



# Introduction of Joint Custody: The Background to the Quick Passage of the Revised Civil Code



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## Even if parents do not consent

On May 17, 2024, the revised Civil Code, which introduces joint custody after divorce, was passed and enacted in the Diet by a majority vote of the Liberal Democratic Party (LDP), Komeito, the Constitutional Democratic Party of Japan (CDPJ), the Japan Innovation Party (JIP), and the Democratic Party for the People (DPP). Despite the fact that the sole custody system after divorce, which has been in place since 1947, is being revised for the first time and will significantly change the child-rearing environment, the deliberations of the opposition parties with the government took a total of 33 hours and 40 minutes in both the Lower House and the Upper House. It took a month and a half from the start of the actual deliberations to the passage of the bill.

This revised Civil Code, which will be in effect by 2026, allows for joint custody not only when both parents agree, but also when one parent refuses, depending on the decision of the family court. The legal standard for the decision is the vague “interests of the child,” and much of the decision is left to the discretion of the family court. After the law comes into effect, even those who have already divorced and

lost custody will be able to petition the family court to change joint custody. This is expected to increase the number of single parents forced to resume relationships with their former spouses against their will. In addition to everyday actions such as caring for the child, the revised law now allows one parent to exercise custody alone if there are “urgent circumstances.” Again, there is no specific definition of this in the law. In response to a question in the Diet, Takeuchi Tsutomu, Director General of the Civil Affairs Bureau, Ministry of Justice (MOJ), explained the interpretation of “urgent” as “cases where custody cannot be exercised in a timely manner through consultation between parents or through family court procedures, and where there is a risk of harming the interests of the child,” and gave examples such as admission procedures after the announcement of the results of a child’s entrance examination (when custody must be exercised by a certain date), the child’s escape from domestic violence or abuse (when it is necessary), and emergency surgery (when a medical treatment contract must be concluded with a medical institution). At the same time, it was clearly stated that prior consultation between parents is required when making decisions about the child’s relocation (including to a nearby place), career, obtaining a passport, medical care, etc. In case of disagreement, the only options are to accept the other party’s argument or to go to court. This can have negative consequences for the child, such as the possibility of frivolous child support lawsuits and the atrophy of parenting by co-resident parents. These problems are mainly due to the system in which joint custody can be applied even if the parents do not agree (hereafter referred to as “non-consensual” joint custody). Why has a law with such risks been passed without much confusion?

### **“The Draft Interim Proposal” and the anger of pro-proposal lawmakers**

The origins date back to 2011. When the Civil Code was revised to determine the division of child support and visitation after divorce, the possibility of joint custody was included in the supplemental resolution. This was in response to growing momentum that parenting should be gender-inclusive, as well as the voices of parents who lost custody in divorce, became estranged from their children, and wanted to be involved in their upbringing. Since then, a bipartisan group of lawmakers led by the LDP has been advocating for a system that strengthens the rights of separated parents, such as considering the submission of a “Parent-Child Separation Prevention Bill” that would make visitation mandatory after divorce. In response to domestic and international calls, then Minister of Justice Kamikawa Yoko consulted the Legislative Council of the Ministry of Justice in February 2021 on a review of the post-divorce family system.

In response to the consultation, the Family Law Sub-Committee of the Legislative Council, made up of academics and practitioners, began a full review of whether joint custody should be recognized as a new option. While there were positive views, such as “If more parents work together to raise children after separation, it will be in the best interests of the children,” there were also cautious voices who said that there was a risk that children would continue to be caught up in conflict between their parents, or that they would continue to be exposed to domestic violence, abuse and domination by separated parents. Although the gulf between the two sides was deep, it was decided that the goal for the time being would be to prepare an “Interim Draft Proposal” that would indicate the direction of the legal reform and, once approved, to put it out for public comment.

The issue was how to make joint custody a principle in the draft interim proposal, and in particular how to write “non-consensual” joint custody. This was the proposition for pro-proposal lawmakers. The

goal of the proponents is to apply joint custody to cases where the separated parent strongly desires to continue his or her relationship with the child, but the cohabiting parent refuses. The intended beneficiaries of the relief were not parents with whom the relationship was good, but separated parents who did not have the opportunity for visitation. To achieve this, it was considered urgent to change the law, which could be interpreted as making joint custody the rule, even if it meant relegating it to exceptional or limited cases, such as cases of child abuse, even if it meant eliminating sole custody altogether.

August 26, 2022. The LDP Judicial Affairs Division summoned the Civil Affairs Bureau official and had them present the draft of the interim proposal to be approved at the next Family Law Subcommittee meeting on the 30th. After reading it, one pro-proposal lawmaker opened his eyes and threatened the MOJ staff. “It’s not a ‘joint custody principle’ at all.”

The draft interim proposal listed flatly the continuation of the current system, which recognizes only sole custody, and the direction of introducing joint custody. The bill presented several options, branching out depending on the issue, such as whether or not it would be mandatory to designate a “custodial parent” who would be primarily responsible for the care of the child and have greater authority in exercising custody, and how much authority the custodial parent should be given. It did not even assume that joint custody would become the rule, let alone be introduced, and the bill was so difficult that it seemed unlikely that anyone would be able to understand it after reading it once. The anger of proponents, who saw this as detrimental to the formation of public opinion, reached a boiling point.

In a panic, the Civil Affairs Bureau informed the members of the Family Law Subcommittee that “it would be difficult to reach a consensus at the next meeting.” The August 30 meeting of the Family Law Subcommittee was in disarray. “It must not happen that the deadline is postponed because a division of a certain political party cannot approve the proposal. This will have a lasting negative impact on Japanese democracy” (Akaishi Chieko, Chairperson of the NPO Single Mothers Forum) and “If there was political intervention before the draft was submitted, does this mean that the same thing is happening as in the case of the appointment issue at the Science Council of Japan?” (Professor Emeritus Ochiai Emiko, Kyoto University) were the comments that followed one another, and the completion of the plan was ultimately postponed.

On November 10, 2022, a revised version of the draft interim proposal was presented to the LDP Judicial Affairs Division. In addition to the previous proposals, which were: (1) to make joint custody the rule, (2) to introduce joint custody but make sole custody the rule, and (3) to maintain the current system of sole custody only, a fourth proposal was added, which is to decide on an individual basis whether to choose joint or sole custody. The LDP Judicial Affairs Division, which received the report, approved the revised proposal.

When the Family Law Subcommittee was shown the revised proposal by the MOJ, one member of the Family Law Subcommittee was shocked and asked, “How did it end up like this?” The newly added “optional” proposal was only written in the notes of the original proposal and was never considered an official proposal. The member of the Family Law Subcommittee was outraged and said, “I can only think that the LDP forced it in because they thought a compromise proposal would be more popular with the public.” A senior official at the Ministry of Justice insisted in an interview, “This was an idea that was originally on the table for discussion, and we definitely did not take the LDP into consideration.” However, a pro-proposal lawmaker excitedly stated, “We got it changed. Now we can put it out for public comment,” while another legal affairs lawmaker who considered himself neutral said with a wry smile, “We pooled

everyone's wisdom." Their intervention also extended to the "reference materials" posted on the website along with the draft interim proposal when it was released for public comment. At first glance, it appears to be just a rough outline of the draft proposal, but the section on joint custody is highlighted by a dotted line, and the explanation for the proposal to continue the current system that allows only sole custody states, "Personal custody is exercised solely by the person who has custody." It is true that joint personal custody between parents is not mandatory under the sole custody system, but joint personal custody is still freely available in cooperative cases. The document was misleading because it could have led people to believe that divorced parents would not be able to raise their children together unless joint custody was established. LDP members were involved in the preparation of this document from the drafting stage, and the "redrafting" continued until its release.

Part of this process was made public in a report by the *Tokyo shimbun* newspaper and was criticized by legal experts, but discussions in the Family Law Subcommittee accelerated after the draft interim proposal was approved. In May 2023, the committee overruled the cautious views of some committee members and decided to allow joint custody if parents agree to it in a consensual divorce. In June, the Ministry of Justice proposed a system that would be applied to parents with such high conflicts that they would divorce in court, depending on the judgment of the family court. At the subcommittee meeting on January 30, 2024, while several committee members expressed their intention to oppose the vote, the draft outline that included the institutionalization of "non-consensual" was approved by a majority vote. Three of the 21 participating committee members opposed the proposal. For a subcommittee dealing with civil law, where unanimous decisions are the norm, it was highly unusual for the dissent to persist to the end.

## **What laid the groundwork for the establishment of the revised Civil Code**

The merits of "non-consensual" were also a focus of Diet deliberations. At the Lower House Judiciary Committee meeting on April 2, 2024, many pointed out that "joint custody can only be achieved if there is a sincere agreement between the parents and after a family court ruling. I can agree to this, even if I have to compromise" (Edano Yukio, CDPJ). However, the LDP refused, saying, "We will not change a single word of the article." However, citing the need to avoid criticism of the ruling party, the LDP accepted the amendment to the supplementary provisions that would effectively tighten the application of joint custody, albeit in part, as proposed separately by the CDPJ, including taking legal measures to retroactively change to sole custody in cases where joint custody was agreed upon against the will. If the amendment is rejected in a vote, it will not be reflected, so the CDPJ voted for it "at the very last moment" (party executive).

As I sat in the press gallery in the plenary hall of the Upper House and listened to the bill being passed, I saw the faces of many of the domestic violence victims I had interviewed. I had doubts about whether such an unreasonable bill would really pass. In reality, the LDP proponents' intervention had been carefully carried out behind the scenes and in public — sometimes giving credit to the cautious — over a long period of time, making the introduction of joint custody a *fait accompli*. The online petition of over 240,000 people against the bill was also blocked by this thick wall.

There were other factors besides political intervention. Many media outlets took the stance of "presenting both sides of the argument" because it was an emotionally charged issue. For those raising children, daily life is a series of important decisions, and there are individual differences in the ability to

imagine how much of a burden negotiating with separated parents would be. Many of those concerned about the bill's introduction could not have their faces or names publicly displayed when they filed suit for safety reasons. These conditions combined to lay the groundwork for the bill's swift passage.

Depending on how it is used, custody can hurt children and even take their lives. This overhaul required more time and multi-faceted discussion and consideration of fundamental changes from the perspective of single parents and children. As one of the reporters, not a day goes by that I don't feel like I'm lacking in my own abilities.

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