〔論　説〕

“Equitable Estoppel” in American and Japanese Family Law:

The Dynamics of Imposed Parenthood and Its Bioethical Implications

Keisuke Abe

Ⅰ. Introduction

In Chapter 10 of *the Tale of Genji* entitled *Sakaki* or “*the Sacred Tree*,” Retired Emperor Kiritsubo passes away, apparently without realizing that Prince Reizei, the heir apparent to the throne, is not his son, but is a son of Genji. In recent years, technological progress in DNA testing has undermined the foundation of such blissful ignorance to a significant extent. Interestingly, however, this does not mean that a “child” is deprived of his or her legal status as a child whenever it is established that he or she is actually not a child of the “parent.” Under what circumstances, then, should a putative child, after being discovered not to be a biological child of the putative parent, be nevertheless legally treated as his or her child?

This article will first introduce two cases, one from the United States and the other from Japan, both of which address this important question, and explain what happened in each case. It will then compare the requirements to be met in order for a non-biological, non-adoptive parent-child relationship to be formally recognized under each law. This discussion will show that, although there are a number of distinctions between U.S. and Japanese case law, parenthood that is not based on a genetic connection and which is different from adoption is occasionally

considered legitimate in both countries, and that the recognition of such a parent-child relationship can be seen as an example of how significant one's intent and another person's reliance on that intent are in each legal culture. The emphasis on intent and reliance in this context is best understood as a reflection of modern legal consciousness, which generally attaches great importance to personal autonomy. An individual is deemed to be capable of making a well-considered, rational decision for himself or herself; accordingly, the law holds him or her responsible when another individual has reasonably relied on his or her statement. This individualistic image of family relations may have multiple implications for the future of family law, especially as it relates to issues concerning bioethics and law, such as gestational surrogacy.

II. *Shondel J. v. Mark D.*

The first case of significance is *Shondel J. v. Mark D.*,[1] decided by the Court of Appeals of New York, which is the court of last resort in New York. The names of the New York state courts are somewhat anomalous: the court of first instance is called the Supreme Court, although, for most matters relating to family relations, one usually has to file his or her action with the Family Court first; from there the aggrieved party has a right to appeal to the Appellate Division; and finally, the Court of Appeals, consisting of seven judges and sitting in Albany, is the highest court in New York. *Shondel J. v. Mark D.* is a decision made by the Court of Appeals.

The facts are as follows. In 1995, Mark D., a New York resident, went on a trip to Guyana and met Shondel J., a Guyanese resident. Following Mark's return to the United States, Shondel, still in Guyana, told him by telephone that she was pregnant with his child. She gave birth to a daughter in Guyana in 1996, and named Mark as the father

1 853 N.E.2d 610 (N.Y. 2006).

in a birth registration document. Mark was in New York at that time, but he provided financial support for the child. In a sworn statement, notarized by the Guyanese Consul in New York, Mark declared that he was "convinced"[2] that he was the father, and accepted "all paternal responsibilities including child support."[3] In 1998, he signed a Guyanese registry, stating that he was the father of the child and authorizing the change of her last name to his. Mark named the child the primary beneficiary on his life insurance policy, identifying her as his daughter. He also supported the child with money each month until June 1999 and then less regularly until the summer of 2000.

In August 2000, Shondel commenced a paternity proceeding in the Family Court, seeking an order of filiation declaring Mark to be the father and also seeking an order of child support. In September, when the child was 4 years and 9 months old, Mark commenced a proceeding in the Family Court, seeking visitation. In his petition, he stated that he was the child's father, and that he loved her and wished to "spend quality time with her on a regularly scheduled basis."[4]

However, in October 2000, Mark requested DNA testing when he appeared before a Family Court hearing examiner.[5] The examiner ordered a DNA test, which revealed Mark was not the biological father of the

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2　*Id.* at 611.

3　*Id.*

4　*Id.* at 612.

5　The official title is now "support magistrate." A support magistrate is a quasi-judicial officer, who is empowered to hear and determine support issues in support and paternity proceedings. Many support magistrates spend their entire legal careers doing this work. There are approximately 120 support magistrates statewide; they are selected from attorneys with five plus years of relevant legal experience and appointed by the Chief Administrative Judge (note: The Chief Administrative Judge is appointed by the Chief Judge of the Court of Appeals and oversees the administration and operation of all New York state courts). A support magistrate is appointed on a full-time basis for a three-year term initially, and reappointed to five-year terms thereafter.

child. The examiner dismissed Shondel's paternity petition, and Mark subsequently abandoned his petition for visitation. And he severed his relationship with the child.

Shondel objected to the hearing examiner's order; the Family Court sustained her objection and appointed an attorney as guardian for the child. In October 2001, the guardian reported that Mark had "acted"[6] as the child's father and that the child "considered"[7] him to be her father. The Family Court then set the matter down for an equitable estoppel hearing.

Now, according to Pomeroy's *Equity Jurisprudence*,[8] whose final edition was published in 1941, but which is still frequently cited by American courts today, "equitable estoppel" is the effect of the voluntary conduct of a party, whereby he or she is absolutely precluded from asserting rights, which might perhaps have otherwise existed as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his or her position for the worse and who acquires some corresponding right.[9] So this notion is composed of three basic elements: (1) voluntary conduct; (2) justifiable reliance thereon; and (3) detrimental change of position. To prevent injustice from occurring, a party would be prevented from taking a position contrary to his or her prior acts, admissions, or representations.

At the estoppel hearing, Shondel gave detailed testimony about the extent of the interactions between Mark and the child. She testified that Mark took the child to meet his parents, told his family that she was his daughter, referred to himself as "daddy" when talking with the

6 *Shondel J.*, 853 N.E.2d at 612.

7 *Id.*

8 John Norton Pomeroy (1828-1885) was an American lawyer who practiced law in New York for many years and served as professor of law and dean of the law school at New York University (1864-1868). Later moving to California, he served as professor of law at the University of California (1878-1885).

9 *See* 3 J. Pomeroy, A Treatise on Equity Jurisprudence § 804 (5th ed. 1941).

child, and visited the child almost every other day since Shondel and the child moved to New York. Mark denied all of this, but the Family Court found his testimony without credibility and ruled that Mark had publicly conducted himself as the father. Consequently, the court entered an order of filiation and an order of support; the Appellate Division affirmed,[10] and the case came to the Court of Appeals.

The Court of Appeals affirmed. It stated that, where a child justifiably relies on the representations of a man that he is her father, with the result that she will be harmed by the man's subsequent denial of paternity, the man should be estopped from asserting that denial.[11] According to the Court, the Family Court should have addressed the issue of estoppel prior to ordering DNA testing, but the court has the right to find "fatherhood by estoppel"[12] regardless, even after DNA test results indicated that the man was not the biological father of the child. Since Mark represented that he was the father, and the child justifiably relied on this representation and changed her position by forming an emotional bond with him to her ultimate detriment, Mark is estopped from denying paternity.

Ⅲ. *Anonymous v. Anonymous*

The next relevant case is *Anonymous v. Anonymous*,[13] decided by the Japanese Supreme Court. In this case, Husband A and Wife B had two daughters; the first daughter X was born in 1923, and the second daughter C was born in 1925. Daughter X was adopted by Husband D and Wife E in 1930 and raised as their child. In 1941, Son Y was born to Husband F and Wife G. They requested Husband A to file the notification of birth for Son Y as "Husband A and Wife B's child." Husband A

10　Shondel J. v. Mark D., 774 N.Y.S.2d 366 (N.Y. App. Div. 2004).

11　*See Shondel J.*, 853 N.E.2d at 614.

12　*Id.* at 616.

13　Judgment of July 7, 2006, Saiko Saibansho [Supreme Court], 60 Minshu 2307 (Japan).

reported the birth of Son Y to the municipal office, recording Son Y as the first son born to him and his wife.

Husband A and Wife B raised Son Y as their child. Son Y went to college and then got married, but he continued to live with Husband A, Wife B, and Daughter C. Husband A died in 1974, and in his lifetime, he never said that Son Y was not his child. His estate was entirely inherited by Wife B. Wife B died in 1996, and by her will, her estate was entirely inherited by Daughter C. This was because her estate was the land and building where they had lived and Wife B was concerned about Daughter C's life. Son Y was already financially independent and had his own family. Like Husband A, Wife B never denied that Son Y was her child, either.

Thereafter, Son Y moved out of the house. In 2002, Daughter C died at home during her life of solitude. Daughter C never denied that Son Y was Husband A and Wife B's child, either.

Now, Daughter X became angry with Son Y, because she believed that the delay in the discovery of Daughter C's death was the result of Son Y's failure to check Daughter C's health condition. Daughter X was also offended because Son Y did not consult with her when he determined the people who were to attend Daughter C's memorial service. So she brought an action to seek declaration of non-existence of the parent-child relationship between Couple AB and Son Y. The lower court upheld Daughter X's claim and Son Y appealed.

The Supreme Court reversed. It held that Daughter X's claim should be deemed to be an abuse of right and therefore impermissible. It gave five reasons for reaching this conclusion.

First, Son Y actually lived with Husband A and Wife B, and then with Wife B, as their child for a period of about 55 years. Second, Daughter X denied that Son Y was Husband A and Wife B's child only after a dispute occurred over inheritance upon Daughter C's death. Third, if the non-existence of the parent-child relationship is declared, Son Y is expected to suffer considerable mental distress. Fourth, Husband A and Wife B never said that Son Y was not their child, and they

are presumed to have desired to maintain their relationship with Son Y as their child. Now that they are deceased, it is impossible for Son Y to be adopted by Husband A and Wife B and acquire the status of their child. Fifth, the motive for which Daughter X came to deny the parent-child relationship cannot be deemed to be reasonable.

Ⅳ. Congruence of Common Law and Civil Law: The Doctrine of Equitable Estoppel and Its Japanese Counterpart

To compare this case with *Shondel J.*, the Japanese court's rationale for legitimizing a non-biological, non-adoptive parent-child relationship is very different from the one that is used by the New York court. First of all, the time that Son Y actually lived with his putative parents as their child was 55 years, whereas in *Shondel J.*, the time that elapsed before the case was brought to hearing was only 4 years and 8 to 9 months. And Mark D. had never even lived with his putative daughter. It is also notable that the New York court's reasoning is more straightforward in highlighting the significance of Mark's prior statements or representations. The Japanese court's analysis is much more nuanced; it is equivocal and ambiguous, for the court just refers to five factors and decides the case in light of the totality of the circumstances.

However, on closer inspection, it is apparent that the decisive factor is the intent of the putative parents. The court emphasizes the elapse of time as one of the reasons for its judgment, but the supplementary nature of the time factor should not be overlooked. Suppose a British man immigrates to Japan and eventually decides to be naturalized as a Japanese citizen, accordingly the municipal office must create a family register for him, so it does so. Suppose further that the municipal officer, in his ignorance of English names, mistakenly records his name incorrectly. For some reason, the naturalized citizen does not notice this mistake for 50 years, until he is an old man. There is no doubt that the court will order the rectification of his name upon his request. It is totally irrelevant how many years have passed since his naturalization.

This is because a family register plays a major role in Japan, publicly demonstrating who you are. Ensuring accuracy of the matters recorded therein is usually considered to be of paramount importance. In fact, the lower court had upheld Daughter X's claim precisely for this reason.

Son Y's mental distress and the unreasonableness of Daughter X's motive do not seem to be determinative, either, especially in light of the fact that family law cases are usually painful, stressful, and emotionally difficult. Many of them come to court because one of the parties files a lawsuit for emotional reasons; the motive for bringing a case is very often irrational. What makes this case different from others is the simple factor that Husband A and Wife B strongly desired to maintain their relationship with Son Y as their child.

The Japanese court's reasoning is even more visible in another *Anonymous v. Anonymous*,[14] which was decided on the same day as the aforementioned *Anonymous v. Anonymous*. In this case, it was one of the putative parents who sought declaration of non-existence of the parent-child relationship. Again the Supreme Court mentioned a number of grounds for denying the claim, but in one passage, it vividly contrasted the situations of the putative parent and the putative child. No blame can be attached to the putative child with respect to the false notification of birth, as he was just a baby at that time, whereas the putative parent is the very person who recorded the relationship, or at least acquiesced to the false notification made by her spouse. It is therefore patently unfair for the putative parent to claim that the putative child is not hers. The same logic can be seen here as in *Shondel J.*: the putative parent is estopped from denying the parent-child relationship, for that relationship has been established precisely because of her voluntary conduct.

From the perspective of comparative law, Japan is a "mixed jurisdic-

14 Judgment of July 7, 2006, Saiko Saibansho [Supreme Court], 59 Kasai Geppo 98 (Japan).

tion" in the sense that its legal system is built upon dual foundations of common law and civil law materials.[15] Like in other mixed jurisdictions such as Louisiana and Quebec, private law in Japan has been principally rooted in the civil law tradition, whereas its public law is primarily Anglo-American.[16] So the claims for declaration of non-existence of the parent-child relationship in these cases were denied by way of statutory interpretation, specifically on the basis of Article 1, paragraph 3, of the Civil Code modeled after the Napoleonic Code, which is a general provision that says, "no abuse of rights is permitted." But the underlying principle is virtually the same as the doctrine of equitable estoppel in Anglo-American jurisprudence.

Ⅴ. Some Concluding Observations

It is evident that the law in New York as well as in Japan has been willing to disregard the importance of genetic connection as a determinant of family relations at least in some circumstances. In doing so, the courts in both jurisdictions have given their attention to the intent of the putative parents as represented in their prior statements. This has some wider implications.

If a person who has no genetic connection with the child and who currently does not want to be the father, like Mark D., can be legally regarded as the father based on his voluntary conduct in the past, then surely it must follow that a person who does have a genetic connection and who does have the intent to be a parent should be treated as a parent. This is exactly the situation of a person who makes a contract with a gestational surrogate.

Similarly, if a child who has no genetic connection with the putative parents can be accorded status as their natural child just because the

15 *See* Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions, in* Mixed Jurisdictions Worldwide: The Third Legal Family 3, 7-8 (Vernon Valentine Palmer ed., 2001).

16 *See id.* at 8-10.

putative parents filed a fictitious notification of birth, then certainly it must follow that, when a gestational surrogate gives birth to a baby, who typically does have some genetic connection with the commissioning parent or parents, and when there exists a written contract accurately reflecting the intention of all the parties involved, indicating that the baby should be treated as a child of the commissioning parent or parents, the baby should be given status as the commissioning parent or parents' natural child, and not as an adoptive child.

All of this casts serious doubt on the righteousness of the statutes prohibiting surrogacy or those automatically treating surrogacy contracts as invalid, which can be found in some states in America. Japan currently does not have any statute of that kind, but because of the internal regulation of the medical profession, specifically the guidelines issued by the Society of Obstetricians and Gynecologists, surrogacy is extremely rare. In 2007, the Supreme Court justified the municipal office's refusal to register twins delivered by a surrogate in Nevada as the natural children of a Japanese couple, on the grounds that they should adopt them instead.[17] This decision has been severely criticized, for, under Nevada law, the surrogate is not a mother at all - the commissioning parents, the Japanese couple, are the parents from the very beginning. On the other hand, consent of birthparents is required to effect adoption in Japan, and it is generally agreed that one cannot adopt his or her own natural child. As a result, the couple are raising the twins, who are genetically their children, as the husband's illegitimate children born to an American lady. To this day the twins remain U.S. citizens, despite the fact that they have lived in Japan since six weeks after their birth.

By making surrogacy illegal or impracticable, a society deprives certain groups of people of their fundamental rights to procreate and form a family. Such people include women who are physically incapable

17 Judgment of March 23, 2007, Saiko Saibansho [Supreme Court], 61 Minshu 619 (Japan).

of conceiving a child, and single men who cannot find a partner who is willing to deliver a baby. A reasonably strong argument can be made to the effect that the prohibition of surrogacy is unconstitutional because it interferes with the autonomous choice of an individual in a discriminatory manner,[18] in light of the fact that a fertile woman who wishes to start a family by herself can freely do so by bearing a child by using the sperm of a friend or by purchasing sperm from a sperm bank. A gross asymmetry can be seen here in the protection of fundamental constitutional rights.

History repeats itself in *the Tale of Genji*, as Genji's legitimate wife gives birth to the child of a secret lover in Chapter 36, which is entitled *Kashiwagi* or "*the Oak Tree*." Unlike Emperor Kiritsubo, Genji is aware that the newborn is not his son, but is the son of his wife's secret lover. He nevertheless decides to raise Kaoru, the baby boy, as his own son. Kaoru grows up in Genji's palace and is regarded by everyone to be Genji's son throughout the novel. The parent-child relationship thus formed between Genji and Kaoru is a natural one; it is not an adoptive one. The story brings to mind the similar decisions of modern day Genjis: a countless number of husbands around the world who agree to artificial insemination of their wives with donor sperm, not to mention a certain percentage of the far more numerous husbands who automatically undertake the responsibility as the fathers of the children born to their wives without ever attempting to perform DNA testing. It is ironic that only those who make use of gestational surrogacy are told to go through adoption procedures when many of them have more genetic connection with their babies than, and are as well prepared to foster them as, these modern day Genjis.

It is time to recognize the importance of an individual's intent to become a parent as a key determinant of parenthood. Legal systems, especially those of countries where the declining birth rate has been

18　*See, e.g.,* CONST. OF JAPAN, art. 13 (the right to privacy); art. 14, para. 1 (prohibition of discrimination).

causing serious concern among policymakers, should make every effort to guarantee the right to reproduce to everyone who has the intent to be a parent and the ability to raise a child responsibly. They should also strive to eliminate the obstacles to the individual pursuit of happiness and to make the opportunities to form a family realistic for everyone.

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