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# KOREAN DIVORCE LAW ON CLAIMS FOR PROPERTY DIVISION: DIVIDING RETIREMENT ALLOWANCE IN DIVORCE

Faye Y. Park<sup>†</sup>

*Abstract:* As South Koreans divorce closer to the retirement age, the issue of whether retirement allowance should be divided upon divorce has become more prevalent. The applicable law in the division of the retirement allowance in a divorce is Article 839-2 of the Civil Code. This article provides that property realized through the cooperation of both spouses shall be divided in divorce by agreement. The Korean courts have historically undervalued the contribution of spouses who provide housework by giving them less property in the division of acquired marital property. Retirement allowances pose problems because a spouse can contribute in acquiring them solely by providing housework, which is difficult to quantify. Furthermore, retirement allowances do not become realized property until the retired spouse receives the retirement allowance; thus the unemployed spouse may not receive a fair amount of property if they divorce before retirement. The Ministry of Justice proposed an amendment to Article 839-2 to include the language that property realized by cooperation shall be divided equally. Once the amendment comes into effect later this year, courts should divide the received retirement allowance equally, regardless of whether one or both parties were economic contributors. Courts, however, should retain the discretion to determine the amount of property each spouse receives to reflect different circumstances, such as the employed spouse's unreceived retirement allowances. Additional amendments to include property that will be realized in the near future are recommended.

## I. INTRODUCTION

The divorce rate in South Korea<sup>1</sup> for people under forty-five years of age is decreasing,<sup>2</sup> but the divorce rate for those over forty-five is increasing.<sup>3</sup> Furthermore, the average age of divorce is increasing; men divorce at the age of 45, and women at the age of 39.3.<sup>4</sup> Overall, divorce at an older age, which Koreans refer to as *hwang-hon*<sup>5</sup> divorce, is becoming more prevalent.<sup>6</sup> With an increasing number of *hwang-hon* divorces occurring closer to the retirement age, a heated debate is emerging about the

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<sup>1</sup> "Korea" refers to the Republic of Korea, also known as South Korea.

<sup>2</sup> So-Young Choi, 신 이혼 풍속도... '배우자 퇴직금 챙기기' [The New Divorce Customs... 'Collecting the Spouse's Retirement Allowance'], LAW TIMES, <http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?kind=&serial=35181> (last visited Jan. 2, 2008) (title translated by the author).

<sup>3</sup> So-Young Choi, *supra* note 2.

<sup>4</sup> *Id.*

<sup>5</sup> 황혼 [*Hwang-hon*] means twilight or dusk.

<sup>6</sup> So-Young Choi, *supra* note 2.

divisibility of retirement allowances.<sup>7</sup> Disputes over retirement allowances are prevalent. This is because they are lump-sum payments employees receive upon termination of their service with the employer based on the length of their service and rate of pay at the time of termination.<sup>8</sup> Unlike retirement pensions that a retiree receives every month, retirement allowances are one-time payments that make up for a large portion of property of the married couple at the time of divorce.

Article 839-2 of the Korean Civil Code governs the division of all property upon divorce by agreement.<sup>9</sup> The article provides that each spouse has a claim to property acquired during marriage through cooperation.<sup>10</sup> Under this statute, the court has the broad discretion to determine what property is divisible and to determine the method of division, taking into consideration how the property was originally acquired.

Application of Article 839-2 to retirement allowances raises many questions, particularly where only one spouse is employed while the other does mostly housework. The court must identify whether the housework-providing spouse “cooperated” in accumulating the property. Once the court determines that the spouse made a valuable contribution in accumulating the retirement allowance, however, the question still remains on whether unreceived retirement allowances should be part of the divisible property. Furthermore, the court must decide the most equitable division method of the retirement allowances by taking into account how much each spouse contributed to the property.

One of the most illustrative case rulings on the issue of whether yet-to-be received retirement allowances of employed spouses should be subject to division of property is the Korean Supreme Court<sup>11</sup> decision 2002S36.<sup>12</sup>

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<sup>7</sup> *Id.* Under the Labor Standard Act of Korea, Article 34 (Retirement Pay System), all workers with more than one year of service are entitled to receive retirement allowances from their employer. The employer can choose the retirement pension system which came into effect on December 1, 2005, instead of retirement allowance system. Retirement Pay System, <http://www.ckcaccounting.com/employment-retirement.htm> (last visited Feb. 15, 2008).

<sup>8</sup> Retirement Pay System, <http://www.ckcaccounting.com/employment-retirement.htm> (last visited Feb. 15, 2008).

<sup>9</sup> CODE CIVIL [C. CIV.] art. 839-2 (S. Korea).

<sup>10</sup> *Id.*

<sup>11</sup> The Korean Judiciary System, <http://www.korealaw.com/node/17> (last visited Feb. 14, 2008). In Korea, there are three levels of courts: the District Court, High Court and the Supreme Court. The District Court, which includes a specialized Family Court, is the court of original jurisdiction which is similar to a U.S. trial court. The High Court is the intermediate appellate court where an appeal from a District Court case is heard. The Supreme Court is the highest court in Korea.

<sup>12</sup> Korean Supreme Court Decision 2002S36 delivered on Aug. 28, 2002 (Gong2002.10.15.(164), 2337). This Comment will refer to the translation of this Korean Supreme Court Decision provided by the author. The translation follows this Comment.

In that case the Korean Supreme Court held that a spouse's future retirement allowance is not subject to division upon divorce.<sup>13</sup>

In 2007, the Family Court ruled on the issue of retirement allowances that a spouse has already received prior to divorce. The court held that the non-retiring spouse is entitled to the other's retirement allowance.<sup>14</sup> Furthermore, the court held that the entire retirement allowance, and not only the amount that corresponds to the period that the wife and husband were married, is divisible under Article 839-2.<sup>15</sup>

These two cases provide that received retirement allowances are divisible anytime after their receipt.<sup>16</sup> They recognize that retirement allowances are property accumulated through the cooperation of both spouses, despite one spouse providing exclusively housework.<sup>17</sup> On the other hand, the courts disregard the housework-providing spouse's contribution in accumulating the retirement allowance, if the retirement allowance has not been received.<sup>18</sup> The current rule harbors an inequitable division of property where both parties contribute in accumulating retirement allowances—the allowances are not divisible despite such contribution if they are not received before divorce. Furthermore, the cases do not address the different circumstances that would impact the decision of providing the most equitable method in dividing the retirement allowances.

Legislation amending the claim of property, which will come into effect in 2008, may have an impact on future court decisions dealing with retirement allowances. The Ministry of Justice announced that the amendment on claims for property division in divorce by agreement will allow the equal division of property acquired through joint cooperation between wife and husband.<sup>19</sup> The Ministry of Justice suggested that the amended law will limit a party's discretion to dispose of domestic buildings, allow property division even during marriage, and equally divide the property that both wife and husband acquired through cooperation.<sup>20</sup> For the amendment to have any impact on the future decision of the retirement

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<sup>13</sup> *Id.*

<sup>14</sup> Family Court Decision 2006DHap10699 (Divorce and Property Division) delivered on Nov. 21, 2007.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 법무부 민법중 상속편 개정안 [Ministry of Justice Civil Law Inheritance Law Amendment], 법무부공고제, [Ministry of Justice Public Announcement], 2006-79, available at <http://www.ilovetax.net/bbs/bbs2/contenton.php3?no=354&pagenum=7> (title translated by the author) [hereinafter Ministry of Justice Civil Law Inheritance Law Amendment].

<sup>20</sup> *Id.*

allowances, the courts must take action. They need to resolve the inequity of treating retirement allowances as accumulated property during marriage while not permitting their divisibility if the allowances were received after divorce.

This Comment argues that both received and unreceived retirement allowances should be divisible upon divorce. This Comment also discusses the possible impact of the proposed amendment that will require courts to divide acquired property equally on the division of retirement allowances. Part II provides the background of Article 839-2 and discusses the language and the proposed amendment to Article 839-2. Part III analyzes Korean Supreme Court and Family Court decisions in light of how they address the problem of retirement allowances. Part IV provides an analysis on why unreceived retirement allowances should also be included as divisible property upon divorce. Finally, in light of the case analysis, Part V examines the impact of the amendment to Article 839-2 on dividing retirement allowances. Furthermore, this part recommends that courts should divide retirement allowances to achieve equity between the spouses, and suggests additional amendments the government should consider.

## II. KOREAN LAW PROVIDES THAT SPOUSES RECEIVE PROPERTY UPON DIVORCE IN PROPORTION TO THEIR CONTRIBUTION TO ITS ACCUMULATION

Article 839-2 went into effect on January 1991, giving a non-employed spouse the right upon divorce to claim the couple's property in proportion to his or her contribution to the accumulation of this property.<sup>21</sup> The purpose of this law was to provide women, who historically were lower earning spouses, with a fair property division.<sup>22</sup> Since its enactment, however, there have been disputes concerning what should be included as divisible property and how it should be divided.<sup>23</sup> The law provides broad discretion to courts in determining what should be acquired property and how the parties contributed in accumulating such property.<sup>24</sup> Classifying

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<sup>21</sup> See Sam-In Han, 민법 이혼시 재산 분할의 제문제-판례 연구를 중심으로[Civil Law The Recurring Problem of the Division of Property upon Divorce-Case Study], 340 고시연구 [Bar Examination Res.] 136, 136 (2000) (title of the article and journal translated by author).

<sup>22</sup> See Korean Supreme Court Decision 2002S36 delivered on Aug. 28, 2002 (Gong2002.10.15.(164), 2337).

<sup>23</sup> See Hwang Jee Yoon, A Study on the Criteria of the Property Division Claim at the Time of Divorce-With the Cases of England and America, 18 부동산학보 [REAL EST. J.] 153, 153 (2001) (title of the journal translated by author).

<sup>24</sup> Myung-soo Choi, A Study on the Claim for Property Division, 15 경성법학 [KYUNG-SUNG L. REV.] 141, 173 (2006).

retirement allowances as acquired property during marriage, when only one spouse is employed while the other has provided housework, is problematic.

Contribution to accumulating retirement allowance through housework is difficult to quantify. The courts may have discrepancies on what proportion of the retirement allowance each spouse should receive. Notably, this discrepancy may be remedied through the Ministry of Justice's proposal to add language to Article 839-2, which focuses on dividing any property acquired during marriage equally between each spouse.<sup>25</sup>

A. *Article 839-2 Protects Lower-Earning and Unemployed Spouses but Has Not Been Effective*

As a result of three decades of intensive lobbying by women's rights advocates, in January 1991 a significant change to Korean family law went into effect.<sup>26</sup> The law gave women unprecedented rights in the areas of marriage, divorce, child custody, and property inheritance.<sup>27</sup> Article 839-2 was part of this larger overhaul.<sup>28</sup> The main purpose of Article 839-2 is to divide material property acquired during marriage in proportion to the contribution to the accumulation of such property.<sup>29</sup> Previously, women were only entitled to a share of marital assets if they earned money during the marriage; therefore, if they were housewives with no income, they had almost no freedom to seek divorce because divorce was economically devastating for them.<sup>30</sup> Article 839-2 acknowledges the housewife's economic contribution, and therefore provides greater freedom to divorce.<sup>31</sup>

Under Article 839-2, only joint property is divisible upon divorce, whereas the married couple's individual property is not.<sup>32</sup> Individual property belongs to either wife or husband individually; an example of this

<sup>25</sup> See Jinsu Yune, *Review of the Bill for the Reform of the Matrimonial Property System*, 21 가족법연구 [FAMILY L. RES.], 107, 107 (2007).

<sup>26</sup> Rosa Kim, *The Legacy of Institutionalized Gender Inequality in South Korea: The Family Law*, 14 B. C. THIRD WORLD L. J. 145, 152, available at <http://www.law-lib.utoronto.ca/Diana/fulltext/kim.htm>.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> Hyung-Lae Song, *A Study on the Right to Request Property Partition*, 19 한국법학회 법학 연구 [KOREAN L. INST. LEGAL STUD.] 213, 214 (2005) (title of the journal translated by author).

<sup>31</sup> *See id.* (citing 장현정 [Hyun-jung Chang], *재산분할청구제도에 대한 여성학적 연구* [Women's Study on the Claim for Property Division System] (1998) (석사학위논문 [Masters Degree Dissertation], 이화여자대학교 대학원 [Ewha Woman's University Graduate School]), 26-27) (title translated by the author).

<sup>32</sup> Hyunah Yang, *Envisioning Feminist Jurisprudence in Korean Family Law at the Crossroads of Tradition/Modernity* 223 (May 1998) (unpublished Ph.D. dissertation, New School for Social Research) (on file with Marian Gallagher Law Library, University of Washington).

is property owned prior to the marriage.<sup>33</sup> Furthermore, property acquired solely through one's individual effort in a marriage is also recognized as individual property.<sup>34</sup>

Article 839-2 has not fully accomplished its goal of protecting lower-earning and unemployed spouses. Reviewing divorce cases involving a division of assets shows that housewives have generally received a smaller portion of the property compared to women who were employed during marriage.<sup>35</sup> One of the most repeated reasons for this inequitable division of property is that courts undervalue housework.<sup>36</sup> This reflects that only monetary earnings are considered as "contribution" in accumulating property, while the importance of other types of economic contribution, such as efforts in increasing the family capital and housework, are ignored.<sup>37</sup> It is hard to assign value to such activities where no money is paid for such services.<sup>38</sup>

*B. Article 839-2 Does Not Define Acquired Property and the Courts Have Split on the Issue*

The main purpose of Article 839-2 is to divide material property acquired during marriage.<sup>39</sup> The basis of this law is to liquidate the property between the married couple, and is not dependent on whether the spouses caused the dissolution of their marriage.<sup>40</sup> The language of Article 839-2 is as follows:

- (1) One of the parties who has been divorced by agreement, may claim a division of property against the other party.

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<sup>33</sup> Myung-Soo Choi, *supra* note 24, at 153-54. Article 830 defines "particular property" as property that a spouse owned before marriage or property acquired during marriage but is under the name of only one spouse. The meaning of "particular property" in terms of divisible property under Article 839-2 is different from the meaning under Article 830, because property accumulated during marriage that is under only one spouse's name is still divisible if it is a result of cooperation of the married couple. The "particular property" is also translated as "peculiar property." The applicable law on a married couple's particular property is the legal property system under the Civil Code Article 830. CODE CIVIL [C. CIV.] art. 830 (Source of Law) (S. Korea).

<sup>34</sup> See Hyunah Yang, *supra* note 32, at 223.

<sup>35</sup> Jinsu Yune, *supra* note 25, at 123.

<sup>36</sup> *Id.*

<sup>37</sup> See Hyunah Yang, *supra* note 32 at 229.

<sup>38</sup> See Kristen Gerencher, *The Economic Value of Housework: New Survey to Track Women-Dominated Labor*, Jan 17, 2001, <http://www.partnershipway.org/html/subpages/articles/valueofhouseword.htm> (last visited Feb. 14, 2008).

<sup>39</sup> See Korean Supreme Court Decision 2002S36 delivered on Aug. 28, 2002 (Gong2002.10.15.(164), 2337).

<sup>40</sup> Hwang Jee Yoon, *supra* note 23, at 154.

(2) If no agreement is made for a division of property as referred to in Paragraph (1), or if it is impossible to reach an agreement, the Family Court shall, upon request of the parties, determine the amount and method of division considering the amount of property acquired by cooperation of both parties and other circumstances.

(3) The claim for division of property as referred to paragraph (1) shall be extinguished at the expiration of two years from the day of divorce.<sup>41</sup>

This means that the legal ownership of the property is no longer the absolute standard, and the property, regardless of its ownership, should be divided according to the contribution in acquiring the property and other circumstances.<sup>42</sup> The provision, however, does not guarantee that the courts will divide the acquired property equitably according to the circumstances. This is because the provision does not specify what types of property fall under divisible property and does not suggest a specific proportion each spouse should receive. Thus courts have split on the issue regarding division of property upon divorce.

According to the language of the provision, the type of property divisible upon divorce is property acquired by cooperation of both parties. “To acquire” in Korean is “*ee-rook-hada*,”<sup>43</sup> which also means “to realize.” Currently, courts have interpreted this to include property that the spouses hold at the time of divorce as divisible property upon divorce.<sup>44</sup>

In applying Article 839-2, the court has discretion in deciding what the terms “cooperation” and “other circumstances” mean.<sup>45</sup> If a property is under one spouse’s name, this spouse has the advantage in the division of the property, while the party that does not own the property will have difficulty convincing the court to recognize his or her contribution.<sup>46</sup> For instance, in the case of retirement allowances, if only one spouse receives the allowance, then it is clearly under that spouse’s name. If the other spouse only did

<sup>41</sup> CODE CIVIL [C. CIV.] art. 839-2 (Claim for Division of Property) (S. Korea).

<sup>42</sup> Hyung-Lae Song, *supra* note 30, at 216.

<sup>43</sup> *Ee-rook-hada* [이룩하다] means to accomplish, achieve, or complete. Naver English Dictionary, <http://endic.naver.com> (last visited Feb. 14, 2008).

<sup>44</sup> Hyung-Lae Song, *supra* note 30, at 227.

<sup>45</sup> See Jong-Kwun Park, 이혼에 따른 재산분할의 합리적 산정 [*The Logical Calculation of Property Division Due to Divorce*], 26 외법논집 [FOREIGN L. J.], 한국외국어대학교 법학연구소 [Law Research Institute Center for International Area Studies, Hankuk University of Foreign Studies] 77, 78. (2007) (title and title of journal translated by the author).

<sup>46</sup> See Hyunah Yang, *supra* note 32, at 224.

housework, this spouse has to convince the court to recognize the housework provider's economic contribution in accumulating the retirement allowance.

The provision in itself does not shed light on whether retirement allowance should be included under property acquired through cooperation, which is divisible upon divorce. It does not state how much each spouse should get if only one of the spouses has received the retirement allowance and the other one has provided only housework. First, the court has discretion in determining what properties the couple has acquired during their marriage. Thus, the court has the power to decide whether retirement allowance should be considered as property acquired during marriage. Second, once the court decides that the retirement allowance is divisible property upon divorce, the court has the discretion to decide the portion of the retirement allowance each spouse should get because the provision does not provide a method of division of the property.

C. *The Ministry of Justice Suggested an Amendment Requiring Equal Division of Property Acquired During Marriage*

In 2006, the Ministry of Justice announced the proposal for amending Article 839-2 among other family and inheritance laws.<sup>47</sup> On November 23, 2007 the National Assembly passed the amendment, and on December 11, 2007 the Cabinet Council passed the amendment.<sup>48</sup> After its promulgation, the law must come into effect within six months; thus the amended law will have legal force in the second half of 2008.<sup>49</sup>

One problem the Ministry of Justice sought to address is Article 839-2's adoption of the separate property system. Under this law the party that does not have his or her name on property acquired during marriage tends to be less protected.<sup>50</sup> Additionally, the Ministry wanted to address the problem of undervaluing housework. The valuation of housework has been difficult, and housewives' contributions have not been properly reflected in property division decisions.<sup>51</sup> The Ministry announced that the laws will be

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<sup>47</sup> Ministry of Justice Civil Law Inheritance Law Amendment, *supra* note 19.

<sup>48</sup> 자녀양육 계획함의 않으면 이혼 못한다 [You Cannot Divorce Without a Planned Agreement on Child Support], [http://www.donga.com/news/print\\_web.php?n=200712110424](http://www.donga.com/news/print_web.php?n=200712110424) (last visited Mar. 3, 2008) (title translated by the author).

<sup>49</sup> 이르면 내년부터 이혼때 부부재산 균등분할 [As Early as Next Year in a Divorce a Married Couple's Property Shall be Divided Equally] (2006), <http://www.donga.com/fbin/output?f=total&n=200610310190&top20=1> (last visited Mar. 3, 2008) (title translated by author).

<sup>50</sup> Ministry of Justice Civil Law Inheritance Law Amendment, *supra* note 19.

<sup>51</sup> *See id.*

amended so that in a divorce all property accumulated during the marriage will be equally distributed between a wife and a husband.<sup>52</sup>

In particular, the amendment to add language requiring equal division of all property acquired during marriage is applicable to the division of retirement allowance upon divorce.<sup>53</sup> The proposal is to add to Article 839-2(2) language stating “[i]n this situation, it shall be a general rule to divide equally the property realized by cooperation of both parties.”<sup>54</sup> Once the courts recognize unrealized retirement allowances as divisible property upon divorce, the unrealized retirement allowances will be divided equally among the spouses.

### III. TWO KOREAN CASES SUGGEST RETIREMENT ALLOWANCES ARE DIVISIBLE UPON DIVORCE

The two cases presented in this section ruled on the divisibility of retirement allowances. These cases are significant because they serve as examples of how courts apply the law, even though they do not serve as binding precedent as they would in common law legal systems.<sup>55</sup> Cases, however, are important in civil law systems because they show how abstract laws are applied to specific factual situations.<sup>56</sup>

While the courts have settled the legal question of whether allowances are property accumulated through the cooperation of both spouses, they have created other questions. The question about whether it is equitable to exclude undisbursed retirement allowances still remains. Ruling that undisbursed retirement allowances are indivisible creates inequity where both parties contribute in accumulating retirement allowances, but the allowances are not divisible despite contribution if they are not received before divorce. The cases also do not address the most equitable method for dividing retirement allowances.

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<sup>52</sup> *Id.*

<sup>53</sup> See Jinsu Yune, *supra* note 25, at 107.

<sup>54</sup> *Id.* at 122 (proposal translated by author).

<sup>55</sup> According to the Korean Civil Code, “[i]f there is no provision in Acts applicable to certain civil affairs, customary law shall apply, and if there is no applicable customary law, sound reasoning shall apply.” CODE CIVIL [C. CIV.] art. 1 (Source of Law) (S. Korea).

<sup>56</sup> See 이상욱[Sang-wook Lee], 법학! 어떻게 공부할 것인가? 판례의 중요성과 이용방법 [Law! How Should We Study It? The Importance of Case Law, How to Use It] 340 고시연구 [BAR EXAMINATION STUD.] 231, 231 (2002) (title of article and title of journal translated by the author).

A. *The Two Decisions Resolved Different Questions of Property Division*

The two representative cases that have ruled on whether the retirement allowance should be part of the divisible property in a divorce case are the Korean Supreme Court decision 2002S36<sup>57</sup> and the Family Court decision 2006DHap10699.<sup>58</sup> The Korean Supreme Court decided on whether future retirement allowance should be subject to property division. The Family Court decided whether received retirement allowance is subject to property division. These two cases recognize that retirement allowances are property accumulated through the cooperation of both spouses, in spite of the fact that one spouse provides exclusively housework.

Aware of the increasing trend of *hwang-hon* divorce, the Korean Supreme Court addressed the issue of whether undisbursed retirement allowance should be subject to property division under Article 839-2. In this case, the Korean Supreme Court held that the spouse's future retirement allowance is not subject to the division of property under Article 839-2.<sup>59</sup> The court ruled that in a situation where a party of a married couple has not retired and is still employed, without other special circumstances, for example, having confirmation of his or her retirement date and retirement allowance amount, the unreceived retirement allowance is not divisible property.<sup>60</sup> Furthermore, the court decided that if a spouse has not yet received retirement allowances, this fact would serve as a consideration in possibly granting a higher proportion of property to the unemployed spouse.<sup>61</sup>

The Family Court's decision in November 2007 considered whether received retirement allowance should be divisible upon divorce, and whether the entire retirement allowance should be divisible or only the retirement allowance corresponding to the years that the couple were actually married. The couple in this case was married for eight years and at the time of their divorce the husband had already received his retirement allowance.<sup>62</sup> The husband claimed that before he married his wife he was already employed at

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<sup>57</sup> Korean Supreme Court Decision 2002S36 delivered on Aug. 28, 2002 (Gong2002.10.15.(164), 2337).

<sup>58</sup> Family Court Decision 2006DHap10699 (Divorce and Property Division) delivered on Nov. 21, 2007.

<sup>59</sup> Korean Supreme Court Decision 2002S36 delivered on Aug. 28, 2002 (Gong2002.10.15.(164), 2337).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See Family Court Decision 2006DHap10699 (Divorce and Property Division) delivered on Nov. 21, 2007.

the workplace from which he received his retirement allowance.<sup>63</sup> He therefore claimed that only the part of his retirement allowance that accrued during the marriage to his wife should be subject to division of property.<sup>64</sup> The Family Court disagreed and held that the entire retirement allowance of her husband should be included as divisible property upon divorce.<sup>65</sup>

The Family Court justified its decision to make the husband's entire retirement allowance subject to property division based on the fact that the couple was married during the majority of the time the husband worked at the place where he received the retirement allowance.<sup>66</sup> Second, there is no evidence that will make the division between the retirement allowance earned before they married and after they married possible; therefore, the court decided to include all of the retirement allowance under divisible property.<sup>67</sup> The court held that it will take this situation into account when deciding what percentage of the divisible property each spouse should receive.<sup>68</sup>

### B. *The Problem of Dividing Retirement Allowance Still Persists*

The Korean Supreme Court decided that future retirement allowance should not be considered as property accumulated during marriage, while the Family Court decided to include the entire retirement allowance that the husband had already received as property subject to division. Both courts agree that received retirement allowance should be considered divisible property. This is significant because both courts acknowledged the non-working spouse's contribution in taking care of the household so that the working spouse could earn the retirement allowance. The retirement allowance is a result of the contributions of both spouses during marriage, and if one of the parties received the retirement allowance, it should be part of the final settlement of property.<sup>69</sup>

The problem of the retirement allowance is that the basis of accumulating the retirement allowance could happen during marriage, but the couple may divorce before acquiring it.<sup>70</sup> According to the interpretation of the current law, only the retirement allowance that a spouse has received

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Korean Supreme Court Decision 2002S36 delivered on Aug. 28, 2002 (Gong2002.10.15.(164), 2337).

<sup>70</sup> Hyung-Lae Song, *supra* note 30, at 228.

at the time of divorce is divisible.<sup>71</sup> The Korean Supreme Court decided that when the spouse is still working and his or her retirement date or allowance has not yet been decided, the future retirement allowance should not be included in the divisible property upon divorce.<sup>72</sup> Despite the court's express and tacit acknowledgement that retirement allowance is earned through the contribution of both spouses, holding undisbursed retirement allowance as indivisible denies the contribution of one spouse in accumulating this property.

#### IV. HOLDING THAT THE UNRECEIVED RETIREMENT ALLOWANCE IS NOT DIVISIBLE UPON DIVORCE IS INEQUITABLE

To solve the problem of denying the contribution of a spouse through housework in accumulating retirement allowances, unreceived retirement allowances should be divisible upon divorce. There are four reasons that support this argument. First, holding that unreceived retirement allowance is not divisible upon divorce would largely discount the housework contribution in accumulating retirement allowances, defeating the purpose of Article 839-2 which is to legally acknowledge the housewife's economic contribution in accumulating marital property. Second, such a decision would result in unjust enrichment of the employed spouse. Third, not allowing the division of unreceived retirement allowances, which are a large sum of money, will limit the freedom to divorce.<sup>73</sup> Finally, unreceived retirement allowances, unlike other speculative unrealized assets, are guaranteed by law at the time of the divorce, and thus should be divisible.

First, holding unreceived retirement allowances as undivisible property would defeat the purpose of the Article 839-2. The reason for enacting this law was to provide women, who have traditionally been housewives and thus less economically powerful, with a claim for property division from their husbands upon divorce. Not recognizing that housework contributed to accumulating retirement allowances would deny them a large portion of the property that is rightfully theirs.

Second, holding that unreceived retirement allowances are indivisible upon divorce would result in unjust enrichment of the employed spouse. As people in a family need a combination of financial and care-giving support,<sup>74</sup> if one spouse provides exclusively financial support, then the other has to

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<sup>71</sup> *Id.* at 227.

<sup>72</sup> See Korean Supreme Court Decision 2002S36 delivered on Aug. 28, 2002 (Gong2002.10.15.(164), 2337).

<sup>73</sup> Hyung-Lae Song, *supra* note 30, at 227 (citing Hyun-jung Chang, *supra* note 31).

<sup>74</sup> See Hyunah Yang, *supra* note 32, at 220.

provide the care-giving support. Housework is hard to assign a value but is essential for the family's survival.<sup>75</sup> If a spouse is providing housework, such as preparing food, taking care of the children, ironing shirts, or running household errands, he or she indirectly allows for the other spouse to concentrate exclusively on employment. Retirement allowances are an end result of the length of service and rate of pay at the time of termination;<sup>76</sup> therefore housework providers are "cooperating" in realizing this property. If a spouse has provided housework, for example, for more than twenty years, but the employed spouse has not yet received the retirement allowance, it is unfair to deny access to property that the housework providing spouse "cooperated" in acquiring for twenty years.

Third, retirement allowances are a large sum of money, and denying division of such a large sum may become a disincentive to divorce, thus limiting the unemployed spouse's freedom to divorce. As the history of the claim for property division law indicates, one of the purposes of enacting this law was to protect housework-providing spouses' freedom to seek divorce by relieving the concern over their livelihood.<sup>77</sup> Going back to the previous example where a spouse has provided housework for more than twenty years and the employed spouse has not yet received the retirement allowance, the unemployed spouse may depend on receiving a large sum of money from the retirement allowance. To receive part of the retirement allowance, the housework providing spouse may stay in an abusive relationship without being able to exercise his or her practical and subjective freedom to divorce.

To give an example of how retirement allowance comprises a substantial portion of the joint property, let us examine the example of a civil servant spouse. If a spouse is a civil servant, the lump-sum retirement allowance is based on his or her final salary and length of service.<sup>78</sup> The amount of allowance is calculated as follows: (final salary  $\times$  service years  $\times$  1.5) + final salary  $\times$  (service years - 5)  $\times$  0.01.<sup>79</sup> If the spouse worked as a civil servant for twenty years, and his or her final salary was \$5,000, then he or she would receive about \$150,750. This is a substantial amount, and with the increase of *hwang-hon* divorce, there will be an increase in instances of a

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<sup>75</sup> See *id.*

<sup>76</sup> Retirement Pay System, *supra* note 8.

<sup>77</sup> Rosa Kim, *supra* note 26.

<sup>78</sup> Republic Of Korea Civil Service Commission, [http://www.csc.go.kr/eng/csS/css07\\_01.asp](http://www.csc.go.kr/eng/csS/css07_01.asp) (last visited Feb. 15, 2008).

<sup>79</sup> *Id.*

party demanding from the other division of the retirement allowance, whether it has already been received or not.

Finally, retirement allowances are not very speculative, and thus can be divisible property upon divorce. The United States, for example, qualifies retirement plans as interests constituting property because they are not interests that are too speculative or are characterized as a mere expectancy.<sup>80</sup> In the United States, retirement benefits consist of pensions and other types of retirement plans such as profit sharing, stock options and Individual Retirement Accounts.<sup>81</sup> Only recently, Korean employers gained freedom to choose a pension system instead of the retirement allowance system.<sup>82</sup> Despite this difference in the retirement system between Korea and the United States, the retirement allowance and the retirement benefits are similar in that they may be classified as unrealized assets. Retirement allowances are speculative unrealized assets because the retirement period can vary depending on when the person may retire.<sup>83</sup> Unlike other speculative unrealized assets, such as stocks, however, regardless of the retirement reasons, the retirement allowance is guaranteed at the time of retirement under the Labor Standard Act, Article 30-2.<sup>84</sup> Therefore, highly probable future retirement allowance should be counted as divisible property, especially if the spouse is close to retiring and will receive the retirement allowance.<sup>85</sup>

While recognizing that unreceived retirement allowances should be considered divisible property, the court should set limitations and methods on how the unreceived retirement allowances should be divided among the spouses. The limitations and the method on dividing unreceived retirement allowances are discussed in Part VI below.

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<sup>80</sup> See 3-37 FAMILY LAW AND PRACTICE, Chapter 37 Principles of Property Distribution § 37.11, 1 (Mathew Bender & Company, Inc. 2007). The way the United States treats retirement benefits is similar to Korea, but it tends to have a broader definition of what constitutes a divisible property upon divorce. The U.S. courts qualify pension and other types of retirement plans as interests constituting property, unless the interest is too speculative or is characterized as a mere expectancy. Therefore, the United States considers retirement benefits as divisible property whether they are vested or non vested benefits, and whether they are matured and not matured, as long as they are not too speculative.

<sup>81</sup> *Id.*

<sup>82</sup> See Retirement Pay System *supra* note 8.

<sup>83</sup> Jong-Kwun Park, *supra* note 45, at 92.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

V. THE AMENDMENT TO ARTICLE 839-2 WOULD BRING POSITIVE CHANGES IN DIVIDING UNRECEIVED RETIREMENT ALLOWANCE

Under the current Article 839-2, the courts have the discretion to divide received retirement allowances, and they do take into consideration whether one or both parties were economic contributors. Furthermore, the courts do not include unreceived retirement allowances in the divisible property upon divorce, even though they are not mere expectancies.

Once the amendment comes into effect, the courts should divide the accumulated property in half regardless of whether both spouses were employed, or only one of them was employed while the other provided housework. By providing that, in general, property acquired during marriage be equally divided, the court decisions on division of property upon divorce will be more consistent because courts will have the article to refer to. Received retirement funds, as an acquired property during marriage, should be equally divided. Furthermore, retirement allowances should be included under divisible property upon divorce as discussed previously.

When such amendment comes into effect, the question remains whether the courts should strictly adhere to the equal division of property and divide all acquired marital property equally, or maintain some of their discretion in taking into consideration various circumstances where it would be inequitable to divide the property fifty-fifty between the spouses.

A. *Courts Should Retain Some Discretion in Deciding the Proportion of Property Each Spouse Gets in Divorce*

After the amendment goes into effect, requiring courts to strictly adhere to dividing the accumulated property during marriage equally may not always be fair, and sometimes other circumstances should be considered in determining the adequate divisible proportions.<sup>86</sup> Specifying that accumulated property be divided equally will bring formal equity, but does not necessarily bring substantive equity.<sup>87</sup>

The United States, for example, has two ways of deciding what proportion of property each spouse shall receive in a divorce.<sup>88</sup> The first method is to give courts the discretion to take into consideration the circumstances of each case, such as the contribution a spouse has made in

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<sup>86</sup> See Gyung-gun Jun, *A Study on the Amendment Regarding Matrimonial Property System*, 20 가족법 연구 한국 가족법학회 [FAM. L. RES. KOREAN FAM. L. J.] 47, 66 (2006). (title of the journal translated by author).

<sup>87</sup> Hyung-Lae Song, *supra* note 30, at 221.

<sup>88</sup> Hwang Jee Yoon, *supra* note 23, at 157.

accumulating the property, and divide the property accordingly.<sup>89</sup> Such a method is employed in the state of New York.<sup>90</sup> The other method is for the legislature to pass a law requiring that property be divided equally upon divorce.<sup>91</sup> California employs this method.<sup>92</sup>

In New York, the court has the discretion to divide marital property, and it takes into consideration other factors, for example, income, age, health, and type of property.<sup>93</sup> If the couple has been married for a long time, the court awards half of the marital property to the spouse that exclusively provided housework,<sup>94</sup> but for short-term marriages, the court awards less than half of the marital property.<sup>95</sup>

In California, the general rule in a divorce is to equally divide property owned by both spouses regardless of each spouse's contribution in accumulating that property.<sup>96</sup> This rule applies, however, only to the property excluding the separate property and the separate loans.<sup>97</sup>

These two methods have their advantages and disadvantages.<sup>98</sup> First, the method of giving the court the discretion to decide the proportion each spouse should receive has the advantage of tailoring the decision according to the circumstances of each case. On the other hand, the disadvantage of this method is that the courts may be inconsistent in their decision, and it is hard to predict how the court will decide on the division proportions. Furthermore, the courts have to consider all the evidence that would make the decision of division of property fair, which can be costly.

Second, the method of having a law that requires equal division of property in divorce has the disadvantage of being inflexible, and the courts will ignore circumstances that should be reflected for an equitable division of property. Nevertheless, this method has the advantage of providing a simple method of dividing the property. Under this method the court is not

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<sup>89</sup> *Id.*

<sup>90</sup> In the United States most of the states have the marital property system of separate property, which originated in the common law of England. Under the separate property system, there is no sharing of the earnings and whatever one earns is his or hers. If only one spouse is employed, then this spouse will own all property acquired during marriage except for gifts and inheritances. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 418 (7th ed. Aspen Publishers 2005).

<sup>91</sup> Hwang Jee Yoon, *supra* note 23, at 157.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (citing N.Y. DOM. REL. LAW § 236(b)(5)(d)).

<sup>94</sup> *Id.* (citing *Perri v. Perri*, 97 A.D.2d 399, 467 N.Y.2d 226 (2d Dept. 1983)).

<sup>95</sup> *Id.* (citing *Duffy v. Duffy*, 94 A.D.2d 711, 462 N.Y.2d 240 (2d Dept. 1983)).

<sup>96</sup> *Id.* at 158.

<sup>97</sup> Eight states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington) have the system of community property, which originated from the continent of Europe. Under the community property system, each spouse is the owner of an undivided one-half interest in all earnings of the spouses and property acquired from those earnings. DUKEMINIER ET AL., *supra* note 90.

<sup>98</sup> Hwang Jee Yoon, *supra* note 23, at 158-59.

required to reflect on all the evidence of whether the spouses are entitled to the property. Also, property divisible in a divorce naturally increases with marriages that have lasted longer.<sup>99</sup>

In light of the advantages and disadvantages of these two U.S. methods of deciding the proportion each spouse should receive in a divorce, the most adequate solution to this problem is to interpret the amended language of a claim for property division as providing equal division of accumulated property as the principal rule. Additionally, the language “Family Court shall . . . determine the amount and method of division taking into consideration the amount of property realized by cooperation of both parties and other circumstances”<sup>100</sup> should be interpreted as giving the Family Court the discretion to decide whether other circumstances require that the court divide the property otherwise.

Courts should retain some discretion in deciding if the equal division of acquired property during marriage should be applied and determine whether extraordinary circumstances may result in unfairness if accumulated property is equally divided. For example, the court should have the discretion to determine whether unreceived retirement allowances should be divisible property, and what percentage each spouse should receive. If the courts were to have no discretion in deciding the appropriate proportion in the division of property, then the decisions may lack fairness in certain circumstances.<sup>101</sup>

Giving courts some discretion to consider other circumstances will not only benefit the housework-providing spouse, but also the employed spouse. A counterargument to dividing retirement allowances equally is that it will be unfair for the employed spouse if the unemployed spouse did not contribute in acquiring them. The employed spouse may present evidence that the unemployed spouse barely did any housework. With such evidence, the courts may address this inequity by taking this evidence into consideration and giving the employed spouse a larger portion of the entire divisible property upon divorce.

Furthermore, if the courts continue to view unreceived retirement allowances as indivisible upon divorce after the amendment comes into effect, giving courts discretion to take into consideration “other circumstances” and resulting in a more equitable division of property. As discussed earlier, the Korean Supreme Court decided that unreceived retirement allowances are not part of divisible property upon divorce, but

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<sup>99</sup> *Id.*

<sup>100</sup> CODE CIVIL [C. CIV.] art. 839-2 (Claim for Division of Property) (S. Korea).

<sup>101</sup> See Jinsu Yune, *supra* note 25, at 123.

they are taken into consideration when dividing property that a married couple owns at the time of divorce. If the courts decide that unreceived retirement allowances are not part of accumulated property and divide what they decide is divisible equally between the spouses, then in the end, the unemployed spouse will receive a much smaller portion than the employed spouse. Hence, if the court retains discretion to take into consideration the impending retirement allowance, then the court can award a larger portion to the unemployed spouse.

*B. Additional Amendments Are Recommended*

The Ministry did not address the problem of properties that spouses acquire after divorce based on the efforts of both spouses during marriage, such as the retirement allowance. Under the current law, there is a way to divide unreceived impending retirement allowance. According to the claim for property law, a party can claim property up to two years from the day of divorce.<sup>102</sup> Therefore, if a spouse acquires property as a result of the activities during the marriage, the other spouse can claim this property as long as it is within two years after divorce.<sup>103</sup> The current case law reveals that courts are reluctant to add retirement allowances that the spouse receives after the two years as divisible property upon divorce.<sup>104</sup>

The government should broaden the category of divisible property upon divorce by changing the word “acquired property” to “accumulated property,” to provide a more equitable division of property. Defining what property is divisible upon divorce would decrease inconsistency of the court’s decisions.<sup>105</sup> When specifying what constitutes accumulated property, it should include property about to be realized in the near future such as retirement allowances as divisible property. The two-year window provided in the claim for property law, in which the spouses can claim property, might not be long enough to include all near future allowances.

However, the government should specify limitations on the period within which a working spouse should receive the retirement allowance, and also implement a method of calculation in determining how much the non-employed spouse should receive depending on how long their marriage lasted. Similar to the system that United States courts in many dual property states use, the government can specify that the calculation of the marital

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<sup>102</sup> CODE CIVIL [C. CIV.] art. 839-2 (Claim for Division of Property) (S. Korea).

<sup>103</sup> Hyung-Lae Song, *supra* note 30, at 228.

<sup>104</sup> *Id.* at 229.

<sup>105</sup> Myung-soo Choi, *supra* note 24, at 169.

share of the retirement allowance is the duration of the marriage divided by the length of the spouse's period of employment.

## VI. CONCLUSION

The two Korean cases reviewed in this analysis reveal that retirement allowances are divisible only if they have been received or the date of the retirement and the amount has been declared. This holding that an unreceived retirement allowance is not divisible upon divorce is inequitable. This is because it would discount the housework contribution in accumulating retirement allowances, and instead enrich the employed spouse. A spouse who is counting on receiving a portion of the retirement allowance will be discouraged to leave an unhappy marriage until the employed spouse retires and receives the retirement allowance, limiting their freedom to divorce. Finally, retirement allowances are guaranteed by law, and thus an unreceived retirement allowance is a highly probable asset, therefore, should be divisible.

Once the amendment to divide all accumulated property during marriage equally goes into effect, the courts will apply this method of division as the general rule. At the same time, the courts should retain some discretion to take into consideration other circumstances to make the division of property more equitable. If the courts continue to view retirement allowances as indivisible property, then it is better that the courts take into consideration that one of the spouses will receive retirement allowances in the close future, therefore dividing the property so that the unemployed spouse can claim a larger proportion of the divisible property. The amendment does not address one of the problems of the current Article 839-2 in that the term "acquired" property excludes any property about to be realized in the near future, which is a result of the cooperation of both spouses. If the government were to further amend the current law, it should broaden the definition of what properties are divisible upon divorce to accomplish more equity in dividing marital property.

**SUPREME COURT DECISION 2002S36 DELIVERED ON  
AUGUST 28, 2002 [PROPERTY DIVISION]**

**[Gong2002.10.15.(164), 2337]**

**Translated by Faye Y. Park**

*Translator's Note:* The Supreme Court Decision 2002S36 delivered on August 28, 2002 (Gong2002.10.15.(164), 2337) is a representative court ruling on whether retirement allowances that the employed spouse has not received should be subject to the division of property under Article 839-2. The court concluded that the spouse's unreceived retirement allowance is not subject to the division of property upon divorce. The court ruled that in a situation where a party in a married couple has not retired and is still employed, without special circumstances such as having confirmation of his or her retirement date and retirement allowance amount, the future retirement allowance cannot be included as property subject to final settlement of property. The format and style of this translation has been modified from the original opinion. However, it does not contain substantive changes that could affect the conveyance of the meaning or content of the original version.

**【Main Issues】**

- [1] Situation where individual property belonging to one party in a marriage becomes subject to property division
- [2] Method of assessing property contribution which is the basis for calculating the amount of division of property
- [3] Whether future retirement allowance can be included as property subject to division (negative)
- [4] A case holding that when the husband receives the insurance payment on behalf of the wife, the received amount cannot be subject to property division
- [5] Situation where debt to a third party by one spouse during a marriage becomes subject to final settlement of property
- [6] A case that reversed a judgment of the lower court that failed to fully address the issue of whether remaining debt during divorce by agreement is subject to final settlement of property.

**【Summary of Decision】**

- [1] The main purpose of the property division system set forth in Civil Code Article 839-2 is to liquidate and divide material property accumulated during marriage in case of a divorce. Therefore, when a married couple is divorcing and there is property accumulated through both parties'

cooperation, the court must decide the amount and method of property division by taking into account both parties' whole circumstance such as the amount of contribution in the formation of the property when determining the amount and method of division. In this situation, in principle, a spouse's individual property is not subject to the division; however, even for such individual property, if the other spouse actively cooperated in maintaining this individual property, and either prevented its diminution or collaborated in its increase, the property may become subject to division.

[2] Even though property contribution, which is the basis for calculating the amount of division of property, does not necessarily have to be recognized through market price appraisal, it has to be appraised through objective and rational materials.

[3] In a situation where one of the spouses has not retired and is still employed, and no special circumstances occurred such as confirmation of his or her retirement date and retirement allowance amount, only the likelihood that the spouse will receive a retirement allowance provides no basis on which the future allowance can be regarded as property subject to final settlement of property. The circumstance that a party has the probability of receiving future retirement allowance is sufficient to be considered as one of the "other circumstances" in determining the amount and method of small property division under Civil Code Article 839-2.

[4] When a husband receives an insurance payment on behalf of a wife who was the beneficiary of the insurance, the insurance payment is the wife's individual property, and it cannot be considered as property created through cooperation between the parties. Therefore, the husband has the duty to pay his wife the same amount, and because this debt is retained separately from the property division, the amount the husband received cannot be subject to property division.

[5] The debt to a third party by one party of a married couple during marriage, except for daily household-related debt, in principle, is not subject to liquidation because it is a private debt. However, if debt is undertaken for the creation of joint property, then it is subject to final settlement of property.

[6] A court ruling that reversed the judgment of the lower court that did not fully address the issue of whether remaining debt during divorce by agreement is subject to final settlement of property.

#### **【Reference Provisions】**

[1] Art. 839-2 of the Civil Code / [2] Art. 839-2 of the Civil Code / [3] Art. 839-2(2) of the Civil Code / [4] Art. 839-2(2) of the Civil Code / [5] Art. 839-2 of the Civil Code / [6] Art. 839-2 of the Civil Code

**【Reference Cases】**

[1] Supreme Court Decision 93M1020 delivered on May 13, 1994 (Gong1994Sang, 1698), Supreme Court Decision 94M734 delivered on October 25, 1994 (Gong1994Ha, 3125), Supreme Court Decision 94M598 delivered on December 13, 1994 (Gong1995Sang, 492), Supreme Court Decision 95M175, 182 delivered on October 12, 1995 (Gong1995Ha, 3780), Supreme Court Decision 94M635, 642 delivered on February 9, 1996 (Gong1996Sang, 952), Supreme Court Decision 97M1486, 1493 delivered on February 13, 1998 (Gong1998Sang, 767), Supreme Court Decision 2001M565 delivered on June 12, 2001 / [2] Supreme Court Decision 94M734 delivered on October 25, 1994 (Gong1994Ha, 3125), Supreme Court Decision 95M175, 182 delivered on October 12, 1995 (Gong1994Ha, 3780), Supreme Court Decision 96M1397 delivered on June 11, 1999 (Gong1999Ha, 1411), Supreme Court Decision 99M1909, 1916 delivered on January 28, 2000 / [3] Supreme Court Decision 94M1584 delivered on March 28, 1995 (Gong1995Sang, 1752), Supreme Court Decision 94M1713, 1720 delivered on May 23, 1995 (Gong1995Ha, 2265), Supreme Court Decision 96M1533, 1540 delivered on March 14, 1997 (Gong1997Sang, 1107), Supreme Court Decision 98M213 delivered on June 12, 1998 (Gong1998Ha, 1888), Supreme Court Decision Ja2000S13 delivered on May 2, 2000 (Gong2000Ha, 1427) / [5]<sup>1</sup> Supreme Court Decision 92M501 delivered on May 25, 1993 (Gong1993Ha, 1881), Supreme Court Decision 94M963 delivered on November 11, 1994 (Gong1994Ha, 3274), Supreme Court Decision 95M1192 delivered on December 23, 1996 (Gong1997Sang, 531), Supreme Court Decision 9786 delivered on February 13, 1998 (Gong1998Sang, 767)

**【Full Text】**

**【Appellant】** Appellant (Attorney Ahn Sung-II)

**【Appellee】** Appellee<sup>2</sup>

**【Judgment of the Lower Court】** Chuncheon Gangneung District Court Judgment Ja2001B10 delivered on April 27, 2002

**【Disposition】** The judgment of the lower court shall be reversed and the case shall be remanded to Chuncheon Gangneung District Court collegiate court.

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<sup>1</sup> *Translator's Note:* The original opinion does not have reference cases for [4].

<sup>2</sup> *Translator's Note:* The parties are unnamed in the decision.

【Reasoning】 The grounds for appeal are examined as follows.

*1. The Presence of an Agreement Between the Parties Regarding Property Division*<sup>3</sup>

In regard to the appellant's claim that an agreement has been established between the parties about the property division, and thus this case's property division judgment claim is inappropriate, the lower court recognized that based on admitted evidence, on April 27, 2001, the appellant and the appellee agreed on a divorce by agreement, and the appellant agreed to pay the appellee compensation in the amount of 270,000,000 won, consolation money in the amount of 30,000,000 won, and car insurance in the amount of 90,000,000 won. Then, from the foregoing findings of facts and reflecting on the process of the agreement, the provisions as to the compensation and the insurance subject to the above agreement merely reiterate the general requirement that the appellant must return to the appellee the residual after the expenditure from the damages the appellant received on behalf of the appellee. Furthermore, the provisions provide that the appellee should receive the Post Office insurance payments, which designated the appellee as insurance recipient. The remaining provision<sup>4</sup> indicates that the appellant must pay the appellee compensation for divorce. Therefore, the court denied the appellant's claim because an agreement such as the above does not include division of property as a result of divorce by agreement. Together with the related evidence based on the record, the recognition and judgment of the lower court is justifiable, and there are no violations of law including a mistake of fact as a result of violation of acceptance of evidence rule, or misinterpretation of law of the parties' agreement of property division. Therefore, the appeal with respect to the foregoing is groundless.

*2. The Subject and Scope of Property Division*

*A. The Judgment of the Lower Court*

The lower court recognized that according to the admitted evidence, the properties the appellant acquired during his marriage in his name are Gangneung Joomoonjin Joomoonlee 1086-8 field 3,620 square meters (m<sup>2</sup>)

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<sup>3</sup> *Translator's Note:* The subsection headings have been italicized throughout this translation for the convenience of the readers.

<sup>4</sup> *Translator's Note:* This provision refers to the agreement on the consolation money in the amount of 30,000,000 won.

(market price of 109,500,000 won); Gangneung Noamdong 610 Hyundai apartment 101-1302 (market price of 80,000,000 won); the retirement allowance that the appellant will receive when he retires from his workplace; and the post office, which amounts to 138,000,000 won as estimated as of August 28, 2001. Additionally, the appellant until May 2005 received auto safety insurance in the amount of 13,800,000 won and on June 20, 2000, received 12,300,000 won from Dongyang Life Insurance Company on behalf of the appellee because of the appellee's car accident. From the foregoing findings of facts, the lower court held that at the time of the appellant and appellee's divorce by agreement, the property that the appellant owned such as the above apartment, field, retirement allowance bond, and received insurance payment, totaling in the amount of about 353,600,000 won, was acquired and created through the joint efforts of the appellant and the appellee in their marriage. Therefore, these properties are actual joint property, and are subject to division of property in the divorce agreement between the parties.

*B. The Judgment of the Supreme Court*

(1) Whether the field in this case is subject to property division and what its value should be

(A) Whether the field is subject to property division

The main purpose of the property division system set forth in Civil Code Art. 839-2 is to liquidate and divide material property accumulated during marriage in case of a divorce. Therefore, when a married couple is divorcing and there is property accumulated through both parties' cooperation, the court must decide the amount and method of property division by taking into account both parties' whole circumstance such as the amount of contribution in the formation of the property when determining the amount and method of division. In this situation, in principle, a spouse's individual property is not subject to the division; however, even for such individual property, if the other spouse actively cooperated in maintaining this individual property, and either prevented its diminution or collaborated in its increase, the property may become subject to division.<sup>5</sup> (See Supreme

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<sup>5</sup> *Translator's Note:* Some parts of the original opinion are underlined. These underlined parts are identical to the Summary Decision section.

Court Decision 97M1486 delivered on February 13, 1998, Supreme Court Decision 2001M565 delivered on June 12, 2001).

In light of the above legal principles and related evidence, the decision by the lower court to recognize the field in this case as subject to division of property is justifiable, and there are no violations of law such as a mistake of fact as a result of violation of acceptance of evidence rule, or misinterpretation of law of the parties' agreement of division of property. Therefore, the appeal with respect to the foregoing is groundless.

(B) The value of the field in this case

However, this court does not agree with the lower court's recognition that the value of the field is 109,500,000 won. Even though property contribution, which is the basis for calculating the amount of division of property, does not necessarily have to be recognized through market price appraisal, it has to be appraised through objective and rational materials. (See Supreme Court Decision 95M175, 182 delivered on October 12, 1995, Supreme Court Decision 99M1909, 1916 delivered on January 28, 2000). The affidavit Gap-5(2) (certified copy of real-estate registration) cannot be material in determining the market price of the field evaluated before this legal proceeding, and the only material providing such value of the field is the certificate of officially assessed individual land price that the appellee submitted. According to this certificate, on January 1, 2001 the publicly notified land price is 7,070 won per square meter; therefore the court can only recognize that at the time of the divorce by agreement the publicly notified land price of this case was 25,593,400 won ( $3,620 \text{ m}^2 \times 7,070 \text{ won}$ ), and there are no materials that support the lower court's recognition that the value of the field in this case is 109,500,000 won besides the appellee's claim.

Therefore, the lower court's calculation of the value of the field of this case cannot be considered as objective or rational material. The lower court violated the acceptance of evidence rule, and either misunderstood the facts of the value of the property subject to division of property, or misunderstood the legal principles of calculation of the value, which resulted in the violation of law that affected the judgment. Therefore, the relevant part of the ground for appeal has merit.

(2) Whether the retirement allowance in this case should be subject to property division

This court reverses the lower court's decision that the retirement allowance in the amount of 138,000,000 won that the appellant will receive in the future when he retires is subject to property division.

In a situation where one of the spouses has not retired and is still employed, and no special circumstances occurred such as confirmation of his or her retirement date and retirement allowance amount, only the likelihood that the spouse will receive a retirement allowance provides no basis on which the future allowance can be regarded as property subject to final settlement of property. The circumstance that a party has the probability of receiving future retirement allowance is sufficient to be considered as one of the "other circumstances" in determining the amount and method of small property division under Civil Code Art. 839-2. (See Supreme Court Decision 94M1713, 1720 delivered on May 23, 1995, Supreme Court Decision 98M213 delivered on June 12, 1998).

However, the lower court held that the retirement allowance that the appellant was to receive in the future was subject to property division without any proof of special circumstances such as confirmation of his retirement date and retirement allowance amount. Therefore, the court misunderstood the legal principles regarding the division of property, which resulted in the violation of law that affected the judgment. Consequently, the relevant part of the ground for appeal that criticizes the court's misunderstanding has merit.

(3) Whether retirement allowance should be subject to property division

This court rejects the lower court's decision that the auto safety insurance payment and Dongyang Life Insurance Company's insurance payment are subject to the division of property.

It is unclear in the record whether the appellant received the auto safety insurance payment in the amount of 13,800,000 won until May 2000 because of the appellee's car accident, and whether on June 20, 2000 he received the insurance payment in the amount of 12,300,000 won from Dongyang Life Insurance Company on behalf of the appellee. Furthermore, according to the records each insurance payment that indicates the appellee as the insurance recipient appears to be the appellee's individual property, and there is no other material indicating that it is property formulated through mutual cooperation. Thus, even if the appellant received the insurance payments, the appellant has the duty to pay the appellee the same amount, and this debt should be maintained separately from property division. In this

respect, even though the appellant received each insurance payment, this amount should not be subject to the property division.

Despite these facts, the lower court held that each insurance payment was subject to property division, and consequently misunderstood the legal principles regarding the division of property, resulting in the violation of law that affected the judgment. Therefore, the ground for appeal indicating this point also has merit.

### 3. *Debt Subject to Final Settlement of Property*

The debt to a third party by one party of a married couple during marriage, except for daily household-related debt, in principle, is not subject to liquidation because it is a private debt. However, if debt is undertaken for the creation of joint property, then it is subject to final settlement of property. (See Supreme Court Decision 95M1192 delivered on December 23, 1996, Supreme Court Decision 97M1486 delivered on February 13, 1998).

According to the records, on November 2, 1999 the appellant received a loan from the Kangneung branch of Nonghyup Cooperative Association National Federation in the amount of 20,000,000 won as general household fund loan, and at the time of divorce by agreement, the loan was outstanding. There is a great possibility that the appellant's debt was used for daily household affairs or at least taken to formulate the married couple's joint property.

Therefore, the lower court should have deliberated whether this debt was subject to property division, but failed to do so. Thus, the lower court did not fully address the issue on the debt that should be subject to division of property that resulted in the violation of law that affected the judgment. Therefore, the ground for appeal indicating this point also has merit.

4. Accordingly, the lower court's decision shall be reversed and the case shall be remanded to the lower court. This decision is rendered *per curiam* delivered with the assent of all participating justices.

Justices: Park Jae-yoon<sup>6</sup> (Presiding Justice)  
Bae Ki-sung (Justice in charge)

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<sup>6</sup> *Translator's Note:* The names of the justices have been written in English by the translator. These names may be spelled differently.