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Governing law regarding the custody of a minor child

With more than one nationality

Upon the divorce or separation of Foreign Parents

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I. Introduction

A minor child between foreign parents with different nationality is most likely to have a dual nationality (nationality of mother and father). The governing of the law of the custody upon the divorce or separation is a critical issue if the governing law of the father and mother is different. For example, the parental authority of the minor child shall be given either mother or father under Article 819(1) and (2) although many states of the United States admit the joint parental authority.

Suppose an American woman who was born and grew up in the state of California and came to Japan 10 years ago and get married 3 year ago and have a minder child of two years with a Canadian man who was born and grew up in Toronto, capital city of the province of Ontario and lives in for 7 year. The minor child has American and Canadian nationality. The issue here is which laws of the country (or state or province) shall govern the custody of the minor child upon the divorce or separation of the child.

II. Summary of Conclusion

The laws of Japan shall govern the custody of the minor child.

III. Discussion

1. Jurisdiction

As long as both the parents and the child live in Japan, the court of Japan has the jurisdiction over the divorce or separation of the husband and wife, and the parental authority/custody right of the minor child.

2. Governing Law of the Parental Authority/Custody of the Minor Child

(1) Governing law of the Parental Authority

The court of Japan shall apply the Act on General Rules for Application of Laws (“GRAL”) to determine the Parental Authority/Custody of the Minor Child.

Under Article 32 of GRAL, the governing law of the nationality of the minor child shall be the governing law of the parental authority and custody of the minor upon the divorce or separation of the mother and the father if the nationality of the minor child is the same as either the mother or the father.

In other cases, the law of the habitual residence of the child shall be the governing law of the parental authority and custody of the minor upon the divorce or separation of the mother and father.

The issue here is what the nationality of the minor child is in application of the Article 32 of GAAL.

(2) Determination of the Nationality Law of the Minor Child

Under Article 38 of GRAL, in case the minor child has more than one nationality, the governing law is the law of the nationality of the country (state or province) where the minor child has the habitual residence. In other cases, the governing law is the law of the country where the minor child has the most closely connected.

In the above rules, the minor child with American and Canadian nationality was born and grew up in Japan and has the habitual residence in the country other than neither the United States nor Canada.

The minor child was born and grew up in Japan, the law of the United States (or the state of California) nor Canada (or the province of Ontario) would be closely connected (although either is equally connected).

In this case, Japan would be the most closely connected country because the minor child was born and grew up in Japan. In practice, and therefore, the law of Japan is the law of nationality of the minor child in the application of Article 38 of GRAL.

(3) Governing law of the Parental Authority/Custody Right

Based on the above discussion (1) and (2), the governing law of the parental authority and custody of the minor child shall be the law of Japan in application of Articles 38 and 32 of GRAL.

Under the laws of Japan, the sole parental authority of the minor shall be determined by the mutual consent of the father and mother or by the court order upon their divorce under Article 819(1) and (2) of the Civil Code of Japan and the sole custody of the minor child is (in general) determined by the mutual consent of the child or by the court order upon their divorce or separation in accordance with Article 766(1) and (2) of the Civil Code of Japan.

IV. Conclusion

As the minor child with American and Canadian nationality was born and grew up in Japan between American mother and Canadian father, his nationality law would be the law of Japan. Accordingly the governing law of the parental authority and custody upon the divorce or separation of the mother and the father shall be the laws of Japan where he has the habitual residence.

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