

## 4. Family Law

### **X v. Commissioner of Social Insurance Agency**

Tokyo District Court, June 22, 2004

Case No. (*gyou-u*) 346 of 2002

1162 HANREI TAIMUZU 140; 1864 HANREI JIHO 92

#### **Summary:**

A niece who had had a *de facto* marriage with her uncle for approximately 42 years is eligible for a survivor pension on the grounds that (a) they had established and maintained a stable relationship; (b) their marriage had been accepted by their community; (c) the purpose of the survivor pension, which guarantees survivors' living after the insured's death, differs from that of Civil Code Art. 734, which protects orderly marriage by prohibiting incest. Thus the Social Insurance Agency's rejection of the niece's application for a survivor pension shall be revoked.

#### **Reference:**

Civil Code Article 734, Paragraph 1; Employees' Pension Insurance Act, Article 3, Paragraph 2

#### **Facts:**

X is the daughter of A's elder brother. A got married to C in 1955 and C gave birth to a girl, B. Soon after C suffered from schizophrenia and went back to her parents' place in 1956, leaving B at A's house. A's night duty and the workload of A's parents had prevented them from taking care of B. X, A's niece, used to visit A's house and take care of B when she had a long vacation, and B became very fond of X. Under these circumstances, D (X's grandfather), who was the head of family, suggested a marriage between X and A. X's relatives, including her parents, agreed to the suggestion. In addition, there existed marriages between relatives such as first cousins in X's community at that time. X, who felt compassion for B, agreed to get married to A. X and A entered into a *de facto* marriage in 1958. They went on their honeymoon, and their relatives

held a celebration party. Meanwhile A and C got divorced in 1960. After that, A submitted a marriage certificate to the office in order to get such social services as the tax reduction arising from the status of spouse, a tax exemption for dependent, a subsidy for maternity expenses and so forth. Furthermore, X had been listed on A's health insurance card as a spouse as well as on a certificate for tax deducted at source. Their *de facto* marriage continued until A's death in 2000.

After A's death, X filed application for a survivor pension to Y (Commissioner of Social Insurance Agency, hereinafter referred to "SIA.") Y rejected X's application on the grounds that X and A's marriage was a case of incest prohibited by Civil Code Art. 734, therefore, X was not eligible for the pension. X brought an action for the revocation of Y's rejection.

### **Opinion:**

#### *Affirmed.*

In deciding whether or not "an individual can be considered as a spouse of a lawful marriage" (Employees' Pension Insurance Act Art. 3, Para. 2, hereinafter referred to "EPIA,") Civil Code Art. 734, which prohibits incestuous marriage, does not have to be applied because the purpose of the survivor pension is to guarantee living of the survivors after the death of the insured who supported them (EPIA Art. 59) is different from that of Civil Code Art. 734, which has the aim to protect orderly marriage. Even though the survivor pension is awarded to the *de facto* spouse of an incestuous marriage, it results from the purpose of the survivor pension mentioned above, and it does not lead to the state's recognition of an incestuous marriage prohibited by the Civil Code. Furthermore, we cannot deny the fact that the survivor pension is based on employees' distribution and has the aspect to make provisions for their old age or the worst. Thus, in deciding the eligibility for a survivor pension, we should contemplate if there is enough reason to deny the award of the pension in terms of public interest, though the insured deceased had paid premiums.

For the reasons set above, in deciding whether or not "an individual who can be considered as a spouse of a lawful marriage" in EPIA Art. 3, Para. 2, it is a wrong construction to interpret that the *de facto* spouse of

an incestuous marriages does not fall within EPIA Art. 3, Para. 2 at all, on the only ground that an incestuous marriage is contrary to moral or ethics. Rather, we should determine the eligibility of a *de facto* spouse of an incestuous marriage after considering the details of the relationship, the circumstances, and how their relationship had been accepted without reluctance by their community or common sense.

To be sure, X and As' marriage was between a niece and uncle contrary to Civil Code Art. 734. However, we could find the following facts; the degree of kinship of X and A was the most distant one that Civil Code Art. 734 prohibits; an unjust motive or circumstances were not found from their *de facto* marriage as they had entered into the *de facto* marriage on the decision of X's grandfather, who had compassion for A in serious trouble, and the agreement of their relatives; they had established a stable relationship for as long as 42 years; their *de facto* marriage had been accepted by their workspace or community without reluctance, rather, we could say they were recognized as husband and wife. Putting all these facts together, it is very difficult to say that it is contrary to public interest to award a survivor pension to X on the only ground that their marriage had been incest. Furthermore, their relationship had the same substantiality as lawful marriage, thus we hold X falls within an individual which EPIA Art. 3, Para. 2 provides.

### Editorial Note:

1. In Japan, a registration of marriage is a formal requirement for a valid marriage. So a *de facto* marriage which lacks registration is not granted any legal protection in principle. The case law and acts on social security, however, grant some protection to a *de facto* marriages which lacks registration to the same extent as lawful marriage as a quasi-marriage. (See EPIA Art. 3, Para. 2; Health Insurance Act Art. 1, Para. 2; Employee Accident Compensation Insurance Act Art. 16-2, Para. 1; Public Housing Act Art. 14 etc.) A legally protected *de facto* marriage requires the nonexistence of impediments to marriage i.e. marriage age (Civil Code Art. 731); a bigamous marriage (Civil Code Art. 732); an incestuous marriage (Civil Code Art. 734), a marriage between affinities (Civil Code Art. 735), a marriage between adopter and adoptee (Civil Code Art. 736) as well as intent to be husband and wife. With regard to

a bigamous *de facto* marriage, however, the case law grants protection to a *de facto* spouse only if the other lawful marriage of one of the *de facto* spouses has broken down and lost its substantiality as a marriage (for instance, Tokyo District Court, December 10, 1968, held that the *de facto* spouse of a bigamous marriage could claim compensation for wrongful death; Tokyo District Court, March 28, 1988, held that the *de facto* spouse of a bigamous marriage were eligible for a survivor pension). On the other hand, with regard to an incestuous marriage, the case law has not given any protection on the ground that it is contrary to ethics (for instance, Supreme Court 1st P.B., February 14, 1985, held that the *de facto* spouse of an incestuous marriage was not eligible for a survivor pension). The issue in this case is also whether or not the *de facto* spouse of an incestuous marriage is eligible for a survivor pension i.e. the spouse falls within “an individual who can be considered as a spouse of a lawful marriage” in EPIA Art. 3, Para. 2.

2. EPIA Art. 3, Para. 2 grants a survivor pension to a *de facto* spouse by providing that “in this act, the terms of ‘spouse,’ ‘husband,’ ‘wife’ includes an individual who can be considered as a spouse of a lawful marriage though his or her marriage lacks registration.” According to SIA’s internal notice, SIA recognizes a *de facto* marriage to be eligible for the pension when (1) spouses agreed that they would establish a relationship and cohabit as husband and wife; (2) they actually had a relationship and cohabitation as husband and wife in terms of common sense. To the contrary, when a *de facto* marriage falls within one of impediments to marriage i.e. incestuous marriage (Civil Code Art. 734), marriage between affinities (Civil Code Art. 735), or marriage between adopter and adoptee (Civil Code Art. 736), SIA does not so.

On this issue, the decision held that in deciding whether or not “an individual can be considered as a spouse of a lawful marriage” in EPIA Art. 3, Para. 2, there was no necessity to apply Civil Code Art. 734 because the purpose of a survivor pension, guarantees living of the survivors supported by the insured deceased, was different from that of Civil Code Art. 734, which prohibits incest to maintain orderly marriage. The decision also held that even though a *de facto* spouse of an incestuous marriage were to be awarded the pension, it would result from the purpose of the survivor pension, and it did not mean that state recognized an

incestuous marriage. What underlies in part the decision seems to be the fact that the insured deceased had actually paid considerable premium, so there should be enough reason to deny the eligibility for a survivor pension in terms of public interest. The decision added that in determining whether an incestuous *de facto* marriage is eligible for a survivor pension, elements such as the details of the relationship, the circumstances, and how their relationship had been accepted without reluctance by their community or common sense should be considered.

3. As mentioned above, an incestuous *de facto* marriage has been excluded from legal protection such as the award of a survivor pension without exception on the ground that it is contrary to ethics. It is remarkable that the decision distinguishes the concept of a spouse in EPIA from that in Civil Code from the point of the purpose of each legislation. The decision has much significance in respect of admitting the possibility that a *de facto* spouse of an incestuous marriage could be awarded a survivor pension according to the individual circumstances of the marriage.

PS: It was reported that on *koso* appeal, Tokyo High Court reversed this decision and dismissed X's claim on May 31, 2005.

## 5. Law of Civil Procedure and Bankruptcy

**X v. Y**

Supreme Court 3rd P.B., July 6, 2004

Case No. (*jyu*) 1153 of 2003

58 (5) MINSHU 185

### Summary:

When co-heirs sue for confirmation that another co-heir does not have the position of heir with regard to the inheritance, they must sue in the form of inherent necessary joint litigation (*Koyuhitsuyoteki-kyodososho*).