

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

ISSUE: Article 1089 of the Civil Code provides that in case of inter-parental disagreement in exercising parental rights over a minor, the father shall have the right of final decision. Is the provision of said Article contrary to the Constitution?

RELEVANT LAWS:

Article 7 of the Constitution (憲法第七條); Article 9, Paragraph 5, to the Amendment (憲法增修條文第九條第五項); Article 1089 of the Civil Code (民法第一千零八十九條).

KEYWORDS:

family law (親屬法), parental rights (親權), gender equality (男女平等), gender discrimination (性別歧視).

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HOLDING: Article 1089 of the Civil Code, which stipulates that in situations of parental disagreement in exercising parental rights over that of a minor the father shall have the right of final decision, is incompatible with Article 7 of the Constitution, which proclaims that both sexes are equal under the law, as does Ar-

解釋文：民法第一千零八十九條，關於父母對於未成年子女權利之行使意思不一致時，由父行使之規定部分，與憲法第七條人民無分男女在法律上一律平等，及憲法增修條文第九條第五項消除性別歧視之意旨不符，應予檢討修正，並應自本解釋公布之日起，至遲於屆滿二年時，失其效力。

* Translated by Mr. Cing-Kae Chiao.

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ticle 9, Paragraph 5, to the Amendment ineliminating sexual discrimination. This Article should be examined and amended. This Article shall be void within two years from the day of this Interpretation.

REASONING: Article 7 of the Constitution states: “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, to the Amendment provides: “The State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality.” The union of man and woman through marriage, and the children created from that union are subject to the above constitutional obligations. In an exceptional situation, where discrimination based on sex is to be allowed by the Constitution, the exceptional situations must be grounded on biological differences or the differences in societal functions as the consequence of the biological differences in order for the exception to be held valid. Article 1089 of the Civil Code stipulates that “parental

解釋理由書：「中華民國人民，無分男女、宗教、種族、階級、黨派，在法律上一律平等」「國家應維護婦女之人格尊嚴，保障婦女之人身安全，消除性別歧視，促進兩性地位之實質平等」，憲法第七條及憲法增修條文第九條第五項，分別定有明文。由一男一女成立之婚姻關係，以及因婚姻而產生父母子女共同生活之家庭，亦有上述憲法規定之適用。因性別而為之差別規定僅於特殊例外之情形，方為憲法之所許，而此種特殊例外之情形，必須基於男女生理上之差異或因此差異所生之社會生活功能角色上之不同，始足相當。民法第一千零八十九條：「對於未成年子女之權利義務，除法律另有規定外，由父母共同行使或負擔之。父母對於權利之行使意思不一致時，由父行使之。父母之一方不能行使權利時，由他方行使之。父母不能共同負擔義務時，由有能力者負擔之」之規定，制定於憲法頒行前中華民國十九年，有其傳統文化習

rights and duties concerning minors, unless specified by other statutes, shall be borne by both parents. Should there be disagreement in the exercise of parental rights and duties, the father shall be accorded the right of final decision. In cases where one of the parents becomes incapable of exercising these rights, the spouse shall assume the duties. Should it be the case that both parents are incapable of exercising parental rights, the next capable person shall assume those duties.”

This particular Article was enacted during the nineteenth year of the Republic, the product of cultural traditions and social mores of a bygone era. With widespread education, and equal access to education granted to both sexes, favorable changes in employment conditions, and women having greater career opportunities, conditions are virtually indistinguishable for both men and women; this Article stipulates that in the event of disagreement, the father shall have the final say; the recommended action should be a compromise between the two parents in the interest of preserving gender equality in exercising parental rights, or else, in the event of

俗及當時社會環境之原因。惟因教育普及，男女接受教育之機會已趨均等，就業情況改變，婦女從事各種行業之機會，與男性幾無軒輊，前述民法關於父母意思不一致時，由父行使之規定，其適用之結果，若父母雙方能互相忍讓，固無礙於父母之平等行使親權，否則，形成爭執時，未能兼顧母之立場，而授予父最後決定權，自與男女平等原則相違，亦與當前婦女於家庭生活中實際享有之地位並不相稱。

such a disagreement, the position of the mother will be subordinated to that of the father, which constitutes a gross violation of gender equality, and creates a glaring discrepancy with the actual status of women in today's family.

Based on the above, Article 1089 of the Civil Code, which stipulates that in situations with regard to parental disagreement in exercising parental rights over that of a minor, the father shall have the right of final decision, is therefore incompatible with Article 7 of the Constitution, which states that both sexes are equal under the law, and also with Article 9, Paragraph 5, to the Amendment which prohibits sexual discrimination. This Article should be amended and shall be void within two years from the day of this Interpretation. This problem should be resolved based on the premises of the principle of gender equality and the best interest of minors; in the event that such a disagreement arises, the nearest relative or a conference of relatives, or the family court decision shall have the right of final decision, unless there are extraordinary

綜上所述，民法第一千零八十九條關於父母對於未成年子女權利之行使意思不一致時，由父行使之規定部分，與憲法第七條人民無分男女在法律上一律平等及憲法增修條文第九條第五項消除性別歧視之意旨不符，應予檢討修正，並應自本解釋公布之日起，至遲於屆滿二年時，失其效力。就此問題，應基於兩性平等原則及兼顧未成年子女之最佳利益，規定其解決途徑，諸如父母協調不成時，將最後決定權委諸最近尊親屬或親屬會議或由家事法庭裁判，而遇有急迫情況時，亦宜考慮與正常情形不同之安排。又立法院於本年七月二十六日致本院（八三）臺院議字第二一六二號函係對立法委員未來是否提案修改有違憲疑義之民法第一千零八十九條，預先徵詢本院意見，核與司法院大法官審理案件法第五條第一項第一款所定要件，未盡相符，惟其聲請解釋之法律條文與本件相同，不須另為處理，均併此

circumstances in which steps other than the normal course of action should be considered. Finally, as for the Legislative Yuan's submission of an official letter titled Tai-Yuan-Yi No. 2162 to this Yuan on July 26th of this year (1994), in which the former Yuan sought to obtain this Yuan's opinion on whether Members of that Yuan are qualified to propose future amendments to the unconstitutional Article 1089 of the Civil Code, the request made is not in conformation with Article 4, Paragraph 1, Subparagraph 1, of the Constitutional Interpretation Procedure Act. However, since the Article that the former Yuan is seeking to have interpreted is the same one that this Yuan has just rendered an opinion on in the foregoing Interpretation, it is therefore unnecessary to make a further interpretation. This situation is herein stated concurrently.

說明。