Simultaneous Solution of the Matters of Divorce and Parental Authority — From the Perspective of International Jurisdiction (summary)

Naohiro KITASAKA

Professor of Law, Fukuoka University

According to Art. 819 (2) of Japanese Civil Law, in the case of the judicial divorce, the court must determine which parent will have the parental authority in relation to a child who has not attained the age of majority (minor). In other words, when the court grants the divorce petition, the court simultaneously must decide which parent will have the parental authority of their minor.

Then, in the international case, does the court pending the divorce proceeding have the international jurisidiction to decide which parent will have the parental authority in relation to the minor ? One example case is the following:

"A Japanese husband and his Japanese wife lived in the State A with their child (minor). But the husband alone returned to Japan, on the other hand, the wife and the child still stayed at State A. Afterward the husband made the petition to Japanese court for divorce and appointment of the person who will have the parental authority in relation to their child."

In this case, does the court pending the divorce proceeding have the international jurisidiction to decide which parent will have the parental authority in relation to the minor just because the court has the jurisdiction to decide the divorce proceeding, even if the child is not a resident of Japan ? This article deals with the international jurisdiction in the matter of the parental authority (especially, the appointment of the person who will have the parental authority) on the occasion of the divorce proceeding.

In this article, first, I will make a survey of Japanese judgments and scholarly debates. There I will show the two ways of thinking. One is that the court of the domicile of the child has the jurisidiction over the appointment of the person who will have the parental authority on the occasion of the divorce proceeding. The other is that the court pending the divorce proceeding also has the jurisidiction over it.

Second, I will outline the provisions of (1) US uniform law (Uniform Child Custody Jurisdiction and Enforcement Act (1997): UCCJEA), (2) 1996 Hague Convention (Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-opera-

tion in Respect of Parental Responsibility and Measures for the Protection of Children and (3) EU Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000: Brussels IIa Regulation), (4) Swiss Private International Law (Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987).

In this article, I will support the way of thinking which is shown in 1996 Hague Convention and Brussels IIa Regulation. That is, the principal idea is that the court of the habitual residence of the child has the international jurisidiction over the matters of parental authority on the occasion of the divorce proceeding. Furthermore, the court pending the divorce proceeding also has the international jurisidiction over it, provided some conditions (for example, acceptance of the jurisdiction of the court by the parents as well as any other person having parental responsibility in relation to the child, and the court is satisfied that it is in the best interest of the child that it should accept the jurisdiction) are met. And I also consider the related issue of the international jurisdiction over the matters of the parental authority (especially, the appointment of the person who will have the parental authority) on the occasion of the divorce proceeding.