Case

The exercise of a claim for partition for a wife by a husband living apart and abuse of rights

(Osaka High Court, June 9, 2005 Hanrei-Jiho No. 1938, p. 80)

Keywords : A right for partition, A duty of living together/cooperation/aid

[Facts]

The plaintiff 'X', a man, and the defendant 'Y', a woman, married in 1968. They had three daughters. X was a licensed tax accountant, and Y helped in the office of X's accountancy practice. X purchased land and a building (real estate) for a family residence in 1989. In 1998, X donated a half joint-ownership share in the family residence to Y. Y contracted the disease Vogt-Koyanagi-Harada syndrome in 1993 and she continues to receive hospital treatment. X strongly hoped that his three daughters would become licensed tax accountants, and would inherit the office which he opened. X forced his three daughters to study for the licensed tax accountant examination. The firstborn daughter 'A' was diagnosed with schizophrenia in 1992 and she is categorized as a third-grade handicapped person. A receives hospital treatment for treatment her illness.

To avoid aggravating A's illness X left the family home in December 1996 and lived at his office. X continues to live apart from Y, but he has not paid most of the marital expenses during the period of separation. X developed prostate cancer and there is no effective therapeutic method of treating his cancer when it recurred. X initiated mediation for a divorce from Y in 2001, but because Y did not accept the divorce the mediation failed. As yet the matter has not been brought to a divorce court.

The income of X (remuneration as a licensed tax accountant, and the executive fee of the company) was about 3,620,000 yen in 2003, about 4,200,000 yen in 2002, and about 4,910,000 yen in 2001. The assets owned by X include a half joint ownership share of the family residence (about 27,000,000 yen at current prices), but X took out a loan on the residence from a financial institution (about 7,400,000 yen is outstanding). In addition, X has one partitionary dominium office building (about 14,000,000 yen at current prices), and a bank deposit account (about 13,700,000 yen). X has about 39,000,000 yen in debts.

X demanded a claim for partition of the family residence by the price method to divide with Y after having auctioned the residence. In contrast, Y argued that the request of X was an abuse of rights.

In the first instance (Osaka District Court, December 13,2004, Hanrei-Jiho, No. 1938, p. 86), the Court accepted X's claim for the following reasons: ① X considered X's remaining days to live and disposed of his residential real estate to pay off a debt. ② Y

contended that if the residence were to be auctioned off, Y would lose her home and A's health might deteriorate again. However, the sale of the residence may worsen the health condition of X and cut off X's income, thus Y and A could not avoid the above situation, because the residence was used as collateral by X. ③ X conducted an action against cooperation duty between couples after a separation, but X ran the accounting firm and continued to pay off the mortgage debt on the residence and secured Y's house. The court denied rights abuse, and Y appealed this decision to the Osaka High Court.

[Judgment]

The Court accepted Y's claim for the following reasons:

① "A right for partition that Article 256 of the Civil Code prescribes lets each joint owner rule over the assets freely, only in terms of economic factors, and enables a shift to the severalty which is possession of the principle in modern civil society, and is a right that is deserved with respect to disposal of the share right as an essential attribute of the joint ownership (Supreme Court, April 22, 1987, Judgment; Min-shu Vol. 41, No. 3, p. 408). However, obviously, a joint ownership related purpose, a property to let you accomplish the division for each joint owner freely and is remarkable and irrational, since there are cases where you should recognize when the use of the division right of a claim is applicable to the abuse of the right."

② "Real estate for residence is substantial common property of the couple, which X acquired after the marriage with Y, . . . Y and A continued living, thus the processing should have been entrusted to the distribution of property in a divorce, and it was originally entrusted to the procedure, . . . about this matter, it is thought that it is very likely that Y will acquire real estate for residence alone, but there is no such choice, and X will take the possibility of the independent acquisition of the property to choose a form of the common property division request, real estate for residence away from Y as far as X handles this by a common property division procedure."

③ "X has a duty of living together/cooperation/aid (Article 752 of the Civil Code) and it should originally say that it is the duty of X to find the whereabouts of Y and A. However, after the mediation on marriage cost sharing, X paid only a small monthly payment of just 30,000 yen after September 2004 without performing even allotment of the marital expenses, and left A, who had contracted a mental disease, and Y, having lived apart, placing Y in a difficult financial situation. X abandoned his duties, though X is the source of the family's income. As a result, Y is forced to nurse A even though Y's physical condition and her financial situation are poor. When the division request of this matter is accepted, and the family residence is referred to an auction, Y and A will be forced to vacate their home which may cause the condition of A to worsen. Because of the mortgage over the family residence the money from the sale of the family residence will not provide for Y and A's living expenses. Y and

A cannot secure their own home. Y is already about 60 years old and receives out-patient treatment for Vogt-Koyanagi-Harada syndrome and neurosis, and consequently Y will fall into a more difficult financial situation in the future because it is difficult for her to get satisfactory income."

④ "In contrast, X requested the division of the real estate for residence considering the remaining days he is expected to live, because X is suffering from prostate cancer, which has worsened, and his income has decreased due to the treatment of his cancer. It had become difficult for X to repay the money he had borrowed. . . . X does not receive the statement of the auction from the financial institution and X is not in a financial situation whereby he must quickly dispose of the family residence. Even if it is necessary, X could sell his office and rent another office. The court does not accept the reason that he must sell the family home to allow him to repay his debts early. In addition, the court does not accept that X overcame the strong objection of Y which is that she is his wife and X is in a difficult situation such as the above."

⑤ "The court accepted that X's claim was applicable to the abuse of rights, judging from a comparison of the situation brought as a result of the necessity of the partition, and X's claim is illogical allowing for the purpose and the nature of this joint ownership-relation."

[Commentary]

In this case, a married couple hold equal shares in residential real estate in which the wife and one of the couple's children live after the couple's separation. The husband claimed division of the common property requesting this be done by the method of price division with the wife. There is the case that a similar matter was completed for about a residence that a parent and child shared. This case is about a residence that a couple shares. This is regarded as an important case, because it is the first officially reported case and in this case there were different judgments about this issue.

Joint ownership is interpreted as having individual property in comparison with other co-ownership forms, and the common property division right of claim (Article 256 (1) of the Civil Code) meets the essence of the joint ownership of individual property with shared disposal.

The effect that each joint owner can claim the division of the property at any time (Article 256 (1) of the Civil Code) is led by such individual property, but the division claim is denied for right abuse, concerning the purpose and the nature of the joint-ownership relations.

When a court judges whether the use of the common property division right of claim falls under right abuse, it compares the necessity of the division request of a plaintiff with influence in the life of the defendant, and the court judges that applicable to the abuse of the right, because the degree of the latter is great. Consideration of various facts such as

the actual situation of the defendant and the living conditions of the defendant, the health condition of the defendant who resides in the common property is a characteristic on this occasion.

In this case, it influences the judgment greatly among other things for there to be joint-ownership relations, assuming the owners are married. Primarily the court nominates for one of the reasons that it is very likely that Y acquired this real estate alone, when Y was divorced (② in this judgment, above). It may be said that this is joint ownership assuming the couple relations-related special consideration. Second, the court, it is based on cohabitation cooperation aid duty (Article 752 of the Civil Code) and judges division request to deal with an abuse of rights (③ in this judgment, above). It may be said that the authority that the other spouse can live in the residence which the spouse owns is interpreted by Article 752 of the Civil Code.

In addition, this case does not mention the subjective circumstances of a plaintiff exercising a claim for partition, in particular, but it may be said that it is a fact that consideration of the intention and the motive of the plaintiff will be made in similar cases in the future.

(MATSUHISA Kazuhiko)

Case concerning a petition for the acknowledgment of a child who was born through assisted reproductive measures

(Supreme Court, P. B. 2, September 4, 2006; Hanrei-jiho No. 1952, p. 36)

Keywords : Acknowledgment, Birth of a Child through In-Vitro Fertilization

[Facts]

"X," the plaintiff, was a child who was conceived through in vitro fertilization using frozen sperm from his deceased father, "A." This case concerns a plea by X's mother, "B," to the public procurator for the acknowledgement of X in accordance with Article 787 of the Civil Code and Article 42(1) of the Law of Procedure in Actions Relating to Personal Status(at the time of appeal: Article 32 (2) and 2 (3)).

A and B married on May 8, 1997. A, however, was soon diagnosed with leukaemia and he proceeded to undergo treatment by way of an anticancer agent. When a bone-marrow donor was found, it was decided that he would then undergo a bone-marrow transplant. Such a procedure involves intensive and prolonged exposure to radiation. As A was concerned this could potentially affect his ability to reproduce, he stored his sperm in a sperm bank prior to the operation.

Although the couple had been attempting AIH (Artificial Insemination using the husband's semen) since the beginning of the marriage, they had been unsuccessful.

Toward the end of August 1999, they approached a doctor and expressed their desire to undergo artificial insemination using the sperm that had been frozen before the bone-marrow transplant.

Before the transplant operation, A told B that if B were not to remarry in case of A's death, he wished B to bear A's child. After the operation, A told his parents that he wanted B to bear a child, through in-vitro fertilization using his frozen sperm, to succeed him. A and B decided the hospital where they would continue the infertility treatment, and carry out the birth of a child through in-vitro fertilization.

A died on September 19, 1999. After his death, B consulted with, and obtained consent from, A's parents to proceed with the artificial insemination. The frozen sperm was transferred to another hospital which could perform the fertilization procedure. B gave birth to a boy, X, on May 10, 2001. After the delivery, B submitted a notification of the birth to the city office, stating that X was the legitimate child of A and B. However, the office rejected the notification on the basis that the date of birth of the child exceeded 300 days from the date of death of the father, in which case the law provides that a child shall not be deemed to be the legitimate child of the father.

B proceeded to register a complaint against this decision with the Family Court, which complaint was subsequently dismissed. She immediately filed an appeal, which was also dismissed on January 29, 2002.

The notification of X's birth was accepted on May 23, 2002. Although X was entered into the family register, with A listed as the head of the family, the "father" column remained empty. At which point, B appealed once again, and brought an action for acknowledgement.

[The Matsuyama District Court Judgment]

(The Matsuyama District Court, November 12, 2003; Hanrei-jiho No. 1840, p. 85)

The Matsuyama District Court dismissed B's appeal on November 12, 2003, on the following grounds:

It must be decided not only whether legal recognition of a paternal relationship would ensure the welfare of the child, and provide harmony and order in terms of succession law, but also whether the similarities between the assisted reproductive measure used and natural reproduction would generally be well received by society.

AIH by an agreement between the couple is a viable option for couples experiencing difficulty in conceiving through sexual intercourse. It is not substantially different from natural reproduction in terms of the development of the child. Furthermore, from the perspective of the child's welfare, it is unlikely that any serious problems will arise as one can expect the parents will provide good upbringing and support to the child. However, the court could not regard the abovementioned scenario as similar to a case where the

child was conceived and born through artificial insemination using stored sperm after the donor had died. This method of artificial reproduction is quite distinct from the process of natural insemination and gestation. In light of what is socially acceptable, there is a general lack of social understanding in recognizing the deceased father as a sperm donor. As such, in these circumstances, the court was hesitant to consider the deceased donor as the legal father.

In this case, the court cannot acknowledge that the sperm donor had agreed to the use of artificial insemination after his death.

The plaintiff emphasized the welfare of the child. As stressed by the plaintiff, the non-existence of a legal father can certainly result in social disadvantages, and this is by no means an insignificant matter. Therefore, even in circumstances where the frozen sperm was used after the death of the father, it is clearly apparent that he is the biological father, and also that there is a reasonable basis for the claim that socially recognizing this man as the father benefits the welfare of the child.

The right of the child to know their origin, and the social disadvantages that would ensue from a blank “father" column in the family register, ought to be seriously considered.

However, it cannot be conclusively said that legal recognition of a father-son relationship whereby the father could not obtain custody or participate in the upbringing and support of the child, would necessarily suit the welfare of the child.

A clear social consensus on this point has yet to emerge owing to the rapid progress of assisted reproductive technology. Rather, social consensus will only begin to emerge following expert studies and a national debate. However, reports by the Japan Society of Obstetrics and Gynaecology (JSOG), and trends in legislation, etc., indicate strong disapproval of the conception and birth of a child using the frozen sperm of a deceased man. There has yet to emerge a general positive perception that would acknowledge the child as the child of the deceased sperm donor. It cannot be shown that there is a great deal of positive opinion supporting the recognition of the child as a child of the deceased sperm donor. Social understanding has yet to reach that state that it would approve such a claim for recognition.

Difficult problems such as, the time period after the death of the donor during which the sperm can be used, and the conditions under which the child will be recognized, must be dealt with. The current three-year limit for a petition for post-mortem recognition is nothing more than a technical limitation that was established to provide for early determination of a biological relationship between a father and a child. This limit was established at a time when the scientific means to establish a biological relationship had not been developed. The problem posed is whether this three-year limit is applicable in the case of assisted reproductive measures.

The plaintiff, “B," appealed the District Court ruling.

[The Takamatsu High Court Judgment]

(The Takamatsu High Court, July 16, 2004; Hanrei-jiho No.1868, p.69)

On July 16, 2004, the Takamatsu High Court overturned the District Court's ruling and recognized "X" as the child of the dead father. The court cited the following reasons for its decision:

In assisted reproduction cases, a petition for acknowledgment requires the fulfilment of two conditions: the child and the father must be related biologically, and the father must have consented to the conception.

In an action for acknowledgment under the Civil Code, there is a system that establishes legal parenthood by providing objective recognition to the existence of a biological relationship between the father and the child in cases where the father does not recognize children born out of wedlock. On this point, pregnancy and birth by means other than natural pregnancy were not contemplated, and hence, there is no reason why a child born through artificial insemination cannot bring an action for acknowledgment. From the same perspective, there is no reason to make it a condition that the father must be alive when the mother becomes pregnant.

In natural pregnancies, it is recognized that the conception is based on the intention of the father. However, the court will have to permit the possibility that a legal parental relationship can also occur in cases of stored sperm. Such a situation is unsatisfactory as it imposes a serious unexpected responsibility. Therefore, it is appropriate to obtain the father's consent in cases of pregnancy and birth by artificial insemination.

Although the respondent insists that there is no practical benefit that flows from allowing a child born after its father's death the right to petition for acknowledgment, it is apparent that there arises the question of a succession right when a familial relationship is established between the child and the relatives of the father. The arguments of the Legislative Council and other such bodies should not be considered as guidelines for interpretation of an action for acknowledgment under the current Civil Code as it appears that the legal relationship between a child and parent will undergo further legal development in the future.

As the wife conceived the child through in-vitro fertilization using her husband's stored sperm, there is a biological relationship between the father and the child, and as the husband had consented to his wife giving birth to a child after his own death using his stored sperm, this petition should be accepted.

It is sufficient that the husband sincerely wanted his wife to become pregnant if she so desired, even after he had died. Although the wife did not report the matter of her husband's death to either the hospital that stored his sperm or the hospital that carried out the in-vitro fertilization, it appears that the hospitals did not make any inquiries. Also, there is no evidence to suggest that the wife hid the fact intentionally.

Although the Legislative Council and other such bodies have been debating the form of consent, under the current law in force, as a condition to the acknowledgment of a child conceived after the death of the child's father, it is irrelevant to make a determination as to whether the father had consented or not. It is sufficient that the husband consented to his wife's pregnancy.

[Supreme Court Judgment]

The Supreme Court quashed a lower court ruling that accepted a petition for the acknowledgment of a child who was born after the father's death and dismissed B's appeal on September 4, 2006, on the following grounds:

Artificial reproduction using assisted reproductive technology can realize a pregnancy which may have otherwise been impossible by natural reproduction: a child conceived after the father's death falls into the category of a child by such artificial reproduction. It is evident that the legal relationship between a dead man and a child conceived after the man's death is not envisaged under the Civil Code.

Because the father of the child died before the conception of the child, there is no way that the father is a person who exercises parental power, and there is no possibility that the child can be in the custody of, or receive the education, and support of the father, or that the child can become the successor of the father. It should be said that children conceived after their father's death who are not in a position to succeed the father (the person to be succeeded by representation to), cannot become a successor by representation in relation to the father, because it is interpreted that a successor by representation must be the person in a position to succeed the person to be succeeded by representation to, in the case that succession by representation arises from death. Thus, there is no way that a basic legal relationship can arise between a child and their dead father.

The problem about the formation of a legal relationship between the child and their dead father should be solved by legislation to provide necessary conditions and effects to acknowledge this relationship after consideration is given to whether or not acknowledgement should be given to this relationship, on the basis of multiple considerations such as: the ethics concerning artificial reproduction using the frozen sperm of a dead person; the well-being of the child; parent-child relations and opinions of an interested party to form the relationship; and the general feeling in society about such things, etc. Since there is no such legislation, the formation of relations between the child and their dead father cannot be acknowledged.

[Supplementary Opinion of Judges]

Two judges from the Supreme Court gave supplementary comments about their concerns about the continued existence of facts under assisted reproductive technology and a necessity for the revision of laws.

• **Judge TAKII Shigeo:** It is said that the law that governs natural relationships, as set out in the Civil Code does not contemplate children born, in substantial numbers, through progress in assisted reproductive technology. Rather, owing to the state of the law the actual state is that the assisted reproductive technology that can produce such children depends on self-restraint in medical circles and associated groups. I have no objection to the opinion that the well-being of a child is the first consideration, no matter what the appropriate regulation is. However, it is not evident what the acknowledgement of legal relations in such a case means for the well-being of the child. What must be considered now is not only the well-being of the child, but also the birth of the child that is based on the will of its parents, and appropriate legal parent-child relations. We must consider what the well-being of a child is through these considerations. I am concerned that the law must not interfere with the birth of children who have no living father at the time of conception [finally?] if the legal relationship is permitted by reason of the existence of a blood relationship and a parent's will in the name of the well-being of children who were already born after the father's death. I think that considerations about the birth of children who were born after their father's death, meaning of the legal parent-child relationship, and the children who were born regardless of their own will, must not be neglected in the name of the well-being of children of whom nobody cannot deny their value.

I think that the above problem should no longer depend on the self-control of medical circles and groups, accomplished facts should not be left to pile-up in the name of medical care, and that it is necessary for the immediate revision of laws about such a problem, on the basis of consideration about the relations law system: not only for children who were born after their father's death but also children conceived through the assisted reproductive technology that the Civil Code did not anticipate, in accordance with the progress of medical technology and change of social recognition.

• **Judge IMAI Isao:** I can understand the sentiment of X and his legal representative who insist on the fact that a child who was conceived after the child's father died has no responsibility for its own birth, it is evident the child has the right to receive the respect as an individual as much as a child from a natural pregnancy, and it must not put the child at a disadvantage by reason of a defect of law. However, it seems to me that the interests of children which will arise from accepting this petition for acknowledgment of the child in this case are not so important, and that accepting this petition must be inappropriate, because the serious problem that the accomplished fact of birth under assisted reproductive technology is legally accepted must occur when there is not enough consensus about it.

It is necessary for there to be a drastic solution to this problem to maintain law on the basis of diverse consideration from medical and parent-child laws. The well-being

of children should not be achieved until such a law is achieved. Therefore, I hope for the timely revision of laws in view of the remarkable speed of progress in assisted reproductive technology.

[Commentary]

This is a significant case concerning AIH, and the Supreme Court adjudged first a problem that is not contemplated in the Civil Code, namely, fitness for the formation of legal relations of a child who was born through in-vitro fertilization using the husband's frozen sperm after his death. In addition, there are cases concerning a petition for the acknowledgment of a child conceived after the father's death (Osaka High Court, Dec. 15, 2005; no publication, Tokyo High Court, Feb. 1, 2006; Kasai-Geppo 58, 8, p. 74), but the Supreme Court dismissed the final appeal in both cases on Sep. 4, 2006 after this judgement.

Assisted reproductive technology has made exciting progress in Japan, since a child created through AID (Artificial Insemination by Donor's semen) using frozen sperm was first born in 1958. The possibility of having a biological child is increasing due to the progress in the development of assisted reproductive measures, even when the couple had previously given up on the prospect of giving birth to a child. But this gives rise to the problem about the formation of a legal relationship for someone born through such technology. Two AID cases appeared in 1998 (Tokyo High Court, Sept. 16, 1998; Kasai-Geppo 51, 3, p. 165, Osaka District Court, Dec. 18, 1998; Kasai-Geppo 51, 9, p. 71).

It is necessary to give general consideration to the coherence with the present law, existence of the sperm-donor's will, the guidelines in the medical world, and the well-being of children through assisted reproductive measures, for an appropriate solution of such problem.

• Coherence with the present law

Originally, when an action for acknowledgment was incorporated into the Civil Code under Article 787, a father who had a blood relationship with a child was clearly recognized as the person who impregnated the mother through sexual intercourse. However, as assisted reproductive measures impact upon the concept of a father who has a blood relationship with the child, the prerequisites for acknowledgment are likely to be amended. It shall be very hard to recognize the legal relationship for someone who was born through medical-care measures for the simple reason that there is a biological blood relation between the child and the father in such a case of AIH.

Although there is a presumption under Article 772 (1) of the Civil Code that the husband is the father of the child during marriage, it cannot be said that, in this case, the child was conceived during the marriage as the artificial reproduction was carried out after the husband's death. The law in force does not contemplate cases where gestation is

significantly different from the process of natural pregnancy. Under Article 772 (2), a child born two hundred days or more after the day on which the marriage was registered, or within three hundred days from the day the marriage was dissolved or annulled, shall be presumed to have been conceived during the marriage. In this case, however, the date of the husband's death is registered as September 19, 1999, and the date of the child's birth is May 10, 2001. As more than three hundred days had elapsed since the child was born, the above provisions shall not be applicable in this case, and the child cannot be presumed to have been conceived during the marriage. According to Article 787 of the Civil Code, a child can bring an action for acknowledgment within three years from the day of their father's or mother's death. In this case, although the requirement with regard to the three-year limitation has been satisfied, a problem arises when considering whether a child conceived and born after the death of the sperm donor becomes the subject of the acknowledgment. The law does not address this problem, and as such, it must be judged according to socially accepted norms. This is the first decision where an action was dismissed due to the lack of social recognition of the sperm donor as the father of a child, general deficiencies in the law, and so forth.

Judicial precedent imposes a restriction on the time period in which an action for acknowledgment after the death of a mother/father can be brought before the court, as it is desirable to quickly determine one's personal relationships (Supreme Court, July 20, 1955; Min-shu 9, 9, p. 1122). There is an opinion that until the legislation solves the problem about pregnancy occurring after the father's death, however, the situation that the formation of the child-father relationship is dependent on whether it was within this limitation period or not, in cases using frozen sperm as an assisted-pregnancy measure. As this limitation itself will be influenced by the medical guidelines about the period of keeping frozen sperm, it should be shown that it is impossible to recognize a child by artificial insemination as the object of acknowledgment after the father's death, just as with a child conceived by natural insemination. That is, it is necessary to discriminate between the cases of artificial insemination and natural insemination.

Moreover, the Supreme Court ruling cannot recognize "X" as a successor by representation in relation with to his biological father, concerning succession by representation of "A" in the case that succession by representation arises from death, on the basis of the principle of simultaneous existence. The problem about the custody, education, and support from the dead father cannot arise naturally in this case. On the other hand, if the securing of the succession right should be recognized as being to the benefit of the child who was born using the frozen sperm, this problem can be removed through adoption by the grandparents of "A." Therefore, it must not be under the necessity of recognizing the legal relationship between the child and the father.

• The will of the dead donor

Fact-finding regarding whether the father had the intention of his wife having a child using his frozen sperm is very difficult, particularly when the child was conceived after the death of the father. The major factor that encouraged the Takamatsu High Court, in the only case which allowed a petition for the acknowledgment of a child who was born after the father's death, to overturn the District Court's ruling is the fact-finding that the dead father, A, consented to birth though in-vitro fertilization using his frozen sperm, during his lifetime. Moreover, the doctor from the Obstetrics and Gynaecology department of the hospital that preserved the sperm had reached an agreement with the couple that the sperm would be preserved only during the lifespan of the donor, and that the hospital reserves the right to dispose of the sperm after the death of the donor. However, in this case, the wife did not inform the hospital of her husband's death, and the hospital did not seek to confirm the husband's consent to the procedure. Concerning the evaluation of the client's document about the frozen sperm that "A" and "B" tendered under their hand and seal, the Supreme Court judged that it is not satisfactory to construct a legal fiction of the existence of the donor ("A's") will about in-vitro fertilization after his death even if "A" consented during his lifetime.

• Medical guidelines about the period of preservation for frozen sperm

According to a report by a conference on assisted reproductive measures dated April 28, 2003, a policy decision was made that "donated sperm, etc., would be disposed of when the death of the donor was confirmed." Generally, a hospital will exchange a written agreement with the client for "the destruction of donated sperm after the death of the donor". However, there is also the opinion that the use of frozen sperm after the death of the donor may be permitted on condition that the donor had consented to it during his lifetime.

The case of dissolution of marriage cannot be applicable to the case of accepting in-vitro fertilization, because JSOG decided on 1983 that in-vitro fertilization is restricted to married couples. But the society had made no judgements about the period of preservation for frozen sperm, or whether the sperm would be disposed of after the donor's death. Corresponding to this judgment, the Society determined it officially on April 14, 2007. Moreover, the Japan Society for Reproductive Medicine (JSRM) made a guideline "about the frozen preservation of sperm" in September 2006, and determined that the period of preservation for frozen sperm should only be during the donor's lifetime. However, such a determination is effective only on the general members of society, and is not necessarily effective in all medical fields. Conclusive control over assisted reproductive technology depends on the ethics in the medical field generally until there is a readiness to revise the law. I think that it is so difficult that there is a great deal of positive opinion concerning the propriety of pregnancy after the father's death, so this problem must not be

dependent on only the self-control of the medical field in the present condition, and it should not be left as a fait accompli that pregnancy after the father's death is quite distinct from the process of natural insemination. The assisted pregnancy technology is just "assisted" measures for the natural pregnancy progress, so this medical care does not distort Mother Nature.

• Well-being of children and the regulation of medical care technology

Particularly in this case, the possibility of control of the medical technology and that the frozen sperm of the father can be used for artificial insemination after his death need to be considered from the viewpoint of the welfare of a child born by the use of this technology. The social impact on a child who is born in the context of such legal deficiencies should also be considered. As medical technology develops, the need for fixed regulations becomes essential in order to protect human dignity. Even though the laws are inadequate at present, it is necessary to secure the welfare of the child, which is a basic principle in family law.

A solution by legislation is expected to address problems that may arise from such medical advances. I am also moved with sympathy by the insistence of "X" that it should be appropriate to recognize the relationship between the child and the parent, the entry of a "father" column in the family register means the child's well-being; the recognition is necessary to avoid a situation wherein a child who was born through assisted reproductive measures has no legal father, and that this is also true in light of the fact that the child is growing up with the blessings of his relatives, even though the Civil Code does not contemplate pregnancy after the death of the child's biological father.

However, the "exceptional" legal solution of accepting a petition for acknowledgment of a child who was born after his father's death includes the apprehension that one can accept "in principle" as a precedent a pregnancy after the father's death but that a suitable social consensus had not yet formed, and that is quite distinct from the process of natural insemination and gestation. Needless to say, in any case the well-being of children who were born must be considered. But leaving these medical-care measures to the ethics of the medical field could be the substantial cause of a situation that does not legally contribute to the child's benefit. I think that there is a serious life- ethical problem which is enough to violate public order and good morals. Therefore, I can support the Supreme Court ruling. In such a case, important elements for the child's well-being are rather the existence of circumstances for the continuous and stable protection and upbringing of the child by the parents and relations that are established from birth, than the form of legal relationship between a child and his father. In addition, "B" has a parental responsibility to explain about the course of this exceptional birth, by means that the child can adequately understand, in view of the stage of the child's development.

(SASAKI Takeshi)