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<http://www.courts.go.jp/english/judgments/text/2012.03.16-2010.-Ju-.No..332.html>

3. Family Law

X v. Y

Tokyo High Court, October 18, 2012

Case No. (ra) 1926 of 2012

2164 HANREI JIHO 55; 1383 HANREI TAIMUZU 327

Summary:

In respect to the conflict in handing over a child between a husband and wife, a temporary restraining order prior to adjudication in the family court regarding the handing over was quashed before its enforcement without enough compelling necessities for the compulsory execution to issue it.

Reference:

Domestic-Relations Adjudication Act, Article 15-3, Paragraph 6 and 7, Civil Provisional Remedies Act, Article 23, Paragraph 2

Facts:

Y(opponent, appellant: father, a company employee, yearly income of 4.4 million yen) married X(petitioner, appellee: mother, a part-time employee, monthly income of 80,000 yen) in 2007, delivered a child (a boy, 4 years old) in 2008, and bought a new house. As X and Y did not get along with each other and had many fights, X left a signed and sealed notification of divorce at home and left the house with their child in March 2012. They went to X's parents' house to live, (X's father(60 years old), mother(58 years old), and elder brother(35 years old) were living together), and have been living separately from Y since then.

Y met the child twice after the separation, and one afternoon in May

after a few days of the child's second visit, he took the child outside, saying they had promised to play together, and took the child to Y's house. In the evening, Y called X and said, "The child is still sleeping, so he cannot go back yet" and at night, Y called X again and said, "The child insists, 'I love Daddy, I don't want to go home.'" Therefore, X replied, "Then the child may stay overnight with Daddy." The following day, around noon, X's father called Y and said, "Please bring the child back", and after a while, Y brought the child to X's parents' house. At that time, the child was crying and said, "I want to be with Daddy", and Y was also crying, not letting go of the child at the entrance door. When X's father saw it, he said to Y, "Why don't you stay with your son for another few days?" Hearing that conversation, X thought Y may not return the child, so she handed him the child's clothes and memorandum about the child.

Ever since then, Y has been raising the child with the help of his parents. Before the separation, X had taken the child to and from a nursery school, but there is no problem after Y took the role. One evening after a few days, X visited Y to see the child, but the child did not even say "Mommy" nor smile at her, although she had brought up the child almost by herself for four years.

In June, X filed a petition against Y on the merit for designating X as a person having custody over the child and delivering him to X, as well as for a temporary restraining order prior to adjudication. The first instance (Maebashi Family Court Ota branch, August 9, 2012) admitted the temporary one. Against this decision, Y appealed insisting that there were neither necessities for the temporary order nor agreement between X and Y that X would care for the child after the separation, despite its existing found by the original instance.

Opinion:

The decision of the first instance was quashed, and the appeal was dismissed.

Until conflicts of divorce between a husband and wife are concluded by the final and binding decision, a series of decisions have been held with sometimes different conclusions court by court. If the handing over of minors is compulsory executed in such a case, minors would greatly suffer from stress and strain, and this is against the welfare of minors. Therefore,

when temporary restraining orders prior to adjudication are made for the handing over of children, careful consideration is necessary to prevent them from being transferred several times by each enforcement of the subsequent decisions with different conclusion. In addition, as adjudications in family courts are proceedings for non-contentious cases, they should be decided flexibly and promptly case by case, and their conclusions regarding the rights and interests of parties should be bound promptly through the subsequent immediate appeal, unlike civil suits with the oral arguments and three-tiered judicial system.

Given the above legal characteristics and procedural structure, the court should examine the next three points when issuing a temporary restraining order prior to adjudication regarding the handing over of minors: (1) whether a reason why a person having custody started to care for the minor is based on forcible abduction or in any other similar situation, (2) whether the temporary order to hand over a minor is necessary from the point of view of abuse prevention, avoidance of significant deterioration of growing environment, and of the welfare of the minor, and (3) whether waiting for the final and binding conclusion on the merit may be against the welfare of the minor. And, considering all these circumstances as well as any other conditions concerning the minor comprehensively, the court shall find enough compelling necessities for the compulsory execution of a handover of a minor to issue its temporary restraining order prior to adjudication. In considering the fact found above from this regard, in this case, the court cannot find either its necessities or any agreement between X and Y regarding the child's care after the separation. Therefore, the court deems the decision of the first instance, which determined X as a tentative person having custody and ordered Y to hand him over to X based on the temporary order prior to the merit to be unjust.

Editorial Note:

A temporary restraining order prior to adjudication regarding the handovers of children shall be issued only when it is necessary to avoid any substantial detriment or imminent danger because of its nature pursuant to the order of provisional disposition that determines a provisional status in the Civil Provisional Remedies Act (Article 23,

Paragraph 2 of the Civil Provisional Remedies Act shall be applied *mutatis mutandis* to domestic-relations cases based on Article 15-3, Paragraph 7 of the Domestic-Relations Adjudication Act and on Article 115 of the Domestic-Relations Cases Procedures Act). In addition, when the temporary restraining order prior to adjudication regarding handovers of children was issued, its compulsory execution will be available (Article 43 and 52 of the Civil Provisional Remedies Act shall be applied *mutatis mutandis* to domestic-relations cases based on Article 15-3, Paragraph 6 of the Domestic-Relations Adjudication Act and on Article 109, Paragraph 3 of the Domestic-Relations Cases Procedures Act). Therefore, the temporary order may inflict great mental strain and suffering on minors, in addition, when the conclusion of subsequent decisions was different from the former, the child has to go through the ordeal multiple times. In this case, in the light of avoiding repeated compulsory executions as far as possible, and on the premise that the compulsory execution of handovers of children should be based on decisions on the merit which are available for immediate appeals, the court strictly limited the criteria for the necessity to issue temporary restraining orders prior to adjudication and decided to quash those which did not meet these requirements.

It will be a crucial agenda in the future whether compulsory executions of handovers of children in themselves should be admitted or not, and if yes, what type should be approved. On June 12, 2013, the Act for Implementation of the 1980 Hague Child Abduction Convention (Act No. 48 of 2013) passed the Diet, and the government and judiciary are working on coordinating it with other related domestic laws and regulations towards its intended enforcement in the next year. From now on, the five following options will be admitted for handovers of children: a petition for (1) child custody on merits, (2) temporary restraining orders prior to adjudication, (3) Habeas Corpus, (4) the recognition and enforcement of judgments of foreign courts regarding child custody, (5) summary returns based on the Hague Convention, especially for international child abduction between the contracting States. After the Hague Convention is enforced, the position of each procedure will require review. This particular case corresponds to (2) and has common points with (5) on the grounds that the decision on the Hague Convention must be made prior to the merit. The proceedings on the Hague Convention take place on the

premise that it is the best interests of children generally that the hearing and decision regarding child custody should be considered on the merit in the court of their habitual residence before their removal, and therefore that they should be summarily returned to the country of habitual residence. However, when the court of the home country determines a taking parent as the primary carer, the child returned on the Hague Convention in order to receive the decision on the merit may experience again the international transfer. Therefore, it is obvious that the same careful consideration is necessary from the point of view of the welfare of children as in this case. Further consideration is expected in the future to achieve the welfare and best interests of children by a cross-procedural approach.

4. Law of Civil Procedure and Bankruptcy

X v. Y

Supreme Court 2nd P.B., December 21, 2012

Case No. (*jyu*) 1626 of 2011

1571 SAIBANSYO JIHO 4;

2175 HANREI JIHO 20;

1965 KINYU HOMU JIJOH 123

Summary:

A claimant brought a claim for restitution, on the basis that the respondent obtained unjust profit from *res communis* which he rented to a third party. The Supreme Court determined that an action for future performance in this case, that is, a claim for damages after the last day of oral argument in a case cannot be made, thus the claim is not allowed.

Reference:

Article 135 of the Code of Civil Procedure

Facts:

This case began with a family dispute concerning land which was used