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San Francisco Chronicle

Child custody in Japan isn't based on rules

Colin P.A. Jones
 Sunday, August 27, 2006

Imagine discovering you have been living in an artificial world with rules designed to mask a terrible reality. This is, of course, the premise of "The Matrix," but it is also an analogy I use to explain child custody and visitation in Japan, a subject in which I do research (and have had personal experience). Japan's family courts have rules and procedures that hide a sad truth: They are powerless to protect the parent-child relationship when a divorce turns hostile.

Take the case of Samuel Lui, whose Japanese wife took their 2-year-old son from California to Japan in violation of a California court order that gave him custody. The validity of his U.S. custody order was confirmed by Japan's Supreme Court, yet his wife remained in control of the child. In the meantime, he had to file proceedings in the Osaka Family Court just to seek visitation with the child who was supposed to be living with him in California.

By this time, his wife had thoroughly poisoned the child against him, and he ultimately had to agree to a mediated settlement whereby he gave up custody in exchange for limited (and unenforceable) visitation.

Child custody litigation is always sad, but particularly so in Japan. For starters, there is, quite literally, no law. A couple of

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articles in the Japanese Civil Code give Japan's judges the authority to decide custody in divorce cases based on the best interests of the child. But there are virtually no provisions expressing what those interests are (California's Family Code, by comparison, states clearly that best interests of a child involve frequent and continuous contact with both parents regardless of their marital situation).

Visitation, a matter of course in most U.S. divorces, is in Japan a vaguely defined notion created by judicial precedent and only sometimes described as a right. In reality, both custody and visitation are effectively administrative decisions made at the discretion of judges and untrained mediators, some of whom may even regard visitation as harmful to children.

The judges are part of an elite bureaucracy. Chosen from a small minority of those who have passed one of the most difficult exams in the world, the Japanese bar (which until recently had a pass rate of 3 percent), judges usually enter the judiciary in their 20s and spend their careers in a variety of postings around the country, often living in government housing, isolated from the rest of society.

A judge's postings reflect the progress of his or her career, which depends on annual reviews. Well-rated judges will end up in higher courts or become part of the judicial administrative apparatus.

While the criteria used by the judiciary in evaluating its members are not public, efficient docket-clearing is an important factor. So, it seems, is not embarrassing the judiciary as an institution.

In one recent case, a judge who wrote a popular book criticizing the excessive length of some judicial opinions was denied reappointment. The reason? His opinions were too short.

Disfavored judges may end up spending most of their time in lower courts outside of Tokyo or other major cities, or in family court, where excessive tenure may be a sign of a stalled career.

While some judges may seek out such postings, others may have joined the judiciary expecting to preside over cases of national importance rather than resolving marital bickering. Thus, other factors may be at work when the best interests of a child are adjudicated.

Because docket clearing is one of these factors, a judge may be too busy to participate in the mediation proceedings that by law must precede divorce and custody litigation in Japan.

If the mediation is deemed unsuccessful, however, the judge may issue a judgment based primarily on the recommendation of the mediators and a family court investigator (another employee of the judicial bureaucracy). A parent may thus lose custody and be denied virtually all meaningful parental rights in proceedings where the judge has barely heard the parties speak and has never seen the child in question.

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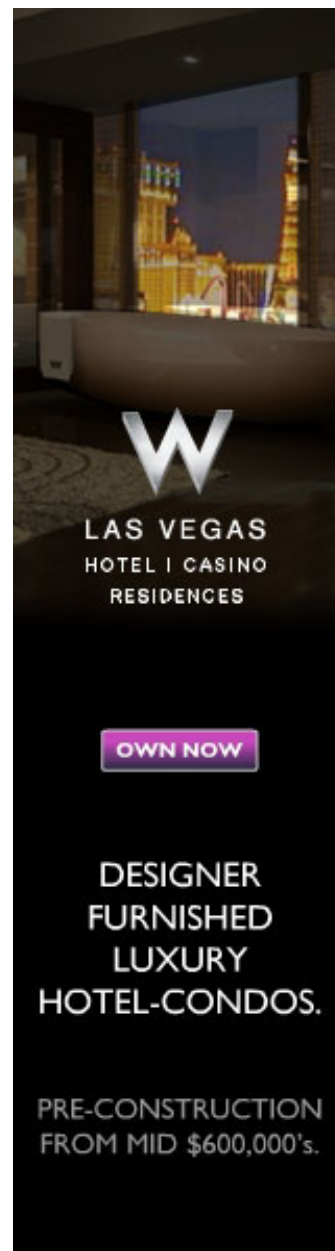
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Custody and visitation decisions also present the judiciary with a problem from the standpoint of preserving its status because they are generally unenforceable.

The Web site of the U.S. State Department Office of Children's Issues warns that compliance with Japanese family court orders is essentially voluntary. Police rarely get involved in family disputes and courts do not have marshals who can enforce compliance.

The penalty for violating a family court order is at most a fine of less than \$1,000. There are other remedies, but they also have limited efficacy, particularly against a party with limited financial resources or who cannot be located.

I interviewed one mother whose attempts to enforce visitation were thwarted when her ex-husband simply hung up the phone on the court officer who had been trying to persuade him to comply. "There is nothing more we can do," the bureaucrat explained, apologetically.

From the standpoint of resolving cases without exposing the judiciary's weakness, it is small wonder that family courts so often seem to find the status quo to be in the best interests of the child, particularly when it comes to visitation.

If this means no visitation when one parent refuses to cooperate, then it is often denied or terminated. If the child is too young, visitation may be detrimental. If the child is going through puberty, visitation might be upsetting. If the parents cannot get along, then it would be bad for the child to be exposed to their fighting (though courts do not seem to care about such exposure within a marriage).

If Dad buys too many expensive presents for the children, then that, too, is potential grounds for termination of visitation.

It doesn't seem to take much for Dad to become optional: One man (who has become a fathers' rights activist) saw his visitation terminated by the court because his ex-wife said thinking about the visits made her physically ill.

Fathers who insist on their rights may be told by family court mediators, "Children don't need a father all the way to age 18."

Those who seek cultural (as opposed to institutional) explanations for this state of affairs should be wary. In a recent book in Japanese on visitation, a widely published expert on family problems explained why visitation was different in Japan than in the United States or Europe.

The book said Japan is a Confucian society where children are important for continuing the bloodline (but only within marriage), while Western countries had gun cultures, long histories of incest, and frequent cases of parents abducting, raping and even killing their children.

Whatever the explanation, the sad dynamics of custody

litigation can lead to a vicious downward spiral. If a wife moves out of the home with the children and files for divorce (most divorces in Japan are initiated by women), she might be inclined to allow visitation.

However, her lawyer is likely to recommend against it, seeing it as a potential opportunity for the father (or hostile ex-in-laws) to take possession of the children. The courts may be unable to intervene and the woman could lose custody.

Some lawyers actually recommend against visitation until the divorce is final -- which may take months or years because of the mandatory mediation.

Nor will a family court want to order visitation if it might result in a new status quo it cannot remedy but will surely be blamed for. After months of not seeing his children, the father may come to view abduction as the only way of preserving their relationship. In a recent case, a former judge was arrested for abducting his own daughter.

One Japanese mother I interviewed had a custody order affirmed all the way up to Japan's Supreme Court. Her ex-husband still has their son despite years of litigation. Since she lost almost all contact with the child when he was 1 year old, she hopes to have at least enough contact that he will remember his mother's face.

Sadly, Japan's courts cannot seem to help realize even this meager hope.

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