

Concerning “Contracts Between Couples”*

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The following is a COMMENT on two presentations concerning the topic of REGULATING RELATIONSHIPS —THE ROLE OF CONTRACT—⁽¹⁾.

Introduction

It was a pleasure listening to all of the presentations for this session (Sixth National Family Law Conference, Adelaide, Australia, October 17-22, 1994).

And, it was quite interesting to listen to the viewpoints of the practitioners on the Family Law Act 1975 and de facto relationships in each state, and about actual contracts being signed for a marriage and the detailed procedure and contents of the contract involved.

I am, as you might say, an outsider since I am not an Australian, and furthermore, as far as making a comment on contracts between married couples and de facto relationships, I may not be the perfect person, however, if you will pardon me and allow me to do so, I would like to give a short comment on my objective impressions concerning this session's topic thereby allowing me to fulfill my job as commen-

* This COMMENT was presented at the Sixth National Family Law Conference on “BREAKING UP IS HARD TO DO” Adelaide Australia October 17-22 1994.

(1) As for the content of the discussion on Regulating Relationships—The Role of Contract—, see Ian Kennedy, “Regulating Relationships—The Role of Contract”; and, David Burrell, “Pro-Nuptial Agreements-A Primer”, *Conference Papers “Breaking up is hard to do”*, The Law Book Company Limited 1994.

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Comparison Between Australia and Japan

1. The Framework for De Facto Relationships

First, if I am correct, my understanding of the story concerning contracts within de facto relationships of homosexuals and heterosexuals in Queensland was that they were becoming difficult to differentiate. My impression is that problems arising from de facto marriages in Australia are being disposed of outside the framework of the marriage system. This is very different from that of Japan. The present issue in Japan concerns how to resolve problems arising from de facto marriages within the framework of the marriage system. Thus, court precedent and academic theory in Japan are attempting to enlarge the protective framework by creating a principle of *Junkon* which recognize *Naien*, De Facto Relationships, as analogous to marriage.

2. Matrimonial Property System

Second, as for the contract between married couples, there is a system referred to as the statutory property system⁽²⁾. In Japan, this system is in principle of the matrimonial property system. Namely, the party that obtains the property owns and manages it by himself or herself. When the ownership of the property cannot be decided it is considered a property of joint ownership. This system is definitely disadvantageous to housewives. Since a monetary value cannot be calculated for housework, the money and property gained by the husband through work is considered his in the first instance.

It is important to note, however, this system attempts to correct the inequalities when a marriage is dissolved. At the time of divorce,

(2) See, Japanese Civil Code, Section 760-762.

there is a provision for the distribution of property⁽³⁾. Within this system, the monetary distribution and procedures are to be discussed and decided by the couple. If a discussion is not able to be arranged, then the Family Court is asked to arbitrate by liquidating the property that is considered jointly owned, deciding on the alimony after divorce, and other matters concerning monetary settlements. Also, at the time of dissolution after death, the wife is entitled to succeed at minimum one half of the property⁽⁴⁾.

The statutory property system is applicable in times when contractual property system for married couples has not been signed. Those who are in the process of getting married are free to decide on who gets what in terms of property matters and to decide on a contract after discussion. What needs to be stressed here is that this contract needs to be concluded before the marriage is formally registered to the Ward Offices, and the contents of the contract must be registered with a third party. This contract must be different in content from the statutory property system, and in principle, it cannot be amended during the term of marriage. The details to this system are explained in the Japanese Civil Code from Section 775 to 759.

Another point of interest is that in Japan, contracts, other than contractual property system for married couples, that are signed within the term of a marriage can be cancelled by either party at any time⁽⁵⁾. This may seem quite strange, however, from the viewpoint of the Roman legal proverb, "Law does not deal with domestic affairs". A court suit demanding the execution of the contract was considered a

(3) *Id.*, Section 768.

(4) *Id.*, Section 900.

(5) *Id.*, Section 754.

harm to the stability of the family, so legislation of this kind was adopted. In Japan, both the exercise of one's rights and the possibility of obtaining happiness becomes significant as a result of a harmonious relationship of the married couple and a stable family. There is an interesting difference in thought here. In Western thought the family and couple exist because the individual exists, however, in Oriental thought exercise of one's rights and the individual's happiness exist on account of the married couple and the family.

In connection with this, for example, within the Japanese family neither the husband nor wife is probably 100 percent satisfied and happy with what he or she has, however, both put up with each other and pursue their family lives without separating. If I am wrong, please forgive me. It is my understanding that married couples living in the advanced western European countries that do not separate are very happy, however, in other cases, there are many who have lost their families. This is a very difficult issue indeed. I stated the following words in the process of presenting the issue. "Would one choose not to eat at all if he or she could not eat until he or she was satisfied, or would one choose to eat everyday although it might not be enough? . . . Of course, the best situation would be for one to eat everyday for as much as he or she chose."

3. Contracts Between De Facto Couples in Japan

To get back on the track, the third point is that in Japan those in de facto relationships cannot conclude the previously mentioned type of contract. According to the presentations, Australia permits those in de facto relationships to arrange and settle matters concerning property since they are clear of the restraints of the common law. Japan is in a more difficult situation. The courts would most likely judge the in-

tervention of sexual intercourse and money to be against public interest and good morals.

In this instance, what should those in de fact relationships do? The answer is probably that they should get married. If this is not possible, then their cases should be dealt with in the jurisdiction of general laws instead of Family Law. Whether it should be considered within the jurisdiction of Torts or Unjust Enrichment is a difficult question. Also, it cannot be easy to be dealt within the jurisdiction of Manageable Affairs Without Mandate. This is how it might be explained at this present stage in time. As for my own personal opinion, I expect the outlook for marriage to become even more diversified, and in the future the choice of marriage or de facto relationships in Japan will be up to the individual. If this is the case, the way one lives his or her life out of wedlock will be dependent upon each individual. It will be an era of "true" freedom of contract.

Conclusion

I would like to conclude my comment by saying, if a marriage relationship is harmonious there would be no necessity in signing a contract and disposing of the problems after divorce. If the relationship is not going well or if it is likely that it may not be a good one, should there be a necessity to go through the trouble of arranging a contract and continuing the relationship? Of course, a contract is agreed upon in advance with future disputes in mind. It is necessary for us as lawyers to study this issue and suggest how contracts concluded by married couples and de facto relationships can function in a way not to bring an end to the relationship. This will be homework for all of us.