

of dealing records necessary for the exercise of the right of the debtor, in spite of plural claims.

4. Family Law

X v. The Commissioner of the Social Insurance Agency¹

Tokyo High Court, May 31, 2005

Case No. (*gyo-ko*) 241 of 2004

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Summary:

A niece who had had a *de facto* marriage with her uncle, one of the prohibited degrees, for approximately 42 years is not eligible for a survivor pension on the grounds that (a) the Employees' Pension Insurance Act Art. 3(2) does not intend to grant eligibility to a spouse of a *de facto* marriage contrary to orderly marriage under Civil Code; (b) the prohibited degrees under Civil Code Art. 734(1) is regarded as offending the public interest, and even the flight of time can by no means cure this impediment to marriage; (c) the Employees' Pension Insurance Act Art. 3(2), granting eligibility to a spouse of a *de facto* marriage, shall not be construed as a provision which admits unlawful marriages with impediments to marriage; (d) the fact that their marriage was accepted by their community does not make it unnecessary to consider ethical problems; (e) the social insurance system is not a *quid pro quo*. Thus the District Court's decision which revoked the Social Insurance Agency's rejection of the niece's application for a survivor pension shall be reversed and the niece's claim be dismissed.

Reference:

Civil Code, Article 734, Paragraph 1; Employees' Pension Insurance Act, Article 3, Paragraph 2 and Article 59.

¹ The details of the District Court's decision have been introduced at 24 WASEDA BULLETIN OF COMPARATIVE LAW 84-88.

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. C went back to her parents' place in 1956, leaving B at A's house, due to her suffering from schizophrenia. The workload of A had prevented him from taking care of B. X used to visit A's house and take care of B, and B became very fond of X. Under these circumstances, D (X's grandfather), who was the head of the family, suggested a marriage between X and A. X's relatives, including her parents, agreed to the suggestion. In addition, there existed marriages between first cousins in X's community at that time. X, who felt compassion for B, agreed to the suggestion and they entered into a *de facto* marriage in 1958. Meanwhile A and C got divorced in 1960. After that, A submitted a marriage certificate to the office in order to get social services. Furthermore, X had been listed on such public records as A's health insurance card as a spouse. Their *de facto* marriage continued until A's death in 2000.

After A's death, X filed application for a survivor pension to the Commissioner of the Social Insurance Agency (hereinafter referred to "SIA.") SIA rejected X's application on the ground that X and A's marriage was a case of incest prohibited by Civil Code Art. 734(1). X brought an action for the revocation of SIA's rejection.

Tokyo District Court affirmed X's claim 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 the survivors' living after the insured's death, differs from that of Civil Code Art. 734, which protects orderly marriage by prohibiting incest.

SIA made a *koso* appeal.

Opinion:

Reversed and dismissed.

In deciding whether or not "an individual can be considered as same as a spouse of a lawful marriage," provided in the Employees' Pension Insurance Act Art. 3(2) (hereinafter referred to "EPIA,") we should consider the issue in terms of eligibility of the applicant's marriage, that is,

whether or not the marriage is contrary to public interest. Public interest is still of much importance and we are not allowed to ignore it. EPIA premises on a marriage which does not fall within one of the impediments to marriage in Civil Code.

EPIA covers a surviving spouse of a *de facto* marriage which can be considered as same as a lawful marriage under Civil Code, but it does not intend to grant eligibility to a spouse of a *de facto* marriage contrary to orderly marriage which does not fall within one of the impediments to marriage. From this point of view, the prohibited degrees under Civil Code Art. 734(1), a marriage between lineal consanguinities, or uncle and niece, is regarded to offend our public interest, and even the flight of time could by no means cure the impediment to marriage.

X argues that compared with the fact that EPIA Art. 3(2) grants eligibility to a spouse of a bigamous *de facto* marriage, it is not justified to exclude the spouse of an incestuous *de facto* marriage. The former, however, is eligible for a survivor pension only if the *de facto* marriage established a substantial relationship as husband and wife and the other registered marriage has fully broken down. In other words, the former's impediment to marriage, bigamy, is cured. On the contrary, the latter, an incest, can be by no means cured. In this sense, argued EPIA provision shall not be construed as a provision which permits unlawful marriages with impediments to marriage. The fact that their marriage was accepted by their community does not make it unnecessary to consider social and ethical problems, and it does not affect our conclusion.

X also argues that the facts as follows should be made a point: (a) the source of the survivor pension is based on the insured's distribution: it is a quid pro quo system like a private pension system; (b) the deceased insured's distribution implies his anticipation that the pension will be awarded to survivors. The national survivor pension, however, is not based only on the deceased insured's distribution, but also the employer's distribution and state-aid. In this sense, the national social insurance system is not a quid pro quo.

Thus we hold that X does not fall within an individual which EPIA Art. 3(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 enjoys no legal protection in principle². The case law and interim notice of social security authority, however, grants protection to a spouse of a bigamous *de facto* marriage only if the other registered marriage has fully broken down and lost its substantiality. To the contrary, the case law has given no protection to an incestuous *de facto* marriage on the ground that it is contrary to ethical or eugenic considerations. The issue in this case is 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 same as a spouse of a lawful marriage” in EPIA Art. 3(2).

2. EPIA Art. 3(2) grants a survivor pension to a *de facto* spouse by providing that “in this act, the terms of ‘spouse,’ ‘husband,’ and ‘wife’ include an individual who can be considered as same as a spouse of a lawful marriage though his or her marriage lacks registration.” According to SIA’s internal notice, SIA does not recognize a *de facto* marriage to be eligible for the pension when it falls within one of the impediments to marriage i.e. a marriage between lineal consanguinities, uncle and niece, or aunt and nephew (Civil Code Art. 734), a marriage between affinities (Art. 735), or a marriage between adopter and adoptee (Art. 736). A bigamous *de facto* marriage is eligible only if the other marriage is fully broken down.

In this regard, the District Court distinguished the concept of “spouse” in light of the difference between the purpose of Civil Code and that of EPIA. The District Court held that there was no necessity to apply Civil Code Art. 734 in deciding whether or not “an individual who can be considered as same as a spouse of a lawful marriage” in EPIA Art. 3(2). The purpose of Civil Code Art. 734 is to maintain orderly marriage by prohibiting an incestuous marriage. But EPIA aims to guarantee the living of the survivors supported by the deceased insured. The

² More details of present conditions on *de facto* marriages in Japan are given in 24 WASEDA BULLETIN OF COMPARATIVE LAW 84–88.

different purposes make a different concept. The District Court 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. Striking down the District Court's holdings, the High Court begins with the emphasis on public interest. The High Court construes EPIA not to intend to grant eligibility to the spouse of a *de facto* marriage contrary to orderly marriage without any impediment to marriage provided in Civil Code, and held that X's incestuous *de facto* marriage was contrary to public interest. There is no room to consider individual circumstances or backgrounds as nothing can cure their impediment, an incest.

With regard to the deceased insured's distribution, the High Court took the position that the national social security system, including the survivor pension, is different from private pension system. The national system consists of three sources—employee's distribution, employer's distribution and state-aid. The national system is not a quid pro quo. The District Court's decision hewed a path toward the possibility to protect an incestuous marriage by distinguishing the concept of a spouse in EPIA from that in Civil Code from the point of the purpose of each legislation.

The High Court, however, brought the issue back to the main stream—no protection without exception. It could be said that the High Court's decision reaffirmed the judicial attitude toward an incestuous marriage and was conducive to the uniform application of EPIA. On the other hand, though the High Court rejected to consider individual circumstances in terms of public interest, considering those facts that this is a case after the death of one spouse of an incestuous marriage, X and As' degree was the most distant one prohibited by Civil Code Art. 734(1), their long-term stable relationship, and their marriage was accepted by their community, it could be said that this case brought little harm to public interest: ethical or eugenic problems.

X filed a *joso* appeal.