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“ADOPTED CHILD IN FACT”: Child Who Cannot Be Admitted Legally As Child

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I. Introduction

In the Japanese Civil Code we can find two kinds of legal relationship between parent and child: real parent and child in blood and adoptive parent and child based on adoption. These are brought forth either by a certain fact (birth) or by a certain procedure (notification of adoption). This means, if there is not such a fact or a procedure, a legal relation of parent and child does not come into being between the persons concerned and no legal effects cannot be expected. On the other hand, however, judgements, theories and special laws admit that there can be some cases where the persons concerned are protected just like the real legal parent and child. These people are called “adoptive parent and child in fact” by judgements, theories and special laws. In many cases there is no blood relation between the adopter and the adopted child, but we can often find that the real father and child in blood are regarded as

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“adoptive parent and child in fact”. In short, this conception, “adoptive parent and child in fact”, is employed in case they want to give some legal effects to the illegal parent and child. It is the purpose of this article to explain how the relation of “adoptive parent and child in fact” come forth and what kinds of legal protection are given to them by judgements, theories and special laws.

II. Formation of Parenthood

As mentioned above, there are two relations of parent and child in the Japanese Civil Code: real parent and child in blood, and adoptive parent and child based on adoption. The former is divided further into two categories: legally married man and wife with their child (legitimate child) and unmarried man and woman with their child (illegitimate child). I will explain here the formation of these three kinds of parenthood and see in which cases the “adoptive parent and child in fact” can be brought forth.

A. Real Parent and Child in Blood

1) Legitimate Parent and Child

We cannot find any definition about the legitimate child in the Civil Code, but judgements and theories define that a child born between legally married man and his wife is the legitimate child. Next, the Civil Code provides as follows in regard to the presumption of legitimacy. “(i) A child conceived by a wife during marriage shall be presumed to be the child of the husband. (ii) A child, born two hundred days or more after the day on which the marriage was formed or born within three hundred days from the day on which the marriage was dissolved or annulled, shall be presumed to have been conceived during marriage.” (Art. 772) Further provides the Civil Code about the legitimate child presumed as above. “In any case mentioned in Article 772, the husband may deny that the child is

legitimate." (Art. 774) That is, only the husband can deny the legitimacy of the child presumed by Art. 772, and thus such a child is strongly protected by these provisions. On the other hand, as for the legitimacy of a child falling outside of Art. 772 — *e. g.* a child born within 199 days after the marriage — not only the husband but also all the people who are concerned can make a protest against its legitimacy.

Now, a child, who was born as a legitimate child, may lose its father, if the legitimacy is denied. It would be rare that such a child would further live together with his ex-father as a member of the family, but if so would be the case, the child might be regarded as "adopted child in fact".

2) Illegitimate Parent and Child

A child born between unmarried man and woman is the illegitimate child. In the Civil Code there is no distinction between the formation of the relation of father and child and that of the relation of mother and child. But judgements and theories modify it, distinguishing these two relations, and understand as follows: (a) the relation of father and child is formed according to the father's acknowledgment. The Civil Code provides that a child who is not legitimate may be acknowledged by his father (Art. 779). An acknowledgement can be done through a formal notification to the ward office for family registration (Art. 781) (no approval of the spouse is required for this notification). In case the acknowledgement is not done, the relation of father and child will be formed through the action for acknowledgement (a child, his lineal descendants and the legal representative of any of them can bring an action for acknowledgement; however, this shall not apply after the lapse of three years from the time when the father died. (Art. 787)).

If there is no father's acknowledgement nor judgement admitting the action for acknowledgement, a father and a child, even if they are real father and child in blood, cannot be legally admitted as parent and child. Following cases are given as such cases. (i) The father does not want to make the acknowledgement nor does the child bring any action

against the father.¹⁾ When they live together — though it is not seldom — some legal effects can be given to them as “adoptive parent and child in fact”. (ii) In case the father died without making any acknowledgement and it is already three years since he died, the child has no means to make the legal relation between his lost father and him. The child has no father for ever. In this case, however, an “adopted child in fact” would seldom or never come into question. (b) As for the relation of mother and child, judgements and theories think in another way. The Civil Code treats father and mother equally in respect to the acknowledgement (Art. 779) and the action for acknowledgement (Art. 787). Theories, however, have been laid stress on the substantial difference between the illegitimate relation of father and child and that of mother and child. The theories explain the following. It is very difficult to find out the father of the child who was born from an unmarried woman. Therefore, it is necessary to take a certain legal step (acknowledgement or judgement) for the formation of the legal relation of a father and an illegitimate child. On the other hand, the relation of mother and child, differing from that of father and child, is quite clear from the fact of delivery. Therefore, any acknowledgement is not required for the formation of the relation of mother and child. An illegitimate relation of mother and child can be legally formed from the fact of delivery. This point of view of theories came to be admitted by the Supreme Court (27. 4. 1962). In short, as for the relation of mother and child, the blood relation accords with the legal relation as a rule, and so in the case of the relation of mother and child the “adopted child in fact” would not come into question.

B. Adoptive Parent and Child

Some legal conditions must be satisfied in order to form a relation of adoptive parent and child. These conditions fall into two parts: formality

1) It often happens that a father gives money or other property to his child or the mother to have them make no action for acknowledgement. The Supreme Court held that such an agreement, *i. e.* a renunciation of the right to require acknowledgement, was of no effect (10. 4. 1962.).

and substantiality. The formal condition is notification (Art. 799), and for substantial conditions the Civil Code requires following things: (i) an adopter must be of full age (Art. 792), (ii) an ascendant or older person cannot be adopted (Art. 793), (iii) the adoption between ward and guardian requires the leave from the Family Court (Art. 794), (iv) a person who has a spouse can make adoption only jointly with the spouse (Art. 795), (v) if the person to be adopted is under 15 years old, the adoption will be concluded by his legal representative in his place (Art. 797), and (vi) in order to adopt a minor child, the permission of the Family Court must be obtained (Art. 798).

There are cases where persons who have no blood relation live together without going through legal steps, and these are the principal cases which I am going to explain about in this article. The "adopted child in fact" is, in short, a child adopted without satisfying the necessary legal conditions. Two situations can be thought as to the "adopted child in fact", (i) though satisfying all the substantial conditions described in the Civil Code, the adoption cannot be regarded as legal because of lack of the notification (the formal condition), (ii) and the adoption cannot be regarded as legal for lack of both the substantial and formal conditions. (Such a case as satisfying the formal condition in spite of lack of substantial conditions would not happen normally.) Why do the cases lacking such conditions happen?

They result from the peculiarity of marriage procedures of the Japanese Civil Code, *i. e.* the peculiarity of adoption procedures copied from the marriage procedures. The Civil Code employs such a rule as without notification no marriage as to the formation of marriage. A marriage can be admitted legally only after the notification to the family registration in the ward office (Art. 739), and as for adoption, the Civil Code employs the same idea (Art. 799), *i. e.* without notification no adoption.

On the other hand, however, the Japanese traditional manners and customs are quite different. In Japan after marriage ceremonies and

parties, or when a man and a woman live together for some time, they are accepted as husband and wife socially. Here is a big difference between provisions of Civil Code and customs. In spite of the great efforts of the Government and those who are concerned, it still remains as a big problem now. And for the protection of these people — who are not legally married but regarded as husband and wife socially — the theory “marriage in fact (NAIEN)” was invented²⁾. The same thing can be applied to the adoption. Of course there are substantial differences between “husband and wife” and “parent and child”, but customarily ceremonies and parties are often held for adoption and the parent and the child live together in the same home. It comes now into question that there are also adoptive parent and child who are admitted socially but not legally because of lack of notification, and how these people can be protected legally. This is the reason why the study of “adoptive parent and child in fact” is necessary as well as that of “marriage in fact”.

C. Other Problems

After the World War Second the Constitution was revised, and in accordance with it the Civil Code was revised quite a lot. Many provisions which had been existing since 1898 were abolished. As the result there were brought forth following problems.

Under the old Civil Code till 1947, the step parent and step child were legally admitted as parent and child. For instance, a second wife was automatically admitted as the legal mother of the child of the ex-wife. The present Code abolished this, for such a provision was derived from the feudal family system. Thus under the present Code no legal relation of parent and child exists between the second wife and the step child. They are each other only first degree relatives and have each other no right of succession. As a rule — except for the order of the Family Court

2) As for this matter, refer to my article “NAIEN—One problem in Japanese marriage law”, Osaka University Law Review, 12, 1964.

(Art. 877)—no duty of supporting arises. If they want to become legal parent and child, they have to go through the procedure of adoption. However, there are still many people who, being unable to get rid of the conception of the old Code, believe that the second parent and step child are automatically legal parent and child, and making no adoption, they leave the case as it is. In this case, they can be admitted as "adoptive parent and child in fact". Finally, when a man and a woman are living together without going through legal steps, and the man adopts a child legally while no legal procedure is taken between the woman and the child, the child will be an "adopted child in fact" for the woman.

III. "Adopted Child in Fact" Seen in the Court

In the last chapter we have seen in which case an "adopted child in fact" appears. In this chapter we will see in which case the court took up the matter as an "adopted child in fact" and gave to it legal effects.

A. As we have seen in Chapter I, an illegal adoption which is lacking for legal conditions falls into two cases: the one is lacking only for the formal condition and the other for the substantial conditions. Between these we have to specially consider the latter, i. e. even if the case does not satisfy the substantial conditions, is it possible to regard the case as concerned with an "adopted child in fact"? The following case is about the existence of the duty of supporting. There the above mentioned matter is taken up, i. e. the Civil Code describes one of the substantial factors for adoption as follows: in order to adopt a minor child, the permission of the Family Court shall be obtained (Art. 798). Now it came to be the point of issue whether an "adopted child in fact" can be applied to, in case no permission from the Family Court was taken, and then based on this point, they took issue as to the existence of the duty of supporting.

Sixteen-year-old plaintiff X made a promise of adoption with

man and wife (AA') in 1950, but they made no notification. He came to live together with A and A' and their daughter B—X's il-legal wife. A was old and weak. He owned only his house and little field. His income was very small. Then X had to earn money to support A, A' and B as well as to pay for A's sick payment. In 1952 A died. X brought an action, asserting as follows: X was still a minor in 1950 when he promised adoption with A and A'. Therefore, a permission from the Family Court would have had to be taken. But actually this permission was not taken, and so no adoption exists between X and AA'. Therefore, all the money and medical expenses X had given to A before his death were unjust enrichment for A. Now X has the right to require the re-found from Y who is A's heir-at-law.

The District Court held that, the relation of living together among X and AA' can be regarded as the relation of "adoptive parent and child in fact" in spite of no permission from the Family Court. Therefore, it can be thought as the duty of supporting based on the "adoptive parent and child in fact" that X paid for all the living expenses for A and his family. This is not A's unjust enrichments, and X's demand cannot be accepted. X further appealed to the High Court, which rejected it and judged as follows: a permission from the Family Court is not required in case a minor over fifteen years old establishes adoption in fact with the adoptive parent in fact. According to this judgement, the "adoptive parent and child in fact" can be formed, even if the case is lacking for not only the formal condition but also substantial conditions. (Fukuoka, 13. 4. 1956)

However, some theories disagree with this point. In fact as to the formation of the "adoptive parent and child in fact" theories are really out of accordance. These are divided as follows: (i) the first theory insists that no substantial conditions are necessary, for the relation of "adoptive parent and child in fact" is formed, as well as the relation of "husband and wife in fact", as social custom, regardless of legal steps. Therefore, the

substantial conditions are not necessarily required nor such formalities as ceremonies, change of letters or parties. The fact itself that the parent and the child are living together is enough. (ii) The second theory insists that the substantial conditions have to be satisfied for the formation of the relation of "adoptive parent and child in fact". According to this theory, only the case which satisfies all the substantial conditions but is lacking for the formal condition (notification) can be legally protected as "adoptive parent and child in fact". (iii) The third theory interprets it as follows: those who are concerned have to agree as to the adoption, but as for the other conditions for the formation should be considered from the viewpoint of the effects to be given—mainly compensation for the loss resulting from the dissolution.

It is clear that the above mentioned judgement is derived from (i) or (iii), and not from (ii). The adoption is strongly under the guardianship of the Court to avoid a comouflaged unjust adoption (in the old days the human traffic was comouflaged in this way), and protect the interest of the adopted child. From this point of view, the theory No. (ii) can be said to be right. However, thinking of the solution of an actual case, it seems to me the theory No. (ii) is too narrow, for it might give the adopted child quite unjust disadvantages to always judge that "he is not an adopted child in fact because of lack of the substantial factors", when an actual issue arises. And further when we think that the Civil Code gives a special consideration to the interest of the adopted child separately from that of the adoptive parent, the theory No. (iii) seems to be right rather than the theory No. (i) which treats the adoptive parent in fact and the adopted child in the same way. And in my opinion, the fact of living together is indispensable for the formation of the "adoptive parent and child in fact", though for the legal adoption this is not always required. In the above mentioned case the duty of supporting as the effect was the point of issue. Some of the effects which are given to the legal parent and child are given to the "adoptive parent and child in fact" Though such rights as the

surname, the relative relation and the right of succession which are based on the family registration are rejected, but the other effects can be given. The solution in this case is good.

B. For instance, it is a question whether an "adopted child in fact" can further live in the same house, in which he has been living with the "adoptive parent in fact" after the latter's death. (This has been disputed as to "husband and wife in fact". The situation is quite the same as to the "adopted child in fact".) Now we will see the case disputed in the Court.

Defendant Y started to live together with K, a teacher of the *Koto* (Japanese harp), as apprentice, in the house which plaintiff X owned, in 1942. While learning the *Koto*, Y took care of K who was blind and had no family. K promised to adopt Y, but did not make any procedure. In 1955 K died. X, the owner of the house, required the vacation of the house by reason of termination of lease. (K had six heirs-at-law in total such as sisters, nephews and nieces.)

The judgement of the Supreme Court is as follows (25. 12. 1962). The right of lease of the house which K had occupied was transferred to the six heirs-at-law due to the death of K. On the other hand, K had made up her mind to adopt Y before her death and their relationship had developed from that of only teacher and apprentice into that of "adoptive parent and child in fact". This relationship was also admitted by their relatives and acquaintances. When K died, the following were decided among the relatives: Y would be the chief mourner, take over K's property as well as K's professional name, and hold memorial services for K and her ancestors. Under such a situation Y was able to exercise the right to live in the very house, citing K's right of lease, as a member of K's family. K's heirs-at-law took over the right of lease due to K's death, Y can insist the right to live in the same house citing the right K's heirs-at-law have.

This judgement gives us two points of issue. First, if the heirs-at-law require the vacation of the house against the "adopted child in fact" of the person inherited, what will become of it? Explaining that the matter should be solved considering the actual situations of both the "adopted child in fact" and the heirs-at-law, the theory understands also that the require of the heirs-at-law should be rejected as abuse of the right if the heirs-at-law try to drive the "adopted child in fact" out of the house in spite of no need on their side to use the house. Second is the case of no heir-at-law. This problem was dissolved by the revision of the law of rented houses in 1966. Art. 7—2 of the law defines as follows: in case of no heir-at-law, a husband (or a wife) in fact or parents (or child) in fact get the right and duty of lease. Through this provision an "adopted child in fact" can obtain the right.

C. The adoption can be dissolved through presenting a notification to the ward office. On the other hand, no procedure is necessary for the dissolution of the relation of "adoptive parent and child in fact"; the termination of the actual relation means the dissolution of the relation of "adoptive parent and child in fact". As for the termination of the actual relation of living together as parent and child, there are still some problems. First, how is the termination made? No procedure is necessary for the dissolution of the relation of "adoptive parent and child in fact". (i) When the persons concerned agree to the dissolution and bring it to an end to live together, the relation of "adoptive parent and child in fact" will come to an end automatically. (ii) Even in case the one of the persons concerned does not agree, no judgement from the Court cannot be expected. In the case of the legal adoption, when one wants to dissolve and the other does not, the former can bring an action to the Court if there are some facts which fall in legal grounds (Art. 814). On the other hand, in the case of the relation of "adoptive parent and child in fact", the one who wants dissolution can freely bring the relation to an end even if the other opposes it. However, if the dissolution is based on unjust reasons, the other party

can seek aid against the Court. This is the problem of unjust dissolution of the relation of "adoptive parent and child in fact". The following case is about an issue whether the dissolution is just or unjust.

Plaintiff X promised with defendants Y_1Y_2 and their daughter A to marry A as well as to be adopted by Y_1Y_2 . (Such was the typical case of adoption which had been existing in Japan till the end of the World War Second. In this case just a notification was enough. Under the present Code such a notification is not admitted, but the persons concerned can actually fulfil it by presenting two notifications — marriage and adoption.) X, as A's husband in fact, started to live with Y_1Y_2 and A. But as A misconducted herself, the relation between X and A become worse, resulting in dissolution of their relation as "husband and wife in fact". Then Y_1Y_2 requested X to dissolve the relation of the "adoptive parents and child in fact". X presented an action for compensation for damage insisting that Y_1Y_2 's request for dissolution of the relation of "adoptive parents and child in fact" is unjust.

The action was rejected by the Family Court. The judgement was as follows. The Civil Code describes as to the dissolution in the Court; in case there is an grave reason for which it is impossible to continue the relation, an action for dissolution can be presented (Art. 814), and according to the judgements of the Supreme Court (4. 8. 1964), a person who is responsible for the breakdown of the relation cannot request dissolution. In this case, the relation between X and A is already broken (for this breakdown Y_1Y_2 are not be responsible), and there is no more hope that marriage and adoption exist at the same time in the future. This situation comes exactly under the grave reason for which it is impossible for Y_1Y_2 to continue the relation (impossible to make a legal notification for adoption). It seems Y_1Y_2 have a grave reason to dissolve the relation of the

"adoptive parents and child in fact". (Kofu, 28. 11. 1958)

D. Differing from the above mentioned several cases, the following matters have nothing to do direct with the concept "adopted child in fact", but I would like to explain about some problems as follows, for though the concept employed might be different, the result brought about is the same.

In 1962 the Civil Code created such an exactly new system as hardly found in foreign countries. It is usually called "the distribution of residuary estate to specially related persons". Art. 958—3 provides as follows; "In the case of the preceding article (the determination of the non-existence of heir-at-law), the Family Court may, when it seems appropriate, give upon the petition whole or any part of the residuary estate after liquidation, to person who shared the same livelihood with the deceased (the person to be succeeded to), to person who were engaged in nursing the deceased, or to person who had special relations with the deceased".³⁾ It is not always clear why such a system was created, but anyway it is at least clear that the legislator tried to give especially to the "spouse in fact" the possibility to get some of the property through this system. An illegal spouse has no right of succession. No matter how long a man and a woman live together as husband and wife, they cannot inherit the property of the other on the occasion of the other's death. And if there is no heir-at-law, the property is to belong to the National Treasury.

Now the legislator intends the means the "spouse in fact" can get the property if there is no heir-at-law. This is the typical example which falls under the expression a "person who shared the same livelihood with the deceased", and the same thing can be applied to an "adopted child in fact" treated in this article. The following are the cases where an "adopted child in fact" acquires the property left by the "adoptive parent in fact" in the Family Court.

a) T. K married Y. K, her husband, in 1934. Y. K left for war in 1944,

3) As for this matter, refer to my article: "The distribution of residuary estates to specially related persons: A new institution in the law of succession of Japan", *Osaka University Law Review*, 17. 1969.

when there was no child between them. As it seemed quite doubtful for Y. K to return alive, judging from the war situation at that time, Y. K and T. K made an arrangement with A and his wife, to adopt the child which A's wife was expecting. The child, X, is the plaintiff of this case. X often visited the family T. K who lived next door since childhood. T. K treated X with affection like her real child. T. K insured her life in an insurance company to secure the living of X after her death. Y. K was killed in war in 1945, but the official notice of his death arrived only in 1958. Then it was decided between T. K and her relatives that T. K would adopt X, X's husband would be chosen from the relatives of Y. K. and T. K's property would be given to X after her death. T. K continued to live alone after that, but next door X and her family were living. T. K was used to ask advice of X and her family as to the superintendence of her property and other things, and X's mother visited T. K every day, when T. K was hospitalized. T. K wanted to live together with X, and asked X's father to re-equip her house for this purpose, but two days after leaving hospital T. K died. Her funeral was conducted by X's father with X as the chief mourner. The Court admitted X as the specially related person, and judged to give her T. K's land, house, stock certificates, deposits and so on. (Osaka, 27. 11. 1965)

b) Y worked for the landlord A. He had a small house constructed in the neighbourhood and lived together with his illegal wife. After his wife's death, his life became very inconvenient because he was already over seventy and had no children. Then his neighbour arranged adoption in fact between Y and Xs, the plaintiffs. Mr and Mrs. X moved to Y's house and cultivating his fields, took care of him. About ten years after that, Y fell sick, and attended on by Mr. and Mrs. X, died. The Court admitted for them to receive the fields. (Maehashi, 1. 4. 1964)

c) Y lived together with M. N. after holding a wedding ceremony, but due to legal obstructions, they were unable to present a formal notification. They lived together as "illegal man and wife". As they had no child, X,

one of their relatives, was adopted when X was about five years old. The notification for adoption between X and M. N. was presented, but that of X and Y. not. M. N. died in 1928, and X succeeded to his business and was filial to Mother Y, living together with her. In 1959 Y fell sick. Mr. and Mrs. X nursed Y tenderly. Y died in 1961. X conducted a funeral, erected a tomb, and has been holding a memorial service for her. The Court judged that X was able to occupy the house which Y had owned. (Fukui, 1.5.1964)

IV. Conclusion

I have mentioned in which case so called an "adopted child in fact" can appear and how an "adopted child in fact" has been treated in the Court so far. Now I would like to mention some problems as the conclusion. As taken up case by case in the other article⁴⁾, there are many judgements made so far for a long time about "marriage in fact (NAIEN)" as well as many theories about this. It seems all the points at issue have been discussed about "marriage in fact". On the contrary, few problems have been taken up as to the formation and effects of "adopted child in fact". When we see the judgements or theories on "adopted child in fact", we will find that it has been treated in parallel with "marriage in fact". However, it is rare that a case on "adopted child in fact" is brought to the Court, and so many problems about it are left unclear. It seems that it is necessary to pay more attention to the following differences between marriage and adoption. While marriage depends only on the two persons concerned, the third party is to be concerned in the case of adoption, especially when a little child is adopted, *e. g.* the real parent. The nature of the formation is quite different between marriage and adoption. Marriage is based on the free will of a man and a woman who have a equal standpoint, but in the case of adoption, especially when a minor is adopted,

4) See, "NAIEN" *op. cit.*

there is a danger that the adopter might put pressure up the adopted child. That is why there are not a few provisions concerning the formation of adoption to protect the adopted child against such dangers. The meanings of the conditions for the formation are not the same between marriage and adoption. The Civil Code is not expecting any marriage without the fact of living together, but it does not provide that "adoptive parent and child" should always live together. Therefore, it comes to be a point of issue whether an "adopted child in fact" can exist without the fact of living together. (In my opinion the fact of living together is indispensable.) On many points marriage and adoption have differences. Therefore, it is very questionable to discuss an "adopted child in fact" with the same logic as that of "marriage in fact". Finally I would like to explain about the important matters of an "adopted child in fact" itself. The core of the law of parent and child is the parental power. The parental power consists of the right of custody and the right of management of property, which the child holds. As the former is admitted to be transferred to the third party by the Civil Code, it can be understood that the "adoptive parent" is entrusted with it by the real parent, but as far as the right of management of property is concerned, such an understanding cannot be accepted. There are many cases where the right of management of property is issued against the third party, but only a person who has the parental power or the position of guardian based on the Civil Code can exercise this right. Therefore, the "adoptive parent in fact" can do nothing in regard to the property of the "adopted child in fact". (For instance, the former cannot make any effective agreement regarding the property of the latter.) The existence of the "adoptive parent in fact", who has such a limitation as to the parental power, seems to bring forth more problems. It should not be overlooked that the situation of the "adoptive parent and child in fact" is quite different from that of the "legal adoptive parent and child" in many points.