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## **J.Y. Interpretation No. 365 (September 23, 1994)\***

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### **Father's Preferred Parental Rights Case**

#### **Issue**

Article 1089 of the Civil Code grants the father preferred parental rights over minors. Does it violate the principle of gender equality of the Constitution?

#### **Holding**

Article 1089 of the Civil Code grants fathers the right of final decision in situations of parental disagreement over the exercise of parental rights toward their child. Such part of this Article is inconsistent with both Article 7 of the Constitution, which guarantees equality between men and women, and Article 9, Paragraph 5 of the Additional Articles of the Constitution, which purports to eliminate gender discrimination. The said provision shall be revised. Otherwise, it shall become null and void no later than two years from the date of announcement of this Interpretation.

#### **Reasoning**

[1] Article 7 of the Constitution provides, "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." Article 9, Paragraph 5 of the Additional Articles of the Constitution provides, "The State shall protect the dignity of women, safeguard their personal safety, eliminate gender discrimination, and further substantive gender equality." The matrimonial union between a man and a woman as well as the family composed of a married couple and their children living together are both subject

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\* Translation and Note by Hsiao-Wei KUAN

to the above constitutional provisions. Different treatment in law based on sex is only allowed by the Constitution in exceptional situations where it is grounded on biological differences between sexes or differences in the social function of gender roles resulting therefrom.

[2] Article 1089 of the Civil Code stipulates:

Parental rights and duties in respect of the child, unless otherwise specified by statutes, shall be exercised and performed jointly by parents. Should there be any disagreement in the exercise of parental rights, the right to exercise shall be accorded to the father. In cases where one of the parents becomes incapable of exercising these rights, it shall be accorded to the other parent. Should it be the case that both parents are incapable of performing duties jointly, the capable one shall assume those duties.

This Article, which was enacted in 1928, before the Constitution was promulgated, was a product of the cultural traditions and social structure at that time. However, with widespread education and more equal access to education between men and women as well as more equal opportunities for women in employment, such provision granting final decision-making authority to fathers would render different results today. In cases where parents are able to compromise and settle their disagreements, the said provision may not impede equality of parental rights between fathers and mothers. In cases of unsettled disagreements, the said provision nevertheless grants the final decision-making authority to fathers, without taking into account the positions of mothers. Such result will violate the principle of equal protection between men and women and be incompatible with the actual status of women in current family life.

[3] To sum up, Article 1089 of the Civil Code grants fathers the right of final

decision in situations of parental disagreement over the exercise of parental rights toward their child. Such part of this Article is inconsistent with both Article 7 of the Constitution, which guarantees equality between men and women, and Article 9, Paragraph 5 of the Additional Articles of the Constitution, which purports to eliminate gender discrimination. The said provision shall be revised. Otherwise, it shall become null and void no later than two years from the date of announcement of this Interpretation. The solutions to this problem shall be provided for based on the principle of gender equality and the best interests of the child. For instance, if an agreement cannot be reached between parents, the law may grant the final decision-making authority to the nearest elder lineal relatives or a family council, or to the family court for decision. In the event of emergency, the law should consider arrangements different from those under ordinary circumstances. As to the Legislative Yuan's submission of the petition by its Letter Tai-Yuan-Yi-2162 of July 26, 1994, which sought to consult this Court, in advance, on whether its members should introduce bills to revise the disputed Article 1089 of the Civil Code, such petition is incompatible with Article 5, Paragraph 1, Subparagraph 1 of the Constitutional Court Procedure Act. Considering that the provision petitioned by the Legislative Yuan is the same as the disputed provision in this Interpretation, it is unnecessary for this Court to proceed further or otherwise. It is noted here as well.

### **Background Note** by the Translator

The petitioners, Ms. LIANG and Ms. CHANG, filed petitions with the Constitutional Court in July and August 1994, respectively, after exhausting ordinary judicial remedies of their cases regarding the enforcement of child custody. They alleged that Article 1089 of the Civil Code violated Article 7 of the Constitution. The Constitutional Court decided to consolidate both petitions for review.