

PROTECTION OF SPOUSES OF COMMON-LAW MARRIAGE IN JAPAN

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I. EMERGENCE OF INTENTIONAL COMMON-LAW MARRIAGE

A marriage in Japan must be registered at a city, town or village office as provided by the Family (Census) Registration Law (Civil Code, Article 739 (1)). Without registration, the validity of a marriage is not recognized. That is, Japan adopts the legal marriage system or the registration system.

In Japan lately, however, there are some people who positively choose a de facto marriage with the thought that they should aim at a new type family free from the framework of such legal marriage system. Among various reasons for this tendency, (1) refusal of the role of "a daughter-in-law" expected by husband's family, (2) if a woman worker gets married, she is likely to be placed at a disadvantage in respect of wages and social welfare, and (3) reluctance to change her maiden name to husband's family name¹, are among the main reasons.

Recently, a certain study group sent out a questionnaire to 300 couples of the so-called "non-legal marriage," who have not registered their marriage though actually living a married life, inquiring into a motive (answers may be more than one) for choosing a non-legal marriage. In the case of women, (1) those who chose a nonlegal marriage because they wanted to continue to use their maiden name topped the list, accounting for 89%, (2) those who oppose the family registration system placed 2nd, accounting for 86%, (3) those who thought there was no need to report to the state because the question of sexual relations are a private matter accounted for 70%, (4) those who thought that a non-legal marriage would make it easier for them to be free of the role allotted by sex distinction accounted for 62%, In the case of men, in com-

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1 In Japan, a married couple may choose either husband's surname or wife's surname (for a family name) upon marriage in accordance with Article 750 of the Civil Code but in reality about 98% of wives change their surname to husband's surname upon marriage.

parison, (1) those who oppose the family registration system topped the list, accounting for 70%, (2) those who wanted to continue to use a separate surname were second, accounting for 64%, and (3) those who wished to respect their wife's way of living in non-legal marriage were in fourth place, accounting for 63%. Thus, there is a difference between men and women in their views regarding a non-legal marriage.

Such "non-legal marriage" and "de facto marriage" differ greatly from the past common-law marriage in that the former is "an intentional common-law marriage" while the latter, in many cases, is "a negligent common-law marriage." Thereupon, the question arises as to what extent this intentional common-law marriage should be protected by law.²

II. PROTECTION OF COMMON-LAW MARRIAGE

A. Significance and Requirements of Common-law Marriage

A common-law marriage refers to "a de facto couple" who live a married life with the intention of marriage but are not recognized as legally married only because they have not registered their marriage. Accordingly, it is different from mere engagement or cohabitation with no intention of marriage.

Under the old laws which required the consent of the head of a family or of parents for marriage, there was a considerable number of common-law couples but the number has now decreased under the present Civil Code. Most of these common-law couples are of "a negligent common-law marriage" who have neglected to file a report upon their marriage. Couples who have not registered their marriage for two years or more are estimated to account for about 2% of the total number of married couples. Against this background, couples of the recently-seen intentional common-law marriage who do not register their marriage with the intention of avoiding the change of

² If a modern type de facto marriage like this is recognized widely, the national policy for a legal marriage established as an ideal type of marriage cannot be carried through. Thereupon, there is an argument that analogical application may be allowed for the estimation of co-ownership of marital property (Civil Code, Article 762) and joint and several liability of the couple for debts made in the course of daily domestic affairs (Civil Code, Article 761) but analogical application should be restricted regarding the division of marital property at the time of divorce (Civil code, Article 768) and a claim of a close relative for alimony (Civil Code, Article 711).

their family name (or the like) have already been mentioned.

A common-law marriage is effected by the existence of an agreement for marriage between a man and woman and of the fact of living together as a married couple. It requires no customary ceremonies. There is no requirement to satisfy the condition for effectuation of a marriage. It is questionable in a way whether the protection for a common-law marriage should be provided for the so-called "bigamy-like common-law marriage" in which a legally married spouse lives a married life with a third party other than his or her spouse without divorce. But the recent court precedents and academic theories do have a tendency to support this thinking.

B. Legal Effect of Common-law Marriage

A common-law marriage is protected as a relation corresponding to a legal marriage in principle with the application of the effect of a legal marriage.³ Therefore, a couple of common-law marriage must live together and must cooperate and support each other (Civil Code, Article 752). They also have obligations to remain faithful to each other. Also, any agreement made between man and wife may be cancelled by either party any time during the period of common-law marriage (Civil Code, Article 754).

Of property jointly owned by a couple of common-law marriage, the property gained under the name of either party is deemed to be the property of that party alone and the property the ownership of which is not clear is deemed to be the joint property of the couple (Civil Code, Article 762).

The cost of a married life is to be shared by the two and all obligations arising out of daily domestic affairs must be fulfilled jointly and severally (Civil Code, Article 761).

A child born to a couple of common-law marriage is regarded as an illegitimate child and not a legitimate child. Accordingly, his or her portion of inheritance is one-

³ However, since a couple of common-law marriage is not recorded in the family register, the provision that requires man and wife to assume the same surname (Civil Code, Article 750) and the provision that defines a child conceived during the period of marriage as husband's child (Civil Code, Article 772) do not apply correspondingly and the right of inheritance of a common-law wife to the property of a common-law husband is not granted. In addition, no tax privilege is granted as a spouse under the tax law. However, in respect of the social security legislation, including various annuity acts and insurance acts, a common-law wife is treated equally with a spouse of legal marriage.

half of what a legitimate child may inherit.⁴ As to the relation with the mother, a parent-child relationship is established by birth and the child is given the mother's surname, entered into the mother's family register, and governed by the sole parental authority of the mother. The relation with the father is established only when there is acknowledgement by the father.

C. Dissolution of Common-law Marriage

A common-law marriage is dissolved automatically with the death of either husband or wife. In this case, the surviving spouse of a common-law marriage has no right of inheritance. However, there is a court precedent which held that the division of property should be granted through analogical application of the provisions concerning the distribution of property at the time of divorce (Civil Code, Article 768). This division of property involves the liquidation of property through distribution regardless of fault of either spouse and a benefit in the form of property for the purpose of supporting a divorced spouse. If the deceased spouse has no heir to property, the surviving spouse of a common-law marriage may succeed to the leased house and may claim the distribution of an inheritance.⁵

A common-law marriage may be dissolved by mutual consent of a couple. A family court is available for settlement of such problems as division of property, alimony, child guardianship, etc. However, partly because of the disadvantageous position that a marriage has not been registered, the average amount paid for division of property and alimony is only about two million yen, approximately half of what would be paid in the case of a divorce.

A common-law marriage may also be dissolved any time by the intention of either spouse or by the termination of married life. If this unilateral dissolution of a marriage is without justification, however, the spouse effecting the dissolution will be held responsible for unjustified cancellation and must compensate the other spouse for mental and property damages.

4 Article 900 (4) of the Civil Code. Concerning this provision, the Ministry of Justice is proposing amendments to read "the portion of an illegitimate child in inheritance shall be equal to the portion of a legitimate child," but the proposal has not yet been resolved by the Diet.

5 Article 36 of the Land and Building Lease Act, Article 958 (3) of the Civil Code.

付 記

本稿は、1997年7月30日南アフリカ共和国のダーバンで開催された国際家族法学会第9回世界会議（The International Society of Family Law 9th World Conference）の大会において発表したときの原稿である。この研究報告の内容は今年の2月9日法学研究所主催の研究会で報告した非婚（意識的内縁）の保護に関する部分とほぼ同一であるので、ここに掲載することとした。