

Heisei 27nen (ie) 7960 Petition for Visitation Case

Judgment

Nationality ●●

Address ●●

Petitioner ●●

Attorney-at-law on behalf of the petitioner in the judgment procedure

Kaoru Haraguchi

Attorney appointed by the attorney of the petitioner in the judgment procedure

Yoshifumi Shimada

Attorney appointed by the attorney of the petitioner in the judgment procedure

Takafumi Ishikawa

Domicile ●●

Address ●●

Respondent ●●

Attorney-at-law on behalf of the respondent in the judgment procedure

Kensuke Onuki

Attorney-at-law on behalf of the respondent in the judgment procedure

Nao Yamamoto

Domicile and address same as the above respondent

Minor child ●●

The Date of Birth:

Judgment

1. The Respondent shall admit the Petitioner to make a day visitation to the minor child, accompanied by a staff of the third party organization or the person designated by the third party organization, once in two months from the next month of the date of this judgement is fixed. The third party organization shall be selected by mutual consent of the parties to this judgment or by the Respondent if the parties fail to reach the mutual consent.
2. The Petitioner and the Respondent shall follow the instruction of a staff of the third party organization with respect to the time and date, place, method, precaution and prohibition matters of the visitation referred to in the preceding article.

3. The Petitioner and Respondent shall each pay fifty percent of the fees to be payable to the third party organization in relation to the visitation referred to in the first article of this judgment.
4. The Petitioner and the Respondent shall each pay fifty percent of the fees of this judgment procedure.

Reasons for Judgment

I. Summary of Case

1. In this case, the Petitioner, the father of the eldest son between the parties in this case (the “minor child”), filed a petition for visitation to the minor child against the Respondent, the mother of the minor child and the wife of the Petitioner currently separated.

2. The Petitioner is requesting a visitation to the minor child at least once every week (more than 2 hours per one visitation) and the visitation with staying overnight every other week. The Respondent is responding to the request of the Petitioner that the direct visitation shall not be admitted because of the current situation of the minor child refusing the visitation with the Petitioner, and only indirect visitation, such as sending the grade reports of the school and photos of the minor child, etc. shall be admitted.

II. Judgement by the court

1. The court found the following facts based on the records of this case.

(1)The family relationship of the parties and present living condition

a. The Petitioner (citizen of ●●) and the Respondent (citizen of ●●) got married on ●●. The minor child was born on ●● between the Petitioner and the Respondent.

b. The Respondent left home with the minor child and started to live separately from Petitioner on March 24, 2015 (the “Separation”). The Respondent has taken care of the minor child after the Separation. The minor child entered into the elementary school on April, 2015.

c. The Petitioner filed a petition for mediation to commence visitation to the minor child on July 13, 2015 (Heisei 27”ie i”5276), however the mediation failed and moved to the judgment proceeding on November 25, 2015.

d. The Respondent has refused to commence the visitation between the Petitioner and the minor child and no direct visitation between the Petitioner and the minor child, including the court supported visitation, has been made since the Separation (the trial visitation in the family court was scheduled in March 2016 but cancelled because of the refusal of the minor child).

e. The Respondent has not let the Petitioner know the address of the Respondent after the Separation.

(2) The relationship between the parties before the Separation

a. The parties previously lived in Ibaragi prefecture and the U.S. after their marriage, and came back to Japan on February, 2000 and lived in the Petitioner's house (current address of the Petitioner, "the Petitioner's house"). They all lived together in the Petitioner's house since then, even after the minor child was born.

b. Before the Separation, the Respondent temporarily left the Petitioner's house with the minor child, leaving the Petitioner during the following terms: (1) from February 25 to 28 in 2011, (2) from October 28 to November 6 in 2011, and (3) in or around September 2013 (the "Separation (1), (2) and (3)")

c. The Respondent went to the advisory organization in ●●● ward for the counseling of DV by the Petitioner and divorce with the Petitioner since April 2011. In the counseling on April 7, 2011, the Respondent stated that the Petitioner committed DV from the beginning of their marriage and verbal violence continued although physical DV temporarily stopped. In addition, the Respondent visited the same organization during the Separation (2) and stated that the Petitioner committed DV again on the day of the commencement of the Separation (2), the purpose of the Separation (2) was to make the Petitioner to reflect himself and that the Respondent, and the minor child could live with safety by Separation.

d. During the Separation, the parties contacted each other by e-mails. During the Separation (1), the parties sent e-mails accusing each other. During above Separation (2), the Respondent sent the e-mail stating that the Respondent has been suffering stress from life with Petitioner after their marriage. The Petitioner sent e-mails stating that the Petitioner has been establishing a good relationship with the minor child, contributing to establish the relationship between the Respondent and the minor child, the behavior of the minor child is partly because the anger of the Petitioner against the Respondent and partly because of the behavior of the Respondent against the Petitioner.

e. There is no offensive word, such as committing DV against the Respondent or the minor child in the e-mails sent by the Petitioner to the Respondent, including but not limited to during the Separation.

f. The Petitioner and the Respondent often fight each other in front of the minor child and the Respondent sometimes told that she wanted to commit suicide in front of the minor child.

(3)The relationship between the Petitioner and the minor child

a. The Petitioner took part in the family events of the kindergarten during the period of which the minor child went there. The minor child looked happy with the Petitioner participated in the family events of the kindergarten.

b. On the other hand, the Petitioner forced him to practice to climb the overhead ladder in the kindergarten even on the recital days and the graduation day even though the minor child started crying for not climbing the ladder well. The Petitioner tried to get the minor child deject before the going to the kindergarten in the morning which caused the minder child delayed the kindergarten.

c. On March 21, 2015, the minor child explained about the events of the kindergarten to the Petitioner by picture-card show. At that time, the minor child seemed to be able to have conversation with the Petitioner without any problem and there was no sign showing the minor child tried to avoid the Petitioner even though the Respondent seemed not to be there (According to the video (Kou 3), only the minor child can be seen in the video and the Petitioner talked to the minor child behind the video.)

d. The minor child stated that the minor child was unhappy when the Petitioner mounted the back of the minor child and kicked by the Petitioner in the questionnaire at elementary school in June 2015 (The questionnaire is for research of bullying). The minor child also stated to the teachers at the elementary school together with the Respondent on September 3, 2015, that the Petitioner stepped the back of the minor child demanding the minor child to play games with the Petitioner, made the minor child to feel that the minder child would be treated badly by the Petitioner if he refused to play game with the Petitioner, demanded the minor child to go to football club alone, the minor child asked the father of his friend to take him to the football club as he could not go there alone.

(4) The attitude of the minor child toward the Petitioner

The family Court Investigator (the “Investigator”) investigated the situation of the minor child. The investigator interviewed the minor child in the child room in the Tokyo Family Court on September

30, 2015 (There was not the Respondent). Summary of statements by the minor child in the interview on the day are as follows:

a. The relationship between the Petitioner and the minor child before the Separation

The minor child stated that the Petitioner bought the sports goods for the minor child in response to the Investigator's question about the sports goods in the Respondent's house (The Investigator had the visitation to the Respondent's house on September 29, 2015). The minor child also stated that he wanted to go to the museum again in response to the Investigator's question about where he wants to go within the place he went with the Petitioner. The minor child, however, stated that he did not want to go with the Petitioner and even did not want to see the face of the Petitioner. He stated that the reasons why he did not want to go with the Petitioner in response to the question raised by the Investigator are that the Petitioner committed the DV. As for the details of DV, the minor stated that the Petitioner stepped the back of the minor child and demanded him to play game around his ears when he was the second year of kindergarten.

b. Visitation with the Petitioner

In response to the Investigator telling that the Petitioner wanted to see the minor child very much, the minor child told that he never wanted to see the Petitioner as he hated the Petitioner. The minor child, however, told the Investigator that he was willing to see the Petitioner after confirming the position of the Respondent when the Investigator told the minor that the Respondent did not mind the minor child going together with the Petitioner. In response to the Investigator, the minor child confirmed that he wanted to go to Mirai Museum together with the Petitioner. He, however, told the Investigator that the Petitioner always told lies. For example, the minor stated to the investigator, that the Petitioner told in the documents showed by the Respondent to the minder child that the Petitioner never committed DV.

In the last stage of the Investigation, the miner child stated that he would to go to Mirai Museum with the Petitioner if the minor child was not scared of the Petitioner in the trial visitation to be held in the child room of the Tokyo Family Court.

(5) Opinions of doctors regarding visitation between the Petitioner and the minor child

After the Separation, the doctors examined the miner child regarding his mental conditions.

a. Dr.●● ("Doctor M") examined the minor child on November 30 and December 7, 2015. The Doctor M stated in the written opinion dated December 14, 2016 (Otsu 6), that (1) as for the mental conditions, the Doctor M found that there was strong emotional denial of the matters regarding the Petitioner and serious rejection of imagination of the Petitioner, which is so eminent to lead to commit suicide of the minor child, and (2) it is impossible for the minor child to commence the visitation with the Petitioner because the visitation with the Petitioner, the object of Trauma of the

minor child, not only prevents the cure of trauma of the minor against the Petitioner but also deepens the trauma.

b. Based on the opinion of Dr. M, the second investigation of the Investigator as to the mental conditions of the minor child was conducted. In response to the Investigator, the current doctor (the “Primary Doctor”) stated that he examines the minor child once in two weeks since December 24, 2015 and the minor child admitted DV of the Petitioner, such as hitting by the Petitioner and damping him in the bath with clothes on. He diagnoses the mental conditions of the minor child as PTSD and Reacting Attachment Disorder. In conclusion, the visitation of the minor child with the Petitioner is not recommendable due to the minor child’s fear even with the word of father.

(6) The Claims of the Parties in the Judgment Proceeding

a. The Respondent claimed that there has been DV committed by the Petitioner against the Respondent even before the delivery of the minor child. This DV is evidenced by the rejection of the Petitioner by the minor due to the DV committed by the Petitioner against the Respondent and the minor child before the Separation.

In response to the claims of the Respondent, the Petitioner denied all the DV claims of the Respondent although the Petitioner admitted occasional quarrels with the Respondent.

b. The Petitioner requested the second opinion by another doctor in response to the written opinion submitted by the doctor. The Respondent refused the request of the Petitioner because the second opinion of the doctor appointed by the Petitioner is not to be accurate and fair.

2. In this case, the court of Japan has the jurisdiction over this case because the minor child lives in Japan in accordance with the international jurisdiction rules. The governing law of this case is the laws of Japan in accordance with article 32 of Act on General Rules for Application of Laws. This is because this case is regarding the visitation, the relationship between parents and child, and the national law of the minor child and one of the parents are the same (the Japanese law).

3. Admissibility of visitation between the Petitioner and the minor child

(1) The Family Court could decide the appropriate method of the visitation by analogously applying Article 766 of the Civil Code where the mutual consent of the visitation between the father and mother during the Separation ends up in failure or the consultation between the father and mother is impossible. The visitation of the non-custody parent shall be admitted in principal because of its usefulness for the sound growth of the child/children in basic unless there is special circumstance, such as the danger of the welfare of the child/children by the visitation of the non-custody parent.

(2) In this case, the Respondent claims that there are the above special circumstances. Because of the serious rejection of the Petitioner by the minor child, the immediate visitation shall not be implemented. The court already found that the minor child showed his rejection to the Petitioner toward the Primary Doctor.

It is true that the relationship with the Petitioner seems to be burden to the minor child as the Petitioner's education and instruction method has been occasionally excessive evidenced by the events where the Petitioner forced the minor child to practice to climb the overhead ladder after the events of kindergarten and demanded to continue to climb even after the minor child burst out crying.

The Court, however, could not find any behavior of the minor child fearing the Petitioner. Instead, the minor child tried to communicate the event and memory of the kindergarten with the Petitioner even in the circumstances only between the Petitioner and the minor child shown in the video taken on March 21, 2015, immediately before the Separation. Reviewing the behaviors of the minor child toward the Investigator, the court found that behavior of the minor child toward the Investigator is based on his concern of the Respondent, then sole custody of the minor child. This is because the minor child stated that he was willing to go to the museum with the Petitioner by confirming by the Investigator that the Respondent was happy with the minor child to go with the Petition even if he once refused the visitation with the Petitioner. Considering the minor child never avoid talking about the Petitioner during the investigation, it is difficult for the court to conclude that the minor child clearly refuses the Petitioner.

In this regards, Doctor M and the Primary Doctor stated that they found in the mental conditions of the minor child there was strong emotional denial of the Petitioner and serious rejection of imagination of the Petitioner, which was so eminent to lead to commit suicide of the minor child, showing violence by the Petitioner against the minder child. The Court, however, could not find the existence of the violence by the Petitioner against the minder child because the relevant evidence does not show the violence by the Petitioner against the Respondent nor does objectively show the violence by the Petitioner against the minder child. Even assuming the minor child told the truth to the Investigator, the Court could not find the opinions of the doctors are accurate because the facts stated by the minor child would not lead the strong rejection of the minder child against the Petitioner. The court could not consider the admissibility of the visitation of the Petitioner to the minor child based on the diagnosis of Dr. M and the Primary Doctor, which is not persuasive due to the following reasons: the diagnosis were made after the substantial time has elapsed after the Separation during which only the Respondent kept the minor child custody and the minor child behaved based on the concern of the Respondent, and, the diagnosis were primarily based on the statements of the Respondents and the minor child and excluding the materials submitted by the

Petitioner in the judgment proceedings.

(The minor child is under the serious conflict between the parents, considering the facts that the Respondent left home with the minor child several times before the Separation, the assertions of the Respondent are completely opposed to those of the Petitioner regarding the existence of DV by the Petitioner before the Separation or the second opinion of the minor child and communication between parties in regard to this adjudication procedure. It should be regarded that the minor child suffers from the conflict between the parents after the Separation. Therefore, the behavior of the minor child after their Separation is affected by the both parties).

In addition, considering the age of the child, the court cannot put importance on the statement of the child in making decision regarding visitation.

According to the above, there should be no special condition that the visitation is harmful to the welfare of the minor child and it is reasonable to decide that the visitation should be done.

4(1) With respect to the way of the visitation between the Petitioner and the minor child, considering the facts that the Respondent has not allowed the Petitioner to visit the minor child by insisting the minor child's rejection, the parties are in serious conflict and they don't trust each other, it is not reasonable and down-to-earth that the way of visitation should not be left on the parties' discussion. Therefore, the third party should be involved in the process when the parties contact with each other about the visitation and the visitation should be done between the Petitioner and the minor child.

(2) With respect to the frequency of the visitation, considering the facts that there is no critical problem in the relationship between the minor child and the Petitioner before the Separation, that there is no visitation between the Petitioner and the minor child for a long time in this case, that the minor child seems to reject the Petitioner although the behaviors should not be regarded as the reason to limit or prohibit the visitation, the present situation in daily life of the parties, and all facts in this case, the visitation should be made once in two months (The court thinks it is desirable that the frequency of the visitation should be increased in the future if smooth visitation can be taken into consideration by doing visitation according to the status of the child).

When they use the third-party institution for the visitation, both parties should follow the instruction by the third-party institution and the fee for the third-party institution should be borne by both parties, considering the family relationship before the Separation, the history to the adjudication procedure and all circumstance seen in the records of this case.

(The date of closing this case: July 14, 2016)

September 14, 2016

Tokyo Family Court Department 3

Judge Kenichi Watanabe