even without having blood ties. In this situation, why should not X continue bearing A's child support even after divorce?

The prior courts considered that the reason why parents should pay child support consisted in the legal parent-child relationship, for which they ordered X to pay the same amount of support to A as the other children. However, Y's attitude to X was negatively estimated by the Supreme Court: not telling the truth, letting X bring A up who was not his true son, in addition, spending a high amount of money that X gave Y as living expenses monthly. At last, it ordered Y to pay A's support on the ground of blood ties. The use of general provision, 'an abuse of rights' (Art.1, Para.3) by the Court presupposes that fathers not having blood ties but legal ones with the child have a responsibility to bear the child support and that mothers taking care of the child, in principle, have the right to demand it of their husbands. But the Court did not admit it, in relation to the relevant demand from Y, since it was considered as an abuse of the rights by Y.

With regard to this conclusion, it is criticized that X should necessarily bear it in the light of child welfare since we admit that fathers not having blood ties with the child could legally become fathers in respect of child welfare as a system of the Civil Law. In other words, this system could naturally imply some matters like a wife's adultery in this case. Indeed, it is only X to whom A should demand it, as far as the father-child relationship between them cannot be denied institutionally. In this meaning, it may lack respect of the child welfare that Y only should pay it. However, in the stand point of X, who learned later that he had become the father of the child not having blood ties with him, it is doubtful that forcing X to continue paying A's child support up to A's becoming an adult, even after having known the truth, would be an institutional effect naturally implied in our Civil Law, except for the child support which X has been paid until now as a part of matrimonial expenses without doubting whether A is his true son.

If the father refused to be the father of the child after having known it,

both the father and son could not but mentally feel some burden on the continuous legal fiction that they are a father and child. In order to maintain the premise that legal parents shall be those who have the liability to pay the child support, the father, at least, needs to accept to continue being the legal father of the child. In addition, the child, especially in fully matured age, should require his or her acceptance of it, too. I think that the clauses in the Civil Law should be properly interpreted and applied, in balancing between the parents and child, for the sake of a reasonable outcome, for which the acceptability of action for a declaratory judgment needs to be wider than now.

Of course, child welfare is an important consideration, but, some regard for the father who learned the truth is also required, in the present condition that parental testing by DNA is prevalent. In this meaning, in this case where Y can afford to bring A up, the conclusion for only Y to bear A's child support after divorce to A's becoming an adult is well balanced between X, Y and A. However, this balance should not be struck in the stage of sharing child support, but, of establishing the father-child relationship. It is unreasonable that the father refusing to be the legal father of the child not having blood ties with him would be forced to bear the long-term child support under a system; actually, the father would be unlikely to continue paying it. A future drastic revision would be expected with regard to the system establishing especially the father-child relationship.

4. Law of Civil Procedure and Bankruptcy

X v. Y

Supreme Court 3rd P.B., March 9, 2011

Case No. (Ku) 1027 of 2009

1345 HANREI TAIMUZU 126;

1527 SAIBANSYO JIHO 3;

2111 HANREI JIHO 31