3. Family Law

A case in which it was held that a *de facto* spouse is not allowed to claim a distribution of property from the successors to the other *de facto* spouse.

Decision by the Third Civil Division of the Osaka High Court on February 20, 1992. Case No. (*ra*) 152 and 167 of 1992. *Kōkoku* appeals for distribution of property and for dismissal of demands for distribution. 45-1 *Kasai Geppō* 120.

[Reference: Civil Code, Article 768.]

[Facts]

A (male, deceased January 1, 1988) married B on September 7, 1954, and had children Y_1 and Y_2 (respondents, *kōkoku* appellants). Around 1966, A met X_1 (applicant, *kōkoku* appellant), and he had intimate relations with her. On June 25, 1968, Y_3 (respondent, *kōkoku* appellant), the child of A and X_1, was born. A acknowledged Y_3 as his child on August 13, 1968. A rented an apartment for X_1, which he frequently visited.

B suffered from emotional instability, and left the marital home together with Y_1 and Y_2 in June, 1980. A and B divorced by agreement on December 2, 1982.

X_2 (applicant, *kōkoku* respondent) was widowed, and earned a living by running a restaurant. A went to the restaurant as a customer around October 1980. In November, A proposed to X_2, saying that he wanted to marry her and that he would divorce his wife. X_2 accepted his proposal and introduced him to her two children. In February, 1981, X_2 began to visit A and his house, and in December, 1982 when A divorced they began to cohabit in X_2's house with her two children. Later, although A lived with X_1 and Y_3 for a time, A bought a house with X_2 jointly in December, 1985, and he began to cohabit with X_2 again.

In July, 1987, A was hospitalized suffering from cancer. Although A lived with X_1 for a short period before entering the hospital and

again after his discharge, he later returned to X_2. When he was rehospitalized in November, X_2 attended him, staying overnight at the hospital every day. X_1 did not go to see him there, because she thought that A would be disturbed if she were to come across X_2 at the hospital.

Based on the above facts, X_2 filed a suit claiming 100 million yen as distribution of property from Y_1, Y_2 and Y_3, A's successors. X_1 also filed a suit, claiming 25 million yen as distribution of property from Y_1 and Y_2.

Although the original court dismissed X_1's application because she was not A's *de facto* wife, it ordered a distribution of 34 million yen to X_2 because she was the *de facto* wife (decision by the Osaka Family Court on March 25, 1991, Case No. (*ka*) 5088 of 1988, and (*ka*) 5569 of 1990). X_1, Y_1, Y_2, and Y_3 appealed.

[Opinions of the Court]

Original decision reversed. The application of the claim for distribution by X_2 dismissed. *Kōkoku* appeal by X_1 dismissed.

If *de facto* spouses dissolve their relationship while they are living, distribution of their property should be conducted as in the cases of legally married spouses. Doing so treats both spouses equally and provides a guarantee to the financially less well-off spouse of security for some time following the dissolution of the relationship.

Under the present law, when a marriage, including *de facto* marriage, is dissolved by divorce, marital property of the husband and wife should be distributed through the system of distribution of property. On the other hand, if the marriage is dissolved through the death of one of the spouses, their property should be settled not through the system of distribution of property but through the system of succession. The provisions of the law concerning succession do not apply to *de facto* spouses. If the law concerning distribution of property could apply to *de facto* spouses in cases of death as well as in divorce, the present systems of divorce law and succession law would be thrown into a state of confusion. Therefore, it is improper that the system of distribution of property should be applied to *de facto* spouses in the case of death.

[Comment]

In Japan, the relationship of *de facto* marriage (known as *naien*) is the relationship of a couple who live together with intent to marry and who, in spite of social recognition as husband and wife, are not recognized to be spouses in law because of the failure to register the marriage. Although the Civil Code has no provisions concerning *naien*, the courts have long protected *naien* relationships.

In the 1910's the courts construed the essence of *naien* as a promise to marry (decisions by the Great Court of Judicature on January 26, 1915, 21 *Minroku* 49, and by the Great Court of Judicature on March 21, 1919, 25 *Minroku* 492). But a view which regarded the essence of *naien* as a special relationship similar to marriage developed and came to be widely accepted in the 1930's, and was recognized by the Supreme Court (decision by the Supreme Court on April 11, 1958, 12 *Minshū* 789).

As a result of the essence of *naien* being considered to be a relationship similar to marriage, the extent to which the provisions of the Civil Code concerning the effects of marriage should be applied to *naien* couples has been problematic. Generally, among the provisions concerning the effects of marriage, those effects founded upon the act of the couple living together and also those effects which do not involve third parties are applied to *naien* couples as married couples. On the other hand, provisions concerning effects founded upon registration as well as those which involve third parties are not applied to *naien* couples. That is, the provisions which application has been recognized are as follows: the duties of cohabitation and cooperation (Article 752); the duties of remaining chaste (interpretation based on Article 770(1)); the rights of avoiding contracts between husband and wife (Article 754); the duty of sharing the expenses of married life (Article 760); joint liability concerning daily household matters (Article 761); the statutory property system and the contractual property system (Articles 755 to 759), and so on. On the other hand, provisions which application has been denied are as follows: the system of the common surname of husband and wife (Article 750); the spouse's right of succession (Article 890); the system of

attaining majority by marriage (Article 753), and so on.

At one time, there was a dispute whether the provision of distribution of property (Article 768) was applied in the case of dissolution of a *naien* relationship. It was considered that because *naien* spouses can not succeed one another, they can not claim a distribution of property. At the present time, however, it is generally considered that a *naien* spouse can claim a distribution of property upon dissolution of the relationship, and the courts have also taken this position (for example, decisions by the Hiroshima High Court on June 19, 1963, 340 *Hanrei Jihō* 38, and by the Osaka High Court on July 6, 1965, 17-12 *Kasai Geppō* 128).

It then came into dispute whether the distribution of property could be applied in the case of dissolution of a *naien* relationship due to the death of one of the spouses. Several years ago, when a family court recognized application in such a case (decision by the Osaka Family Court on March 23, 1983, 36-6 *Kasai Geppō* 51), this issue attracted considerable attention. Some support this decision, while others criticize it as being inapplicable to other cases since there were special conditions in that case. In contrast to this, the case reported above held that the law concerning the distribution of property should not be applied to *naien* relationships on the death of one of the spouses. As this is a decision by a high court, it should be scrutinized. The Tokyo District Court also made a similar decision just one month earlier (January 31, 1992, 793 *Hanrei Taimuzu* 223).

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