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Notable Supreme Court Cases on Family Law*

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I. Introduction

As academic exchanges across borders become more and more active, a judicial decision in one nation influences not only its own future decisions, but also those in other nations on similar issues. The key to a decision is that it must be in accordance with common sense; thus, it is necessary to refer to decisions of other nations to ensure whether a conclusion of a decision at hand is in accordance with common sense. A decision of another nation is not solely based on its culture or historical background, but also on common legal notions. Hence, such decisions are an important resource for common legal notions. In fact, the Supreme Court en banc Decision 2018Da248909 Decided February 21, 2019, which concerns the issue of increasing the maximum working age of a manual laborer from 60 to 65 years old, referred to a German decision on a similar issue.[1)]

Below are the Supreme Court cases that are meaningful in terms of comparative law. Cases that can serve as relevant sources of reference in other nations were carefully selected for this review. This article thereby seeks to promote the international interest of other nations on the decisions of the Republic of Korea.

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1) It refers to the German decision that if the victim has an accident at an early age, his or her working period is the retirement age of the occupation that the victim is expected to have based on his or her intellectual ability, physical condition and surroundings (BGH NZV 1989, 345; BGH NJW 2011, 1148).

II. Overview of the Supreme Court Cases on Family Law

1. *Judgment on a 'Grave Risk' under the Convention on the Civil Aspects of International Child Abduction: Supreme Court Order 2017Seu630 Dated April 17, 2018*

1) Facts and Issues

X ("the Petitioner", father) with Japanese nationality married Y ("the Counterpart", mother), who was born and raised in the Republic of Korea, in Japan in 2006. X and Y have lived in Japan with their children, A ("Principal 1"), who was born on January 2, 2007, and B ("Principal 2"), who was born on June 1, 2009. X and Y had a fight on June 28, 2016. Thus, Y entered the Republic of Korea with Principal 1 and 2, without X's consent.

Accordingly, X requested the return of Principal 1 and 2 based on the Act on the Implementation of the Hague Child Abduction Convention, following the accession of the Republic of Korea to the Convention on the Civil Aspects of International Child Abduction. In response, Y refused to return the children and argued that "there is a grave risk that the return would expose the children to physical or psychological harm or otherwise place them in an intolerable situation."[2)]

The issue in this case is whether domestic violence against a spouse may be a ground for the refusal to return, i.e., 'the existence of a grave risk at Art. 13 para. b of the Convention on the Civil Aspects of International Child Abduction.'

2) Decision of the Supreme Court (Supreme Court Order 2017Seu630 Dated April 17, 2018)[3)]

The Supreme Court ruled that there exists a grave risk in this case.

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2) This is the reason for refusal of return stipulated in Article 12 paragraph 4 subparagraph 3 of the Act on the Implementation of the Hague Child Abduction Convention. The Convention on the Civil Aspects of International Child Abduction stipulates it in Article 13 paragraph b.

3) For the full English translation of the order, *see* https://library.scourt.go.kr/SCLIB_data/decision/6-2017Seu630%20.htm. (last visit on January 8, 2021)

> "According to the Convention on the Civil Aspects of International Child Abduction (hereinafter the "Convention") and the Act on the Implementation of the Hague Child Abduction Convention (hereinafter the "Act"), the court may dismiss a petition seeking the return of a child even where the right of custody has been breached as a result of a wrongful removal of a child, provided that 'there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'" (Art. 12 para. 4 of the Act).

The exceptions to return enumerated in Art. 12 para. 4 subpara. 3 of the Act are placed in order to prevent harm, which may arise from a violation of the specific and individual welfare of a child due to his or her prompt return. Thus, the construction of the said provision should place priority on the rights and interests of a child over the right of custody of either of the parents or the promptness of the procedure.

Therefore, a "grave risk" includes not only cases where there is a concern for harmful effects on a child's mind and body because of the Petitioner's acts of direct violence or abuse against him or her. It also includes the risk of psychological harm to the child due to frequent violence committed against the other parent and deprivation of appropriate protection or care upon the child's return to the State of habitual residence.

Along with the foregoing circumstances, the court receiving the petition for the return of a child must comprehensively examine the entirety of circumstances, including: (i) the degree of harm; (ii) whether there are concerns about recurrence of harm; (iii) the specifics of the environment where the child is brought up both preceding and following his or her return; and (iv) the psychological and physical impact of the return on the child. Based on such examinations, the court should make decisions based on the best interest of the child and on determination whether the return rather poses a grave violation to his or her welfare by taking into account factors such as the custodial right of the Petitioner and the Counterpart.

In light of the aforementioned legal principle and evidence duly admitted, the lower court was justified to have dismissed the petition filed by the Petitioner. The lower court rendered its judgment in view of the circumstances suggesting that: (i) the Petitioner had verbally and physically

abused the Counterpart multiple times, causing psychological suffering to Principal 1 who witnessed such abuse; and (ii) if only one of the Principals were to be returned to Japan, such separation would inflict psychological suffering on both. In so determining, the lower court did not err by misapprehending the legal doctrine regarding "a grave risk."

3) Comment

The Republic of Korea acceded to the Convention in 2012. It enacted the Act in 2012 to implement the Convention. The Convention is designed to prevent the abduction of children internationally. To achieve such purpose, the Convention stands on the principle of the immediate return of the seized child to his or her State of habitual residence. Such a principle was established based on the presumption that such immediate return is in the best interest of the child.[4)]

However, a domestic court may refuse to return a child if one of the five exceptions prescribed in the Convention and Act is proven. Those five are as follows: (i) when a year has passed from the date of illegal movement or detention of a child, and the child has already adjusted to a new environment, (ii) when the person, institution or other body exercising the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention, (iii) when there is a grave risk that the return of the child would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation, (iv) when the judicial or administrative authority finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views, (v) and when the return of the child would not be permitted by the fundamental principles of Korea

4) Hague Conference on Private Int'l Law, Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children(October 30 - November 9, 2006), p. 46 (March 2007), https://www.hcch.net/en/publications-and-studies/details4/?pid=6227&dtid=57 (last visit on January 8, 2021).

relating to the protection of human rights and fundamental freedoms.

Considering the premise of the Convention that the return of the child should be in accordance with his or her welfare, these five exceptions must be interpreted rigidly. However, taking into the child's best interest as the primary consideration in the interpretation and execution of the Convention, it would be undesirable for a domestic court to order his or her return without any inquiry into the impact and the status of his or her rearing before and after the return. Thus, the domestic court has the duty to investigate the matter to a certain degree.[5)]

In the case at hand whether domestic violence against a spouse constitutes "a grave risk that a child will be exposed to physical or mental harm or other unbearable situations due to the return" was raised as an important issue. Violence against a child can be easily recognized as a grave risk. In contrast, violence against a spouse is a controversial reason for refusing the return of a child.

Repeated domestic violence against a spouse causes mental distress to children who witness it, leading to significant adverse effects on their welfare. Thus, the decision at hand ruled that domestic violence by a spouse constitutes a valid ground for refusing the return of a child. This is the first Supreme Court decision related to the Convention.

2. *Whether Non-Notification of Childbirth Experience Falls under the Grounds for Marriage Annulment: Supreme Court Decision 2015Meu654, 661 Decided February 18, 2016*

1) Facts and Issues

The plaintiff met the defendant, who is a Vietnamese national, through an international marriage broker. They got married and registered their marriage on April 9, 2012.

Before getting married to the plaintiff, the defendant had given birth to a child in Vietnam. The defendant did not inform the marriage broker nor

5) Min-Hui Gwak, *Heigeuadongtalchwihyeobyagui haeseoksang jungdaehan wiheomgwa jaui iik ["Grave Risks", Exceptions to return provided for under Article 13 of Hague Convention on the Civil Aspects of International Child Abduction and The Best Interest of Child]*, 67 Minsabeopak [The Korean Journal of Civil Law] 66, 67 (June, 2014) (In Korean).

the plaintiff of this previous childbirth. Thus, at the time of the marriage, they believed the defendant had never given birth to a child before.

After the defendant arrived in Korea to start her married life, the plaintiff's stepfather was convicted of rape and assault charges committed against the defendant. He was finally sentenced to seven years imprisonment on May 30, 2013.

Meanwhile, around August 2013, while the appeal on the said criminal case was pending, the plaintiff found out about the defendant's past childbirth in Vietnam before their marriage.

On August 28, 2013, the plaintiff brought a lawsuit to court, seeking marriage annulment on grounds of fraud. The defendant alleged, "Around October 2003, when I was about 13 years old, I was abducted, raped, and got pregnant by a man of Thai descent, a minority ethnicity in Vietnam. As the man got frequently drunk and was violent towards me, I fled and took shelter in my parents' house around June 2004. I gave birth to a son around August 2004, but the rapist took the baby away from me."

The issue of this case is whether, if the defendant's assertions that she was victimized by sexual violence and gave birth against her will, and her severed relationship with her child are true, the failure to notify the plaintiff of such facts amounts to fraud, which is one of the grounds for annulment of marriage.

2) Decision of the Supreme Court (Supreme Court Decision 2015Meu654, 661 Decided February 18, 2016)[6]

The Supreme Court held that if the defendant's claim is true, the marriage cannot be annulled because such claims do not constitute fraud that leads to marriage annulment. The key points of the decision are as follows:

"'Fraud' under Art. 816 subpara. 3 of the Civil Act includes not only where one party to the marriage or a third party affirmatively notifies the other party of a false fact, but also where a party fails to notify the other party or remains silent in the negative sense. However, failure to give

6) For the full English translation for the decision, *see* https://library.scourt.go.kr/SCLIB_data/decision/02_2015Meu654.htm (last visit on January 8, 2021).

notice or remaining silent may be deemed an illegal deception only when the duty to give advance notice is found on grounds of laws and regulations, contractual obligations, custom, or notion of common sense. Determination on whether a duty to give notice is found on grounds of custom or notion of common sense shall be made in full consideration of the following:

(1) perception of marriage,

(2) social value regarding marriage as accepted by the society as a whole,

(3) the morals and customs of marriage,

(4) society's ethical and moral perspectives and traditional culture,

(5) specific, individual circumstances, such as:

a. parties' age,

b. whether it is their first marriage,

c. the process of leading to the marriage and the content of marriage life up to that point,

d. the extent to which the matter at issue influenced the decision to get married and whether the parties or a third party perceived it as such,

e. whether the matter at issue is an indispensable element in nurturing affection and trust between the spouses,

f. whether the matter at issue pertains to the parties' honor or privacy,

g. and whether the other party has ever inquired about the matter at issue, the content of which the other party was aware or given notice by the party or a third party,

In cases where a party to a marriage or a third party failed to inform the other party of a past childbirth, a duty to notify shall not categorically arise and constitute a ground for marriage annulment under Art. 816 subpara. 3 of the Civil Act for the mere reason that it could have influenced the other party's decision to get married. Rather, balance and harmony shall be struck between one party's honor and privacy and the other party's freedom of decision-making on marriage. This is done by determining with circumspection

whether to recognize the duty to notify and whether that duty is violated, in full view of circumstances such as (1) whether there are concerns of infringement on the essential elements of the party's honor or privacy in case of a disclosure of the past childbirth, (2) whether the party or a third party could have been expected to notify the other party of the matter at issue under social norms, and (3) whether failure to notify the matter at issue can be deemed culpable in light of the good faith principle by thoroughly examining such factors as the circumstances of childbirth such as (a) whether the child so born is alive; (b) whether there are any custody or child support obligations; (c) whether any custody of, or contact with, the child actually took place, and if so, its timing and extent; (d) whether there is any de jure or de facto possibility of a change in the child's custodian; and (e) whether the failure to notify the other party of one's past childbirth was an affirmative commission or a mere omission.

The mere failure to notify the other party of one's past childbirth shall not constitute a per se ground for marriage annulment under Art. 816 subpara. 3 of the Civil Act in cases where one became pregnant and gave birth due to child sexual assault against her will, with the relationship with the child being severed, and with neither any custody of nor any contact with the child for a considerable time. This is in view of the fact that the past childbirth belongs to the confidential sphere of an individual, constituting an essential element of her honor and privacy. Moreover, it cannot be conclusively deemed either that a notification of such a matter is expected from the party involved or a third party on grounds of social norms, or that failure to notify is culpable in light of the good faith principle. The same doctrine shall be likewise applicable to international marriages."

3) Comment

Marriage annulment is only allowed in cases where there are inevitable circumstances compelling the forfeiture of the effect of marriage on grounds which existed at the time of establishing the marriage, in full view of the following: (i) Art. 816 of the Civil Act enumerates the individual

grounds of marriage annulment, while stipulating that a marriage may only be annulled by court proceedings; and (ii) the Civil Act separately provides for marriage dissolution by means of a divorce by agreement or a judicial divorce when there are grounds making it difficult to maintain the marriage.

Art. 816 subpara. 3 of the Civil Act prescribes the declaration of intention to marry made by fraud or duress as a cause for marriage annulment. 'Fraud' includes not only where one party affirmatively notifies the other party of a false fact, but also where a party fails to give the other party notice or remains silent. In the case at issue, it is critical to determine whether the failure to announce the existence of a previous birth experience constitutes fraud.

It should be considered fraudulent in principle if the childbirth experience was not announced to the partner prior to marriage. This is because whether a marriage partner has children is an important factor in the decision to marry.

However, the difficult problem is whether the failure to notify a childbirth, which took place due to sexual assault, constitutes a 'fraud.' In this case, the freedom of the other party's marriage decision and the victim's honor or the secrets and freedoms of her privacy were considered. The fact that she was victimized by sexual violence is a private matter and should not be disclosed to other social members, including her husband, without her consent. Assigning the obligation to the victim to notify others about her childbirth by sexual violence would pose a high risk of infringing on the victim's right to privacy.[7] Accordingly, the decision at issue held that if a victim of sexual violence gives birth to a child, she is not obliged to notify the other person. Even if the failure to gives notice violates the other person's freedom to decide his own marriage, the other person cannot annul the marriage.

In the decision at issue, the defendant belongs to the Thai people, a minority ethnic group in Vietnam. Among the Thai people, there is a

7) Joon-Kyu Choi, *Chulsan gyeongnyeogui bulgojiga honinchwiso sayue haedanghaneunji yeobu [Concealment of Past Child-bearing as Ground for Marriage Cancellation]*, 31(2) GAJOKBEOBYEONGU [STUDY OF FAMILY LAW] 338 (2017) (In Korean).

traditional custom of bride-kidnapping marriage called "Bắt Vợ."[8] Following this custom, a prospective bridegroom forcibly takes a young woman to his home. After spending a few days, the prospective bridegroom visits the woman's parents to obtain permission for marriage. According to the custom, if the woman is not fond of the prospective bridegroom or is reluctant to live with him, she can return to her parents' home. The defendant claimed that she was a victim of bride-kidnapping marriage. The Supreme Court's decision is meaningful in the sense that it clarified that the victim of a bride-kidnapping marriage does not have an obligation to notify her marriage partner of a past childbirth unless there are other special circumstances.

3. North Korean Citizen's Claim for Recovery of Inheritance: Supreme Court Decision 2014Da46648 Decided October 19, 2016.

1) Facts and Issues

A is a North Korean citizen who passed away on December 31, 2006 after disappearing from Seoul in September 1950. A's father, B, passed away on December 13, 1961. A is B's righteous successor. The transfer of ownership by succession of immovables in this case from B to B's wife and descendants C, D, E, F, G was registered on January 23, 1978, to the exclusion of A. Hence the plaintiff, A's daughter, brought an action for recovery of inheritance on the ground that A's right of inheritance was infringed.

Art. 999 para. 2 of the Civil Act prescribes that an action for recovery of inheritance cannot be brought after the ten-year exclusion period has elapsed. The main issue of this case is whether Art. 999 para. 2 of the Civil Act is applicable to a North Korean citizen who has an enormous obstacle in filing a suit for recovery of inheritance.

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8) An Ninh Thế Giới, *Biến tướng hủ tục "cướp vợ" đến "tụt cả váy" của người H'mông*, YouTube (June 2, 2019), https://www.youtube.com/watch?v=DyNAda-ehew.; Coung Bach, *Bride kidnapping in Sa Pa: A bizarre custom of marriage* (April 4, 2020), https://journeyonair.com/sapa-vietnam/bride-kidnapping-custom.; about early and forced marriage of Vietnam child *see* Ashley D. JOrdana, Situational Analysis On child, Early and Forced Marriage in Vietnam, Laos, Myanmar and Cambodia 10 (2016).

2) Decision of the Supreme Court (Supreme Court Decision 2014Da46648 Decided October 19, 2016)

The majority opinion[9] found that the plaintiff's action was unlawful since the claim for recovery of inheritance was brought after the ten-year exclusion period had lapsed on the premise of applicability of Art. 999 para. 2 of the Civil Act. Grounds for the majority opinion are as follows:

> "Art. 11 para. 1 of the Act on Special Cases Concerning Family Relationship, Inheritance, etc. Between Residents in South and North Korea (hereinafter "South-North Families Act") only prescribes that a North Korean (including a former North Korean), who was unable to inherit from a South Korean ancestor due to separation of family members between South and North Korea, may file a claim for recovery of inheritance under Art. 999 para. 1 of the Civil Act, and does not recognize an exception to the application of the exclusion period in Art.999 para. 2 of the Civil Act. However, South-North Families Act recognizes an exception to claims seeking confirmation of paternity or recognition of affiliation. The obstacle to filing a suit for recovery of inheritance due to the division between North and South Korea was expected at the time of legislation, just as the obstacle to filing a suit for claiming confirmation of paternity or affiliation. Hence, the decision not to recognize an exception for the claim of recovery of inheritance despite this expectation should be interpreted as a legislative intent.
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> Although consideration should be given to North Korean citizens in dispute concerning succession between South and North Korean citizens, it should be given within the ambit of the rational interpretation of the South-North Families Act and other related provisions. Since recovery of inheritance affects third parties who subsequently purchased the inherited property, as well as the successors, recognizing an exception to the exclusion period for the claim for recovery of inheritance even after the lapse of a considerable time may pose a threat to the established legal

9) Out of the thirteen Justices, eight Justices joined the majority opinion.

> relations. In recognizing exceptions to the exclusion period, the special reason and extra period for the extension should be clearly prescribed. Further, to minimize the threat to the established legal relations and reasonably adjust several parties' interests, subsequent supplementation to the relevant rules and institutions needs to be followed. Hence, this is beyond the scope of interpretation of laws and needs to be uniformly resolved through legislation.
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> Art. 11 para. 1 of the South-North Families Act assumes the application of the exclusion period in Art. 999 para. 2 of the Civil Act to the claim for recovery of inheritance by a North Korean citizen who was not able to succeed the property of his or her decedent, a South Korean citizen. Hence, a North Korean citizen`s claim for recovery of inheritance lapses at the expiration of ten years from the date the right of inheritance is infringed, just as when a same claim is made by a South Korean citizen."

The dissenting opinion[10] held that the plaintiff's claim was lawful because the exclusion period of ten years did not apply to the his or her claim for recovery of inheritance. Grounds for the dissenting opinion are as follows:

> "If we interpret the South-North Families Act prescribing the claim for recovery of inheritance in such a way that the claim for recovery of inheritance lapsed at the expiration of ten years from the date the right of inheritance is infringed, even when the person making a claim entered South Korea after defecting from North Korea (hereinafter "person who was once a North Korean citizen"), this interpretation cannot be accommodated with the assumption inherent in prescribing an exclusion period. It also cannot be accommodated with the Constitution's spirit that the bond of sympathy as one ethnic group between the citizens of South and North Korea should be forged to become the basis for the peaceful reunification of the Korean peninsula.

10) Out of the thirteen Justices, five Justices joined the dissenting opinion.

> Art. 11 of South-North Families Act prescribes that a North Korean citizen can claim for recovery of inheritance according to the requirements and procedure prescribed in Art. 999 para. 1 of the Civil Act and does not set a clear regulation on the exclusion period. Hence, the matter of extending the exclusion period seems to be left to statutory interpretation. Therefore, the mere fact that Art. 11 of South-North Families Act does not provide for exceptions to the exclusion period does not necessarily mean that Art. 999 para. 2 of the Civil Act shall be literally applicable as is, even to North Korean residents' claims for inheritance recovery. There is a statutory lacuna created by the omission of a separate provision for the extension of the exclusion period on inheritance recovery claims by North Korean residents. As such, a plausible statutory interpretation would be one that fills the lacuna by analogizing parallel provisions.
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> Under the statutory interpretation of Art. 11 para. 1 of South-North Families Act, a former North Korean resident who was unable to inherit from a South Korean decedent due to inter-Korean family separation may claim for the recovery of inheritance within three years from entering South Korea, even if it is subsequent to the lapse of the ten-year exclusion period by virtue of extending the exclusion period for inheritance recovery claims under the Civil Act."

3) Comment

The Republic of Korea consists of South and North Korea. The Civil Act of the Republic of Korea shall apply to North Korean residents. As the hostile relationship between South and North Korea continues, it is basically impossible for North Korean residents to file a suit in a South Korean court. South Korea takes into consideration the de facto obstacles faced by North Korean residents to exercise their rights by legislating South-North Families Act in 2016. The Act includes provisions stating that claims seeking confirmation of paternity or recognition of affiliation proceeding may be litigated within two years from the date on which bars to filing claims are removed by the termination of division of Republic of Korea, the establishment of free visit, or any other cause (Art. 8 para. 2 and Art. 9 para. 2 of South-North Families Act).

To settle the legal relationships surrounding inheritance, the Civil Act of

South Korea states that the claim for recovery of inheritance shall lapse upon expiration of ten years from the date the right of inheritance is infringed (Art. 999 para. 2). This ten-year period is interpreted as an exclusion period and starts to run immediately from the moment the claim for inheritance recovery arises due to infringement of inheritance rights. However, unlike claims seeking confirmation of paternity or recognition of affiliation proceeding, South-North Families Act does not provide any exception to the exclusion period as to claims for recovery of inheritance.

Regarding this, the majority opinion drew conclusions from the legal principle that the Civil Act, as the lex generalis, should be applied because South-North Families Act, the *lex specialis*, does not provide any exception.[11] Thus, the majority opinion ruled that the plaintiff's claim for recovery of inheritance expired with the lapse of the exclusion period.

On the other hand, the dissenting opinion developed a different logic consistent with a purposive interpretation of the South-North Families Act. The South-North Families Act was drafted from the need to protect North Korean residents excluded from the family relationship with South Korean residents due to the prolongation of hostilities between North and South Korea. The dissenting opinion argues that special protection ought to be afforded to North Korean residents' rights in interpreting the law. The dissenting opinion emphasizes that, considering the legislative purpose, the majority opinion's conclusion is unjustifiable, since the North Korean residents' claims for recovery of inheritance would commonly expire upon the lapse of ten years due to the prolonged division separating Korean peninsula.

This case reflects the special realities of Korean division. It is required to envisage the turmoil that would arise from Korean unification in advance and legislate clear solutions. This case revealed the necessity to extend the exclusion period on claims for inheritance recovery for North Korean residents. Because the judiciary has a limited capacity in filling the legislative lacuna through statutory interpretation, a relevant legislation by

11) This refers to the principle of legal interpretation addressing the relationship between general laws (*lex generalis*) and special laws (*lex specialis*), which states that the *lex specialis* should be applied if it imposes regulations related to the specific issue, and when not, the *lex generalis* should be applied.

the National Assembly is necessary to solve the issue of the decision at issue.

4. The Presumption of Paternity Regarding Children Born Through Artificial Insemination and an Extramarital Relation: Supreme Court en banc Decision 2016Meu2510 Decided October 23, 2019

1) Facts and Issues

(1) Factual Background Related to Artificial Insemination

The plaintiff and his wife, X, registered their marriage on August 2, 1985. The plaintiff received a diagnosis of aspermia around 1992 after their marriage. Soon, X conceived via in-vitro fertilization treatment by sperm donation from a third party, Y, with the approval of the plaintiff and then delivered defendant 1. The plaintiff completed on March 29, 1993 the registration of defendant 1's birth as the child of both himself and X. The plaintiff established the substantial parent-child relationship and had never shown any action contradictory to this. He lived together with defendant 1 for about 20 years after the birth of defendant 1.

(2) Factual Background Related to the Extramarital Relation

X conceived defendant 2 through an extramarital relation. The plaintiff registered defendant 2 as his and X's child on August 6, 1997. The plaintiff is deemed to have already known that defendant 2 was not his natural child at least as late as 2008 through a medical examination at a hospital when defendant 2 was in the fifth grade. Nevertheless, the plaintiff did not raise any objection to the fact that the birth registration of defendant 2 was completed as his child until he brought this suit. The plaintiff had been protected and educated Defendant 2 as a father before this suit.

(3) Issues

After obtaining a divorce with X, the plaintiff brought the suit demanding confirmation of nonexistence of biological parental relation against the defendants. The main issues of this case are that (1) whether, in a case where a wife gives birth to a child conceived via artificial insemination by a sperm donor, a third person during the marriage, the

child delivered by the wife may be presumed to be the child of the wife's husband (hereinafter referred to as "Issue ①"), and (2) whether, in a case where it turns out that a child conceived and delivered by a wife during marriage is unrelated to the wife's husband by blood, the child may still be presumed to be the child of the husband (hereinafter referred to as "Issue ②").

2) *Decision of the Supreme Court (Supreme Court en banc Decision 2016Meu2510 Decided October 23, 2019)*[12]

(1) Concerning Issue ①

The majority opinion concluded that, in a case where a wife conceived via artificial insemination and delivered a child, it is reasonable to deem that the child through artificial insemination is presumed to be the child of the husband and ruled as follows:

> "The reason why an artificially inseminated child is presumed to be the child of the husband is that applying the provision on the presumption of paternity to a child born between husband and wife who took part in the process of pregnancy and delivery under the premise of an 'agreement' may be considered legitimate in light of the entirety of the family law system, including the Constitution and the Civil Act. The application of the provision on the presumption of paternity to an artificially inseminated child is to legally guarantee the formation of a family relationship on a voluntary basis, ensure the veracity of the family relationship as socially accepted, and assure family life and status relationship of both husband and wife in a marital relationship."

The concurring opinion[13] affirms that if a child was born through artificial insemination with sperm provided by a third person under the husband's consent, the child shall be considered the child of the husband.

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12) For the full judgment in English, *see* https://library.scourt.go.kr/SCLIB_data/decision/86-2016Meu2510_jy.htm (last visit on January 8, 2021).

13) Out of the thirteen Justices, three Justices joined the concurring opinion.

The child ought to be considered to be her husband's child beyond mere presumption. Since the husband realized 'his intention' by participating in the treatment process of artificial insemination on an equal footing with the wife on basis of mutual agreement, this suffices in establishing a parent-child relationship with the child. Therefore, the parent-child relationship should be recognized to respect the husband's intention.

(2) Concerning Issue ②

The majority opinion concluded that in a case where it turns out that a child is conceived and delivered by a wife during the marriage through an extramarital relation, the child may still be presumed to be the child of the husband and ruled as follows:

> "Determining the scope of the presumption of paternity depending on existence and nonexistence of blood relationship not only contravenes the language and text of the provision of the Civil Act, but also virtually invalidates the provision on presumption of paternity, thereby nullifying the purpose and system of the Civil Act, which regards the provision on the presumption of paternity as basic in the establishment of a parent-child relationship. Should the scope of the presumption of paternity be decided based on the existence and nonexistence of blood relationship, this may lead to an unavoidable result where a third person who is not party to a family relation becomes more involved in the intimate affairs of a family. As long as marriage and family relations do not infringe upon the basic human rights or the public interest, active state intervention on marriage and family life ought to be refrained."

However, the dissenting opinion[14] concluded that it ought to be deemed that the presumption of paternity has no effect on defendant 2, who was born in an extramarital relationship during the marriage and ruled as follows:

> "The precedents of the Korean Supreme Court, which have

14) Out of the thirteen Justices, only Justice Min You-Sook delivered a dissenting opinion.

> acknowledged the exception to the presumption of paternity under certain conditions, ought to be maintained and indeed interpreted on an expanded basis. The precedents have acknowledged 'externally obvious circumstances where a wife cannot conceive her husband's child' as the exception to the presumption of paternity. This criterion determined the extent to which the exception to the presumption of paternity is recognized. This criterion ought to be interpreted to include 'other circumstances where it may be seen to be externally obvious that a wife could not carry her husband's child,' given the changes in various environmental circumstances surrounding the provision on the presumption of paternity and the legislative purpose of the revised Civil Act."[15)]

3) Comment

The Civil Act of the Republic of Korea states that a child conceived by a wife during the marriage shall be presumed to be the child of the wife's husband, and a child born after two hundred days from the day when the marriage was *formed* or born within three hundred days after the day the marital relationship is *terminated* shall be presumed to have been conceived during the marriage (Art. 844).

A mother-child relationship is ascertained by the fact of delivery, but a father-child relationship cannot be clearly ascertained before taking any biological tests. Thus, the Civil Act has a provision presuming a father-child relationship.[16)] The presumption is not broken until the father files for *an action of denial of paternity* (Art. 847) and wins the case. Such action must be brought within two years from the day when he becomes aware of the cause of the action (Art. 847). It is unlawful to file for *an action confirmation of nonexistence of parent-child relationship* in cases where a child is being presumed to be the child of a natural parent. Therefore, if an action of denial of paternity is not brought within two years from the day he becomes aware that a child has no biological relationships with him, the

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15) The dissenting opinion emphasized the aspect that the amendment to the Civil Act surrounding the provision on the presumption of paternity has been made in the direction of mitigating the requirements of denial of paternity.

16) Jinsu Yune, Minbeopgibonpallye [The Basic Civil Law Precedent] 657 (2nd ed. 2020).

relation between the father and the child shall be acknowledged as biological parental relation even though they are not related by blood factually. However, the Supreme Court denied the presumption of paternity in certain exceptional cases to mitigate its rigidity. That is, since the presumption of paternity does not operate on 'externally obvious circumstances' where a wife cannot conceive the child of her husband due to the absence of cohabitation such as cases where either husband or wife has been out of the country over an extended period of time or the couple has been separated as a result of *de facto* divorce, one can file a suit for confirmation of nonexistence of biological parental relation without bringing an action of denial of paternity.[17)]

Firstly, let us examine Issue ①. Since artificial insemination technology was not fully advanced at the time of the enactment of Art. 844 of the Civil Act, whether it applies to cases where a child conceived via artificial insemination is born needs to be discussed. However, the provision on the presumption of paternity itself connotes the possibility of legally establishing a parent-child relationship which is inconsistent with true blood relationship. The provision on the presumption of paternity was introduced to provide wide protection to a family relation which had been established over time by presuming a child born during the marriage to be a child of a natural parent even though there lacks a blood relationship between father and child. In other words, the provision on the presumption of paternity was established in order to prioritize 'the welfare of the child' over 'interests of the father who intends to align the legal parent-child relationship with the truthful parent-child relationship based on blood.' Particularly, Art. 852 of the Civil Act clarified the purpose mentioned above by regulating that an action of denial of paternity cannot be brought again once the father has approved the paternity of his child. In turn, defendant 1 in this case should be presumed to be the natural child of the plaintiff considering the welfare of the child and the purpose of Art. 852 of the Civil Act. Therefore, the plaintiff's action of confirmation of nonexistence of biological parental relation against defendant 1 is unlawful and thus ought to be dismissed. The majority opinion is cogent given this point.

17) Supreme Court [S. Ct.], 82Meu59, July 12, 1983 (S. Kor.).

Next, let us examine Issue ②. The dissenting opinion that Defendant 2, born in an extramarital relationship during the marriage, may not be presumed to be the natural child, puts emphasis on the importance of blood relationship. The opinion maintains that the presumption of paternity shall not operate on cases where it is proven that the father-child relationship does not exist scientifically. This opinion leads to the conclusion that one can ask for confirmation of nonexistence of biological parental relation 'at any moment' once it has turned out, through DNA tests, that there is no blood relationship between the father and the child. This conclusion is problematic in that it overshadows the purpose of setting a limit of two years of period of an action for the denial of paternity. In particular, it cannot avoid the consequences of a third party being deeply intervened in matters belonging to private life of a family. For example, this opinion enables a third party to ask for the parentage diagnosis asserting that a child delivered by the wife is his natural child and thus, easily interfere in another family. Considering that the legislative purpose behind the presumption of paternity is to maintain the peace of the family and expeditiously stabilize the legal status of the child, the analysis presented by the dissenting opinion is inappropriate.

5. *Whether At-Fault Spouse Can File a Divorce Claim: Supreme Court en banc Decision 2013Meu568 Decided September 15, 201*

1) Facts and Issues

As a legally married couple whose marriage was duly registered on March 9, 1976, the plaintiff and the defendant are parents to three grown children. The plaintiff, the husband, left his family around January 2000 to move in with X, who in time gave birth to his daughter. The defendant, the wife, has single-handedly raised the three children. Without a job, the defendant lived on monthly support money from the plaintiff of around one-million KRW (approximately 905 USD), which the plaintiff failed to pay since around January 2012. At over 63 years of age, the defendant's health condition was deteriorating, having undergone surgery for stomach cancer and on thyroid medication. She intends to stay in the marriage relationships with the plaintiff, to whom she shows attachment.

The issue of the case at hand is whether the plaintiff, who is an at-fault

spouse, can file a divorce claim against the defendant.

2) Decision of the Supreme Court (Supreme Court Decision 2013Meu568 Decided September 15, 2015[18]

The majority opinion[19] held that the divorce claim filed by the at-fault spouse is interdicted in principle and only allowed under exceptional circumstances. Thus, the plaintiff is not allowed to file a divorce claim. The gist of the majority opinion holding can be described below.

> "One of the rationales behind the prohibition of divorce claims by an at-fault spouse is to guard against any divorce to expel the legal spouse who finds himself or herself in a bigamous relationship. If we were to introduce a no-fault divorce approach without adequate measures, the risk of ending up recognizing bigamy is all the greater since we lack penal provisions on bigamy unlike other countries.
>
> That Korea has seen a sharp rise in divorce rates and significantly shifted its perception of divorce among its citizens paradoxically calls for an even increased need to protect matrimony and family life. Nor can the harsh realities where the non-liable spouse suffers from a severe emotional distress and destitution by the at-fault spouse's divorce claim be ignored.
>
> However, a divorce claim by an at-fault spouse may be granted as an exception when there are special circumstances where there is little marriage-breakdown liability extant as to reject a divorce claim, such as cases where there is no concern for a divorce to expel the other spouse by either spouse's unilateral intent because the other spouse does not intend to remain in the marriage either, or when the protection and consideration of the other spouse and children are amply provided to the point of offsetting the liability of the claimant spouse, as well as when the passage of time has reached such a point as to render it meaningless to scrutinize the liabilities of both parties

18) For the full English translation for the decision, *see* https://library.scourt.go.kr/SCLIB_data/decision/25-2013Meu568.htm (last visit on January 8, 2021).

19) Out of the thirteen Justices, seven Justices joined the majority opinion.

anymore, with the diminution of the at-fault spouse's liability and the decrease of emotional distress on the part of the other spouse."

In response to the majority opinion, the dissenting opinion[20] argued that even an at-fault spouse could file a divorce claim if the couple's life was deemed irreparably broken down. Thus, the plaintiff's divorce claim should be allowed. The gist of the dissenting opinion holding can be described below:

> "When a couple's communal living relationship is irretrievably broken down, their married life cannot be expected to continue any longer. In other words, only a superficial marriage remains, with any substance of marriage having been nonexistent. When the substance of a marriage has been completely extinguished, with the married life having irretrievably broken down, the situation practically constitutes a status of divorce. It would be reasonable to acknowledge the prevalence of such realities and dissolve the legal marriage accordingly. Acknowledging divorce of a superficial marriage is simply to confirm the nonexistence of the substance of marriage that has already been continued. It does not at all mean to dissolve a marriage by breaking up the substance of a married life when there are possibilities of recovery of marital relationships.
>
> Therefore, although there may be many reasons for a married life to reach a point of irretrievable breakdown and the main fault may be attributable to either or both parties, that fault has no influence whatsoever on the marital relationships anymore since the substance of marriage has been extinguished. Accordingly, who is an at-fault spouse cannot be the standard of determining whether to dissolve the marriage at question. The fault may come into play when considering it in damage compensation for divorce and division of property to protect an at-no-fault spouse, thereby holding the at-fault spouse accountable and safeguarding the other spouse as appropriate."

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20) Out of the thirteen Justices, six Justices joined the dissenting opinion.

3) Comment

Previously, the Supreme Court held that, in principle, divorce claims by an at-fault spouse, who is primarily responsible for the breakdown of marriage, shall not be allowed.[21] However, the Supreme Court exceptionally allowed an at-fault spouse to bring the divorce claim in a case where the other spouse also filed a counterclaim of divorce against the at-fault spouse, or when the divorce intention of the other spouse was clear and evident through the showing of behaviors which were incompatible with the continuation of marriage, and it seems that the other spouse simply opposed the divorce out of vengeful feelings.[22] But such exceptions have been admitted very strictly.

Nevertheless, there has been widespread criticism on the Supreme Court holdings as below: a) terminating a marital relationship can be a relief measure for a couple when their communal living relationship is irretrievably broken down, and b) forcing the couple to maintain a superficial marital relationship by not allowing the at-fault spouse to claim a divorce causes a long-term conflict between the couple and negatively affects their children's mental health. Accordingly, the notion that a claim of divorce by an at-fault spouse ought to be accepted when the marriage is irretrievably broken down has also been strongly supported in Korea. Germany, France, and Switzerland have adopted legislation from this perspective.

The dissenting opinion of the decision supports this perspective. In response, the majority opinion emphasizes that women who are underprivileged may suffer from divorce claims by an at-fault spouse due to the social inequalities between men and women if this perspective is adopted. The majority opinion can be evaluated as maintaining, though not wholly, the precedents of the Supreme Court in that it has not allowed a divorce claim by an at-fault spouse in principle, but at the same time, proposed a new legal doctrine while still being conscious of criticisms on the precedents. Accordingly, the majority opinion has granted more

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21) Supreme Court [S. Ct.], 71Meu41, March 23, 1971 (S. Kor.); Supreme Court [S. Ct.], 86Meu28, April 14, 1987 (S. Kor.).

22) Supreme Court [S. Ct.], 99Meu1213, October 8, 1999 (S. Kor.); Supreme Court [S. Ct.], 98Meu15, 22, June 23, 1998 (S. Kor.).

exceptions for an at-fault spouse to file a divorce claim as compared to the precedents, by ruling that a divorce claim by an at-fault spouse shall be allowed when there are special circumstances where there is not so much marriage-breakdown liability extant as to reject a divorce claim such as cases a) where there is no concern for a divorce to expel the other spouse by either spouse's unilateral intent because the other spouse does not intend to remain in the marriage either, b) when the protection and consideration of the other spouse and children are amply provided to the point of offsetting the liability of the claimant spouse, or c) when the passage of time has reached such a point as to render it meaningless to scrutinize the liabilities of both parties anymore. In fact, since the decision at hand has been delivered, divorce claims filed by at-fault spouses have become more easily accepted in practice than in the past.