**CASE LAW NO. 03/2016/AL**

*This case law was adopted by the Judicial Council of the Supreme People’s Court on 6 April 2016 and promulgated by the Chief Justice of the Supreme People’s Court under Decision No.*

*220/QD-CA dated 6 April 2016.*

**Source of the case law:**

Cassation Decision No. 208/2013/DS-GDT dated 3 May 2013 on “*Divorce*” case of the civil court of the Supreme People’s Court in Hanoi between the plaintiff being Ms. Do Thi Hong and the defendant being Mr. Pham Gia Nam. The persons with related rights and obligations were Mr. Pham Gia Phac, Ms. Phung Thi Tai, Mr. Pham Gia On, Ms. Pham Thi Lu, Mr. Bui Van Dap and Ms. Do Thi Ngoc Ha.

**Overview of the case law:**

In the case where parents grant the land use right of a certain land area to their child and his/her spouse, the couple has built a permanent house on that land area for their residence; when the couple was building, their parents and other family members did not have any objections; the couple even used the house and land continuously, publicly, and stably, have implemented procedures to declare their land use rights, and have been granted the certificate of land use rights, then it must be determined that the land use rights are gifted to the couple.

**Applicable provisions of laws relating to the case law:**

Article 14 of the Law on Marriage and Family 1986;

Article 242 of the Civil Code 1995;

Article 176.2 of the Civil Code 1995.

**Key words of the case law:**

*“Divorce”, “Common property of husband and wife”, “Gift of property”, “Bases for establishing ownership rights”, “Establishing ownership rights pursuant to agreement”.*

**CONTENTS OF THE CASE**

Ms. Do Thi Hong and Mr. Pham Gia Nam married in 1992 and registered their marriage at the People’s Committee of Van Tao Commune, Thuong Tin District, Hanoi. After living together for a period of time, there arose conflict between the couple, causing them to live separately since September 2008. On 18 April 2009, Ms. Hong initiated a lawsuit to request a divorce from Mr. Nam and Mr. Nam consented.

With regard to their children: the couple had two children who were Pham Gia Khang (born in 1992) and Pham Huong Giang (born in 2000). Both Ms. Hong and Mr. Nam wanted to raise the two children alone and did not request any support from the other. Khang wished to live with his father Mr. Nam while Giang wanted to live with her mother Ms. Hong.

With regard to the property: During their time living together, the couple built a two-story house in 2002 (additionally, an attic to relieve the heat was built in 2005). The house was built on a land lot of 80m2 in Van Hoa Village, Van Tao Commune, Thuong Tin District. The couple agreed that the house was their common property. They failed to agree with respect to the land.

According to Ms. Hong: The land belonged to the family of Mr. Pham Gia Phac (Mr. Nam’s natural father), whom was granted in 1992 for resettlement. Later, Mr. Phac and his family met and announced that they were gifting to the couple the land but no documents were made. In 2001, Mr. Phac instructed and Mr. Nam implemented procedures for the red book and, thus, was granted the certificate of land use rights under Mr. Pham Gia Nam’s name as the representative of the household. Therefore, such land use rights are the common property of the couple.

Ms. Hong requested that she be entitled to continue using the house and the land and in return, she was willing to pay 1/2 of the value of the land use rights and assets attached to the land to Mr. Nam in accordance with the price determined by the Valuation Council.

According to Mr. Nam: This land lot was granted to his parents in 1992. His parents only allowed the couple to temporarily live there and did not gift them the land use rights because his family had many children. In 2001, he declared and implemented procedures for land documents by himself without his family’s knowledge. His opinion is that the land is to be returned to Mr. Phac.

According to Mr. Phac and Ms. Tai (Nam’s parents): Mr. Phac was originally granted the land by the People's Committee of Van Tao Commune in 1992. He built a Level 4 house on that land. In 1993, his family allowed Mr. Nam and Ms. Hong to live in that house but did not to gift the land to the couple because Ms. Tai had been paralyzed for 15 years now. Mr. Phac and Mr. On (Mr. Nam’s younger brother) was caring for her and Mr. Phac’s family wished to leave the land to Mr. On because Mr. On did not have his own house. When Mr. Phac’s family was granted the land, there were only four members in the family consisting of Mr. Phac, Ms. Tai, Ms. Lu, and Mr. On (Mr. Nam had already moved away). Only when Ms. Hong requested for divorce, Mr. Phac’s family became aware that Mr. Nam had obtained the land documents under his name in 2001. Thus, Mr. Phac and Ms. Tai requested Mr. Nam and Ms. Hong return the land to them.

Besides, during the settlement process of the case, Ms. Hong further stated that Mr. Nam had been granted by the Army Officer [University] No. 1 of a land lot with area of 125m2 in Thach That District. At first, she requested to divide this land lot, but later she withdrew that request.

In terms of loans: According to Ms. Hong, she and her husband received a loan from Ms. Hoang Thi Chu (Ms. Hong’s mother) of 0.75 tael of gold 9999, a loan from Ms. Do Thi Ngoc Ha (Ms. Hong’s older sister) of 1 tael of gold 9999, a loan from Mr. Bui Van Dap of

VND150,000,000 with an interest rate of 1.25%/month. All of these loans were made without any written agreement. Ms. Hong requested Mr. Nam to repay those loans together with her.

According to Mr. Nam, the couple only owed a loan to Ms. Chu of 0.75 tael of gold, for which he had repaid her an amount of VND13,875,000 (equivalent to 0.375 tael of gold). He is not aware of any other loans and he does not agree to repay them as requested by Ms. Hong.

On 3 November 2010, the Valuation Council valued the property as follows:

Land use rights: 80m2 x VND22,000,000/m2 = VND1,760,000,000.

House: VND475,865,000. The total value of the property is: VND2,235,865,000.

In First-instance Judgment No. 03/2011/HNGD-ST dated 17 May 2011, the People’s Court of Thuong Tin District, Hanoi finds that:

In terms of husband and wife relationship: Ms. Do Thi Hong was entitled to divorce Mr. Pham Gia Nam.

In terms of their children: Assigning Pham Huong Giang, born on 14 August 2000, to Ms. Hong to raise until adulthood. Temporarily suspending the child support obligations of Mr. Nam until Ms. Hong requests child support. Mr. Nam has the right to visit their children, which no one can prevent.

Common property and contributions: Confirming that the two-story house with one attic and all other construction works on Land Lot No. 63, Cadastral Map No. 5 in Van Hoa Village, Van Tao Commune, Thuong Tin District, Hanoi were recognized as the common property of Ms. Do Thi Hong and Mr. Pham Gia Nam. Such common property had the value of VND475,865,000.

Confirming that the land use rights of 80m2 of the Land Lot No. 63, Cadastral Map No. 5 in Van Hoa Village, Van Tao Commune, Thuong Tin District, Hanoi were recognized belonging to Mr. Pham Gia Phac’s household. Compelling Ms. Do Thi Hong and Mr. Pham Gia Nam to return to Mr. Phac’s household the land use rights of 80m2 of Land Lot No. 63, Cadastral Map No. 5 in Van Hoa Village, Van Tao Commune, Thuong Tin District, Hanoi. Assigning Mr. Pham Gia Phac’s household the ownership rights of all assets on that land lot including the two-story house and all other constructions works on the land. Compelling Mr. Pham Gia Phac to pay both Ms. Do Thi Hong and Mr. Pham Gia Nam, each of them an amount of VND237,932,500.

Recommending that the People’s Committee of Thuong Tin District to revoke Certificate of Land Use Rights No. U060645 issued on 21 December 2001 under the name of Mr. Pham Gia Nam in order to implement procedures to grant to Mr. Pham Gia Phac when Mr. Phac requests.

Recognizing Mr. Pham Gia Nam’s voluntary support to Ms. Do Thi Hong of an amount of VND800,000.000.

Compelling Ms. Do Thi Hong to pay Mr. Bui Van Dap an amount of VND179,820,000.

Rejecting all other requests of Ms. Do Thi Hong.

In addition, the first-instance court ruled on court fees and the right to appeal.

On 19 May 2011, Ms. Hong submitted an appeal against the entire first-instance judgment.

On 24 May 2011, Mr. Nam submitted an appeal disagreeing with the support for Ms. Hong of an amount of VND800,000,000 to find a new home. However, at the appellate hearing, Mr. Nam withdrew his request for appeal.

In Appellate Judgment No. 105/2011/LHPT dated 30 August 2011 and 6 September 2011, the People’s Court of Hanoi ruled to:

- Uphold First-instance Marriage and Family Judgment No. 03/2011/HNGD-ST dated 17 May 2011 of the People’s Court of Thuong Tin District, Hanoi (as mentioned above).

In addition, the Appellate Court ruled on the court fees.

After the appellate hearing, Ms. Hong and Ms. Hoang Thi Chu submitted a petition to propose cassation procedures for the aforementioned appellate judgment.

In Protest Decision No. 05/2013/KN-HNGD-LD dated 3 January 2013, the Chief Justice of the Supreme People’s Court protested against Appellate Marriage and Family Judgment No. 105/2011/LHPT dated 30 August 2011 and 6 September 2011 of People’s Court of Hanoi, proposing that the civil court of the Supreme People’s Court to conduct cassation procedures in the direction: setting aside the appellate marriage and family judgment mentioned above and First-instance Marriage and Family Judgment No. 03/2011/HNGD-ST dated 17 May 2011 of the People’s Court of Thuong Tin District, Hanoi regarding properties; transferring the case to the People's Court of Thuong Tin District, Hanoi to reconduct the first-instance procedures in accordance with the law.

In the cassation hearing, the representative of the Supreme People’s Procuracy opined that with respect to the dispute, when the resettlement land was granted to Mr. Phac’s family, Mr. Nam was not there. Since there was no evidence that Mr. Nam’s parents gifted the land use rights to Mr. Nam and his wife, the land still belonged to Mr. Phac’s family. The determination by the two levels of courts that the land belonged to the parents of Mr. Nam has basis. There was a mistake in the loan from Ms. Chu. Therefore, it is recommended that the Council of Adjudicators do not accept the protest of the Chief Justice of the Supreme People’s Court.

**The Cassation Council of the Civil Court of the Supreme People’s Court finds:**

In terms of the marriage relationship and children, the lower courts had already resolved. The parties had no further complaints.

In terms of property: The property disputed by the parties is a land area of 80m2 in Van Hoa Village, Van Tao Commune, Thuong Tin District, Hanoi, under the name of Mr. Pham Gia Nam.

The documents demonstrated that Mr. Phac was originally granted the land by the People's Committee of Van Tao Commune in 1992. Pursuant to the minutes on the handover of the land from the People's Committee of the commune to Mr. Phac, Ms. Hong had already married Mr. Nam by the time that the minutes was made. However, as verified by the First– instance Court of Van Tao Commune in Thuong Tin District on the procedures for granting land, Van Tao Commune had a policy of granting land for resettlement since 1991. Even though at the time when the procedures for granting land Mr. Phac’s family had only four members living together including Mr. Phac, Ms. Tai, Ms. Lu, Mr. On (Mr. Nam was in the army and had not returned), the grant of land for resettlement was granted to households with many members, granted to Mr. Phac, his wife, and children. Therefore, Mr. Nam was also among the subjects to be granted the land. After receiving the land, Mr. Phac and his wife built a Level 4 house. In 1993, Mr. Phac’s family allowed Mr. Nam and Ms. Hong to live on that land area and they were the persons who managed and used the land continuously since then.

Ms. Hong opined that Mr. Phac’s family had announced that they were gifting the couple the land area mentioned above, but Mr. Nam and Mr. Phac asserted that the family did not gift it to the couple.

Considering: As verified by the People's Committee of Van Tao Commune, in 2001, the Commune organized the households in the commune to register for issuance of certificates of land use rights and the households made declarations at the headquarters of the commune (BL 103). All households in the commune were aware of the policy for the land declaration. Mr. Phac was the owner of the land but he did not go make the declaration. Mr. Nam, who was at that time living on that land and also the person who went to declare and implement procedures of issuance of the certificate. On 21 December 2001, Mr. Nam was granted Certificate of Land Use Rights No. U060645 under his name being Pham Gia Nam. The couple had already built the two-story permanent house in 2002 and in 2005, they built an additional attic as floor 3. Mr. Phac and other family members were aware of the construction by Mr. Nam and Ms. Hong, but no one objected. Thus, from when the certificate was granted (in 2001) until the time Mr. Nam and Ms. Hong divorced (in 2009), Mr. Phac’s family did not complain regarding the land grant and house construction. This fact demonstrates the intention of Mr. Phac’s family to gift the land area mentioned above to Mr. Nam and Ms. Hong. Therefore, Mr. Phac’s and Mr. Nam’s testimonies that Mr. Nam declared the land documents without Mr. Phac’s knowledge has no basis for acceptance. There is a basis to determine that Ms. Hong’s testimony that Mr. Phac’s family gifted the land area mentioned above to the couple has basis.

Therefore, the rulings of the lower courts that, Mr. Phac had no knowledge of Mr. Nam’s implementation of procedures the land documents, that Ms. Hong’s testimony on the her husband’s family gifting the property had no basis in order to determine that the land area of 80m2 in Van Hoa Village, Van Tao Commune, Thuong Tin District, Hanoi was the property of Mr. Pham Gia Phac’s household, and concurrently, Mr. Nam and Ms. Hong were compelled to return the land to Mr. Phac’s family were incorrect. The above-mentioned land under dispute should have been determined as the common property of Mr. Nam and Ms. Hong. When dividing it, Mr. Nam’s greater contributions should have been considered in order to divide based on each party’s contributions. The division for the parties should be based on each party’s need for residence to guarantee the rights and interests of the involved parties.

In terms of the complaints of Ms. Hoang Thi Chu (Ms. Hong’s natural mother), whereas: On 7 May 2011 (before the first-instance hearing), Ms. Chu submitted a petition to the People's Court of Thuong Tin District with the content as follows: “*Today is 7 May 2011, I have received an amount repaid Ms. Hong and Mr. Nam. I no longer request the court to resolve this*”. The first–instance court declared that Ms. Chu’s advance court fee of VND200,000 was to be submitted to the treasury but, did not declare the suspension of the settlement of Ms. Chu’s request concerning the loan, which were not in accordance with the regulation specified under Article 192.1(dd) of the Civil Procedure Code. However, after the first– instance hearing, Ms. Chu did not submit an appeal and the Procuracy did not submit a protest. Therefore, based on Article 263 of the Civil Procedure Code, the Appellate Hearing Council only reviewed the parts of the first–instance judgments, which are appealed, protested against, or related to the review of the appealed or protested contents, and the protest of the Chief Justice of the Supreme People’s Court against the aforesaid content was unnecessary.

Therefore, the Cassation Council of the civil court of the Supreme People’s Court finds that the protest by the Chief Justice of the Supreme People’s Court about the property in dispute, particularly a land lot of 80m2 in Van Hoa Village, Van Tao Commune, Thuong Tin District, Hanoi), had basis for acceptance.

In light of the aforesaid reasons, pursuant to Article 291.2, Article 297.3 and Article 299 of the Civil Procedure Code

**RULES**

To set aside Appellate Marriage and Family Judgment No. 105/2011/LH-PT dated 30 August 2011 and 6 September 2011 of the People's Court of Hanoi and Firstinstance Marriage and Family Judgment No. 3/2011/HNGDST dated 17 May 2011 of Thuong Tin People's Court in Hanoi in respect of the parts concerning the property relations; the divorce case between the plaintiff Ms. Do Thi Hong and the defendant Mr. Pham Gia Nam has been settled;

To transfer the case to People's Court of Thuong Tin District, Hanoi for conducting first-instance procedures in accordance with the law.

**CONTENTS OF THE CASE LAW**

*“As verified by the People's Committee of Van Tao Commune, in 2001, the Commune organized the households in the commune to register for issuance of certificates of land use rights and the households made declarations at the headquarters of the commune (BL 103). All households in the commune were aware of the policy for the land declaration. Mr. Phac was the owner of the land but he did not go make the declaration. Mr. Nam, who was at that time living on that land and also the person who went to declare and implement procedures of issuance of the certificate. On 21 December 2001, Mr. Nam was granted Certificate of Land Use Rights No. U060645 under his name being Pham Gia Nam. The couple had already built the two-story permanent house in 2002 and in 2005, they built an additional attic as floor 3.*

*Mr. Phac and other family members were aware of the construction by Mr. Nam and Ms. Hong, but no one objected. Thus, from when the certificate was granted (in 2001) until the time Mr. Nam and Ms. Hong divorced (in 2009), Mr. Phac’s family did not complain regarding the land grant and house construction. This fact demonstrates the intention of Mr. Phac’s family to gift the land area mentioned above to Mr. Nam and Ms. Hong. Therefore, Mr. Phac’s and Mr. Nam’s testimonies that Mr. Nam declared the land documents without Mr. Phac’s knowledge has no basis for acceptance. There is a basis to determine that Ms. Hong’s testimony that Mr. Phac’s family gifted the land area mentioned above to the couple has basis.*

*Therefore, the rulings of the lower courts that, Mr. Phac had no knowledge of Mr. Nam’s implementation of procedures the land documents, that Ms. Hong’s testimony on the her husband’s family gifting the property had no basis in order to determine that the land area of 80m2 in Van Hoa Village, Van Tao Commune, Thuong Tin District, Hanoi was the property of Mr. Pham Gia Phac’s household, and concurrently, Mr. Nam and Ms. Hong were compelled to return the land to Mr. Phac’s family were incorrect. The above-mentioned land under dispute should have been determined as the common property of Mr. Nam and Ms. Hong. When dividing it, Mr. Nam’s greater contributions should have been considered in order to divide based on each party’s contributions. The division for the parties should be based on each party’s need for residence to guarantee the rights and interests of the involved parties”.*