ployer of Y etc. under to article 715 of the Civil Code.

**Editorial Note:**

In earlier case law in Japan, a doctor's duty to inform his patient has been recognized. Nevertheless, the reason why this decision is estimated to be epoch-making is, however the facts of this case are rather particular: ① the Supreme Court held that the patients' right to decide to refuse a blood transfusion on grounds of religious belief is respected as a content of a patient's right of personality, ② for the patient to exercise this right it demands doctors to inform a patient about the Hospital's policy about a blood transfusion, and ③ it grants damages to the patient who refused a blood transfusion due to the doctors' omission of information. Yet there is a difference of opinion about whether or not the rationale of this decision applies when the religious beliefs of a patient are not in question. And then the Supreme Court does not declare that this patient's right is always superior to the doctors' duty to preserve the life of a patient and their discretion, but presumes this right should be harmonized with this duty and the discretion of doctors in concrete circumstances.

YASUHIRO AKIYAMA
KAZUTOSHI OHYAMA

## 4. Family Law

**Supreme Court 1st P.B. March 10, 2000**
Kono v. Otsuyama
54(3) MINSHŪ 1040, 52(10) KASAI GEPPŌ 81, 1716 HANREI JIHŌ 60, 1037 HANREI TAIMUZU 107

When a *de facto* marriage is terminated by the death of either partner of such a marriage, Article 768 of the Civil Code, providing the distribution of property, cannot be applied.

**Reference:**

Civil Code, Articles 768

**Facts:**

A (male) was married with B (female) in 1947, and they had two children, Y1 and Y2 (daughters).

In 1971, X (*de facto wife*) met A, and she began to associate with A, knowing that A was already married. Two months later, A began to visit X's apartment. After B's death in 1987, A came to stay in X's apartment one or two days in a week, and thereafter, his time spent there gradually increased.

While A was often in hospital for treatment for pneumonia from 1985 until his death in 1997, X had gone to the hospital almost every day during the periods of hospitalization to take care of him. Although A often entered hospital since 1994, X never slacked in her care for him. By that time, A had stayed in X's house longer than in the house in which Y1 and her family had lived.

X had received a certain amount of aid for her living expenses from A until his death and once was given 3 million yen by him. Also, although X insisted that A either divide his property with her or consent to a legal marriage, A would not agree to a registered marriage, but stated that he would buy a house and give it to her.

At A's death, X attended his funeral just like other relatives, and neighbors gave their sympathy to X that she had lost a husband.

After that, X insisted that Y1 and Y2, who inherited A's estates, pay 10 million yen to her, asserting that a *de facto* marriage had existed between A and X, and when that marriage was terminated by A's death, Article 768 of the Civil Code regarding the distribution of property should be applied just as in a divorce.

Takamatsu Family Court agreed with X's claim and ordered Y1 and Y2 each to pay 5 million yen to her. Y1 and Y2 made an immediate Kōkoku-appeal against this adjudication. Takamatsu High Court reversed the adjudication, dismissed X's application and gave a leave of Kōkoku-appeal to the Supreme Court.

**Opinion:**

*Kōkoku-appeal dismissed.*

When a *de facto* marriage is dissolved by the death of either partner, we cannot apply Article 768 of the Civil Code as to the distribution of property in a divorce of legal spouses. With respect to the distribution of matrimonial property and financial support upon the dissolution of a legal marriage, the Civil Code distinguishes between dissolution by a divorce and that by the death of either spouse. The Code provides for the distribution of property for the former and the settlement of property by succession for the later. In this regard, although this article of the Civil Code can apply to the dissolution of a *de facto* marriage by a breakdown (divorce), it is not anticipated in the Code to open the door to accept the division of an estate involved in a succession where the dissolution of a *de facto* marriage occurs by a death. This brings an alien moment into the structure of the settlement of an estate by succession. In addition, there is no room to rule that the deceased's obligation to support the other partner can be inherited as a duty attached to the estate. Thus, we have to say that a living *de facto* partner cannot have the right to claim against the deceased's successors any inheritance in distribution of his/her deceased partner's property including factors of the distribution of matrimonial property and of maintenance.

**Editorial Note:**

The Civil Code in Japan requires that marriages become effective by registration (Art. 739) and there are no provisions regarding *de facto* marriages, so called "*Naien*", in the Code. Although a *de facto* marriage has no clear definition, in general, it is considered as a relationship between two sexes without any registration of such, in which they have intentions to marry and live together. Nevertheless, protection to a *de facto* marriage has a long-standing support by the courts in this country. At present, the courts have allowed *de facto* marriage to assume all the provisions applied to a legal marriage, except for effects that suppose a registration of marriage. However, even such precedents did not allow *de facto* spouses to have the right of succession from

each other.

In a legal marriage, when the dissolution is by a divorce, matrimonial property will be divided according to Article 768 of the Civil Code as to the distribution of property upon a divorce, and, when the dissolution is by the death of either spouse, all matrimonial property will be inherited according to the system of succession. In a *de facto* marriages as well, the courts have allowed the application of Article 768, so that the *de facto* spouse can receive the distribution of property as long as both spouses are still living upon the dissolution. However, when the dissolution of a *de facto* marriage is by a death, the *de facto* spouse does not have a right of succession, with all estates inherited by other successors, and nothing being apportioned to the spouse. Yet, this seems unfair if the surviving spouse has contributed to increasing their matrimonial properties if he or she has depended on the deceased financially. In addition, it is unreasonable that a spouse cannot receive any financial provision at all when the dissolution is by death, though he or she can receive it when the dissolution is by a separation.

Some authors have insisted that Article 768 should be applied in the case of the dissolution of *de facto* marriages by death too, in order to ensure distribution of the matrimonial property and a guaranty of living expenses for a surviving spouse. Others have denied the application of the Article and insisted that protection of a living spouse should be ensured by way of applying the general principles of the property law of the Civil Code, particularly a partition of property in co-ownership or constructing a contract of labor or mandate.

Those who deny this application are based on the point that to allow the application would break the structure of the Civil Code. In other words, a provision of Article 768 should be applied in the dissolution of marriage during the course of their lives. But, if the application were allowed in the dissolution of a *de facto* marriage due to a death, it would be necessary to apply it also in the case of the dissolution of a legal marriage based on death as well, so that the succession system might be confused. By contrast, those who approve its application are based on the inequality of denying it. They insist that, even if the Article can be applied on the ground that a *de facto* spouse does not have a right of succession, there is no reason why it also have to

be applied to the dissolution of a legal marriage by a death.

Furthermore, at present, there is also the view that, focusing on a variety of extra-marital relationships, a stable unmarried cohabitation as well as a *de facto* marriage, or quasi-marriage, should be allowed application of the Article, and parties who request protection under the general principal of property law should be respected in their choice.

In prior rulings of lower courts, many decisions have relied upon the general principles of property law and been hesitant to apply this provision. There have only been three decisions upheld that applied it.

This decision is the first such case in the Supreme Court and remarkable in the point that the Supreme Court denied the application of the provision and unified the decisions of the lower courts.

MASAYUKI TANAMURA
HIROSHI NARUSAWA

# 5. Criminal Law and Procedure

### 1. Supreme Court, 2nd P.B., March 27, 2000

Akiyoshi v. Japan

54 (3) KEISHŪ 839, 1715 HANREI JIHŌ 171, 1035 HANREI TAIMUZU 113

The defendant who filed a false application for postal life insurance, concealing the fact that applicants had been placed in hospital for treatment, and had already made contracts which reached the amount legally set as an upper limit, was guilty of fraud.

**Reference:**

Penal Code (*Keihō*) Art. 246, para. 1, The Law on Postal Life Insurance (*Kan'iseimeihokenhō*) Art. 1

**Facts:**

The defendant, Koji (Takaharu) Akiyoshi (hereinafter X), worked