

Seoul Western District Court

Decision

Case

2014HoPa1842 Rectification of registers (Application for objection regarding disposition by public official in charge of family relationship registration)

Applicant

1. Kim, Jhokwangsoo
2. Kim, Seunghwan

Attorneys for the applicants

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Respondent

Seoul Metropolitan City Seodaemun-Gu Office Mayor

Order

The application for this case is rejected

Object of application

The respondent shall accept the applicants' report of marriage on December 13, 2013.
(The actual date of report was December 11, 2013.)

Grounds

1. Background of the disposition

A. The applicants who are both male first met in February, 2015, and started a relationship around May 15, 2005. Applicant A made a proposal to Applicant B in April, 2010, to love and live together, to support and aid each other for life. Applicant B accepted this proposal (Hereinafter "agreement of this case"). The applicants were living together at a house in Seodaemun District, Seoul, and invited their families and relatives on September 7, 2013, to have their agreement recognized. They then hold a ceremony to proclaim their agreement.

B. The applicants, in accordance with the agreement of this case, completed the report of marriage by entering their names as "Reporter 1: Applicant A", "Reporter 2: Applicant B" in the section for "① Contracting Parties in the Marriage (Reporter)", and submitted it to the respondent on December 11, 2013.

C. On December 13, 2013, the respondent, on the grounds of the Civil Act Articles 815(1), 826-834, 839(3)-840, issued a notice of non-acceptance of the report (hereinafter "disposition of this case"), which reached the applicants on the 16th of the same month.

2. Argument of the applicants

The applicants argue that, "marriage", provided in the Constitution, Civil Act, and the Act on the Registration, etc. of Family Relationship etc., without a separate prohibition regarding marriage between persons of the same sex, should be interpreted as "a union between two persons, regardless of their sex, for the purpose of lifelong cohabitation based on affection", in accordance with the principle of interpreting in conformity with the constitution and the principle to ensure the highest protection of fundamental rights, a) the freedom to choose one's spouse in marriage derived from the right to pursue happiness of Article 10 of the Constitution; and b) in relation to marriage, opposite-sex marriage and same-sex marriage should be treated equally by the right to equality; however, although the applicants lawfully reported their marriage, the respondent made a disposition of non-acceptance regarding this case without legal grounds, subjecting the applicants to unfair treatment such as exclusion from inheriting from each other, receiving health care and pension benefits, or making medical decisions for each other. As such, the applicants argue that the disposition in this case is unlawful, should be revoked, and that the applicants' report of marriage should be accepted.

3. Issue

Whether "marriage", provided in the Constitution, Civil Act, and the Act on the Registration, etc. of Family Relationship etc., is a union that can be recognized regardless of the sex of the concerned parties and between persons of the same sex, or if its recognition is limited between man and woman, that is, persons of the opposite sex.

4. Decision on whether marriage is allowed between persons of the same sex

A. Interpretation of current law

The fact that humankind could survive and societies or the institution of state could persist largely depends on marriage and the consequent family institution. Marriage plays the role of providing a sense of stability to individuals, making strangers into relatives, creating a new family, and connecting families. The marriage institution has changed in various ways depending on the region and current trends; yet the fact that it is basically a union between a man and woman has not changed, as with the social and legal sense of "marriage". The values that are commonly recognized as important in a married life, such as love, faith, or commitment, are based upon the premise of the union between man and woman, and not all relationships that involve love, faith, or commitment, is eligible to be established as marital.

As such, the dictionary, which provides definitions that are most common in the current age, defines marriage as "in which a man and woman become husband and wife" (Standard Korean Language Dictionary, published by the National Institute of the Korean Language), and a majority of scholars of family law generally define

marriage as a cohabiting, coupled relationship between man and woman and understands the condition of "opposite sex" as a fundamental element of marriage (e.g. Yoon Jin-soo, Lecture on Family Inheritance Law, pp. 18-20), and public opinion does not appear to be different to this understanding.

Based on such concepts on marriage, Article 36(1) of the Constitution of the Republic of Korea provides that "Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.", and the Civil Act refers to married parties by using terms such as 부부(夫婦), 혹은 부(夫) 또는 처(妻), 남편과 아내 "husband and wife" (Articles 826, 827, 847, 848, 850, 851 etc.) and uses the term "dad and mom (parents)" to refer to the concept that corresponds to the child. (Articles 772, 781 etc.) Likewise, our Constitution and Civil Act etc., although they do not explicitly stipulate marriage as the union between man and woman, uses gender-differentiated terms, such as husband and wife), based on the assumptive distinction, and union, of man and woman in marriage and family life.

In addition, the Supreme Court has so far stated that "marriage is a morally and customarily justified union for the purposes of lifelong cohabitation based on affection between man and woman" (See: Supreme Court decision 82Meu4, 7/13/1982; Supreme Court decision 97Meu612, 2/12/1999; Supreme Court decision 99Meu2261, 4/21/2000; Supreme Court decision 2003Meu248, 5/13/2003; Supreme Court decision 2014Meu4734, 4741, 2/26/2015 etc.), and that "Article 36(1) of the Constitution declares that 'Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.', and, in general, marriage is formed by the physical and psychological union between man and woman. The Civil Act only allows the marriage between persons of the opposite-sex, and does not allow the marriage between persons of the same-sex."(Supreme Court en banc decision 2009Seu1174, 9/2/2011) Likewise, marriage was defined as "union between man and woman" in the reasoning of many rulings and decisions.

The Constitutional Court also stated in its reasoning that "marriage has not changed in that it is the physical and psychological union between a man and woman" (Constitutional Court decision 95HunGa6, 7/16/1997), or that "marriage is fundamentally a union between a man and woman based affection and trust" (Constitutional Court decision 2009HunBa146, 11/24/2011), thus viewing marriage as the "union between a man and woman".

It appears to me, even though the marriage institution has changed in various ways as discussed above, marriage, provided in the Constitution, Civil Act, and the Act on the Registration, etc. of Family Relationship etc., can be interpreted as referring to the "morally and customarily justified union between two persons of the opposite sex for the purposes of lifelong cohabitation based on affection", and cannot be extensively interpreted as "a union between two persons, regardless of their sex, for the purpose of lifelong cohabitation based on affection", taking into account several conditions, such as, the fact that the essence of marriage as the conjoined relationship the between man and woman has not changed and the public opinion is in line with this understanding; that marriage constitutes the basic assumption of the formation of the family and the basis for raising the next generation, and therefore plays an important role in the society and the state; that, although not explicitly stated, the Constitution, Civil Act, and other relevant laws use gender-differentiated terms as if it is a *de facto* assumption; that, as considered above, the Supreme Court and the Constitutional

Court, although not directly discussing whether same-sex marriage can be allowed, proclaims marriage as "union between persons of the opposite-sex", etc. On these grounds, in the general interpretation of current law, the agreement of this case between the applicants who are of the same sex cannot be an agreement to marriage, and the report of marriage based on this agreement cannot be a lawful report of marriage, and, therefore, the disposition of non-acceptance regarding this case is lawful.

B. Whether there is room for re-interpretation

1) The fact that the marriage institution undergoes changes depending on the time and region is the same as stated above, but the circumstances in which the Constitution or Civil Act etc. were enacted or amended are not the same as the circumstances of this age. As the scale and structure of our economy changed due to industrialization, informatization, and globalization, so did the social and cultural circumstances, which resulted in changes in the traditional form of family and role or status of family members, and perception of marriage and sex. Also, internationally, several countries have recently proclaimed that laws that prohibit same-sex marriage are unconstitutional or allowed same-sex marriage through legislation and some countries grants legal status to various forms of marriage-like relationship without fully recognizing same-sex marriage.

Next, the Court considers whether, as the applicants argue, there is room for same-sex marriage to be allowed even without a separate legislation or legal amendment, based on a general interpretation of current laws in accordance with the principle of interpreting in conformity with the constitution and the principle to ensure the highest protection of fundamental rights, and taking into account that several circumstances that have changed in our time, socially and internationally (discussed supra).

First, the question of whether marriage between persons of the same-sex can be allowed on the grounds of sexual autonomy, the freedom to marry, and the freedom to choose one's spouse especially in relation to marriage, which is the argument of the applicants, will be considered.

As the applicants argue, the right to dignity and the right to pursue happiness, provided in Article 10 of the Constitution, are based on a person's right of self-determination, wherein the right to sexual autonomy, especially the freedom to decide one's spouse in relation to marriage and the freedom to marry, is included. (See: Constitutional Court decision 89HunMa82, 9/10/1990, Constitutional Court decision 95HunGa6, 7/16/1997, Constitutional Court decision 2009HunBa17, 2/26/2015 etc.)

However, the right to sexual autonomy

Furthermore, broadly speaking, the right to sexual autonomy does include the freedom to marry and the freedom to choose one's spouse in relation to marriage, but there are, of course, limits to such freedoms. It can be said that included in such limitations are not only those which are prohibited in express terms, such as polygamy and incestuous/consanguineous marriage, but also the limitations which are inherent or assumed in the definition of "marriage" — that is, the "morally and customarily justified union based on affection between man and woman for the purposes of lifelong cohabitation" — as provided in the Constitution, Civil Act, and the Act on the Registration, etc. of Family Relationship etc. This is because in a state that adopts civil marriage system, there is the institution of marriage and then, within that institution, the freedom to marry, while the opposite, that there is the freedom to marry or the freedom to choose one's spouse in marriage, and therefore

the contents of the civil marriage can be changed or amended cannot be said. This is clear even in light of the fact that, in regards to marriage, one cannot choose a blood relative as a spouse in marriage, as provided in Article 809 of the Civil Act, despite the freedom to choose one's spouse in marriage.

Therefore, in accordance with limitations such as those mentioned above, marriage in the legal sense refers to the "union between man and woman", and the right to sexual autonomy of a person who wishes to enter a union with a member of the same sex based on one's homosexual orientation merely includes the liberty to enter a same-sex union and the liberty to choose one's partner; however, beyond such liberties, it is difficult to say that the right for same-sex union to be actively recognized as *de jure* marriage can be derived straight from the right to dignity or the right to pursue happiness, as provided in Article 10 of the Constitution. This conclusion is beyond dispute even when the principle of interpreting in conformity with the constitution and the principle to ensure the highest protection of fundamental rights are applied. The applicants' argument in this aspect is without grounds.

3) Next, the question of whether recognizing the union between man and woman as marriage and bestowing various rights pursuant to marriage, and not recognizing the union between persons of the same-sex and denying various rights pursuant to marriage, is discrimination against same-sex union from opposite-sex union that, without reasonable grounds, violates the right to equality provided in Article 11 of the Constitution, is considered. Article 812-1 of the Civil Act adopts 'civil marriage by registration system' by providing that a marriage takes effect by a report in accordance with the provisions of the Act on the Registration, etc. of Family Relationship, and, the report of marriage, after accepted generally in accordance with Article 813 of the Civil Act, takes establishing effect wherein a marital relationship is formed. Also, the report of marriage shall be lawfully accepted in order to take or bear effects as marriage provided in the Civil Act, etc., and does not take effect as marriage when it is not accepted because it is unlawful. In so far as civil marriage is adopted, the differences that occur between the two is inevitable.

Although whether the applicants can give birth to children is not an element of marriage, and the acceptance of same-sex marriage does not mean the collapse of the marriage institution, looking specifically at this issue since it is argued that discriminating same-sex marriage from marriage between man and woman is violation of the right to equality, the ability to conceive does not fall under the reasons for annulment of marriage as provided in Article 816(2) of the Civil Act unless there are special circumstances (See: Supreme Court decision 4292MinSang995, 8/18/1960; Supreme Court decision 2014므4734, 2/26/2015 etc.), and taking into account that the provisions of the Civil Act does not demand joint agreement on birth plans and does not cite the inability to, or decision not to, give birth to a child together as a barrier to marriage, whether individual pregnancy is possible, i.e. the possibility to give birth to a child together is not, as the applicants argue, interpreted as an element of marriage. And even if same-sex marriage is accepted, considering the expected proportion of same-sex marriage, it would not fundamentally dismantle the institution of marriage itself or encroach upon tradition.

However, that the Constitution, Civil Act, and all other laws related to marriage, encourage marriage and bestows various rights pursuant to marriage is not simply because marriage, through the union between the man and woman who are parties to a marriage, grants intimacy and stability to each other, and therefore brings social stability. That our society recognizes the union between man and woman as marriage and bestows

a respected status and legal benefits is because contracting parties to a marriage, who formed a marriage through the union between man and woman, in general, form a family through marriage and giving birth to a child together; and, in a more stable environment based on love, faith, and commitment to each other, give birth and foster a child together; and, through such marriage, childbirth, and fostering of children, make new citizens; thereby playing a role of providing a basis for our society to continuously sustain and develop. In that light, Article 36-1 of the Constitution provides not only "marriage" but also, with it, "family life", and the State's responsibility to ensure it. When recognized as marriage, the conjoined relationship between persons of the same sex can also play the above-mentioned role to some extent through the adoption institution; however, the effects therefrom will be limited and, ultimately, the effects is that of the adoption institution and not same-sex marriage.

Recently, due to social changes such as increase in infertile couples or voluntarily childless couples, out-of-wedlock births, and divorce, etc., it cannot be denied that exceptions are on the rise regarding the generally expected role of marriage. However, due to the existence of such exceptional circumstances, the social role that is expected of marriage and, furthermore, the essence of marriage, which our society encourages and protects through various laws, does not change.

Therefore, even though the possibility of giving birth to a child together or that the marriage institution or traditions shall not be brought down is not demanded as an element for establishing marriage, this does not immediately lead us to view same-sex union as essentially the same as opposite-sex union, and, as considered above, basic differences that disallow us from equating the two remain. Therefore, there are reasonable grounds for interpreting marriage only as the union between a man and woman to the exclusion of same-sex union, and differential treatment between the two cannot be said to violate the right to equality, as provided in the Constitution. The applicants' argument in this aspect is also without grounds.

4) Taking into account the significant role that the judiciary plays in the protection of the rights of minorities as the last bastion that protects the freedom and rights of the people, the realization of the rights of an individual, even though he/she may be a sexual minority, should not be hindered or inadequate. However, as the applicants argue, if same-sex union is not recognize as a lawful marriage, the rights that the laws provide by the effect of marriage will not be afforded to same-sex union, such as various rights as a husband and wife or a family, i.e. the right to demand cohabitation or support from the spouse, the right to represent the other spouse on normal home affairs, the right to demand the other spouse to jointly bear living expenses, the right to claim the legal right of inheritance or the legal reserve of inheritance, the right to claim for division of property in a divorce, the right to give lawful consent in medical circumstances such as hospitalization, surgery etc. and the right to organize funeral, the right to receive benefits as a family in relation to national health insurance, the right to request family-care leave or adjustment of work schedule in accordance with the Equal Employment Opportunity and Work-Family Balance Assistance Act., the right to receive compensation for surviving families or survivor pension in accordance with the Labor Standards Act or the National Pension Act, the right to request family deduction in various tax laws etc. In this aspect, despite being a same-sex union, it is not impossible to sympathize with the situation of the applicants who wish to be recognized with a justified, lawful marriage, and it is true that the situation they are in is regrettable.

However, regarding the interpretation of legal provisions, the contextual meaning of the letter of the law is the

starting point of interpretation, and a cautious approach must be adopted when newly creating meanings outside the possible meaning of the letter, especially the creation of new institutions in the society or causation of significant changes in the rights and duties of a person due to extensive or analogical interpretation of the letter. From the standpoint of judicial activism, there are instances where teleological interpretation is necessary to achieve results sufficient to the purpose of the legislation; however, analogical interpretation etc. has a basic limit that it cannot overcome the limit set by legislation; if [the interpretation] goes beyond such limits, this is not an interpretation of the law but a creation of a new legislation that causes the issue of infringement of the legislative power provided the Constitution. Moreover, even when teleological interpretation is necessary in order to resolve certain legal issues, conjectural interpretation etc. should be limited to cases where it can be assumed that a legislator, if aware of such an issue, would have made a bill in a similar form to that interpretation because such interpretation is effective and appropriate for resolving issues and is not problematic in the legal system; however, if the interpretation is not effective and appropriate for resolving issues and, to the contrary, has concerns of causing other issues, conjectural interpretation such as the above shall not be allowed. (See: dissenting opinion of the Supreme Court en banc decision 2004Seu42, 6/22/2006.)

As considered above, marriage has to this day been recognized and defined as a "union between man and woman". The question whether to recognize same-sex union as marriage is, as the applicants themselves recognize, is a new issue that was not expected or considered at all at the time of the enactment or amendment of the Constitution and other relevant laws. Our legal system has not provided any institutional measures regarding this issue, and, considering the highly controversial nature, it cannot be assumed that legislators, even if they had awareness of the issue, would have introduced a bill that allows same-sex marriage from the start.

Despite the fact that the role of the judiciary indeed lies in the sufficient protection of the rights of the people, even when they are members of minority groups, the applicants, as sexual minorities, may be protected by the law from discrimination regarding personal areas, such as receiving education, be employed, or receive medical examination etc.. However, in our current legal system that adopts civil marriage, the right to marry between persons of the same sex cannot be recognized on the sole basis of a teleological interpretation of marriage which is a social institution.

5) The applicants cite that in the Supreme Court en banc decision 2004Seu42, made on June 22, 2016, the majority opinion ruled that "regarding a person who is clearly transgender, it is proper to allow one to correct the sex entered on one's family register following the family registration correction procedure provided by Article 120 of the former Family Register Act. The applicants then argue that in this case, too, through an interpretation of law that conforms to the Constitution, it is possible to redefine and interpret "marriage" as a "union between two persons".

However, the above decision, takes into account a transgender person's right to pursue happiness, in a personal area that is an individual's decision regarding one's gender identity, interprets "cases where entrance on family register cannot be legally allowed" which is among the grounds for correction of family registration provided in the former Family Register Act in a way that conforms to the Constitution, it cannot be said that same-sex marriage, in this case, can be allowed because the above en banc decision exists.

6) In this case, the re-interpretation of marriage that the applicants argue is not an individual and specific matter of providing remedies for infringement of rights, such as naming the relationship between the applicants as "marriage" or recognizing the applicants all the rights pertaining to marriage; it is an action that brings about a significant change by expanding the denotation of the institutions of marriage and the family. Moreover, the institutions of marriage and the family are not matters limited to the two persons concerning a marriage, but widely affect the formation of family and relatives around them, constitute the foundations of our society, and are essential institutions that closely relate to the ethical, philosophical, and religious thinking of each members/citizens of the society. Therefore, the question how to resolve matters, such as whether or not to recognize "union between persons of the same-sex" as "marriage," should rely on opinions collected through public hearings etc., and decided through the legislative will of the National Assembly, which is a representative organ of the people, after prudent discussion and deliberation. This is not a matter that the judiciary can resolve through new or analogical interpretations.

If the union between persons of the same-sex is protected by law, whether to afford them recognition of a legal effect completely identical to marriage created by the union between man and woman, or whether to differentially regulate some parts; that is to say, more specifically, a) whether to grant joint adoption, which, based on an interpretation of the Civil Act, is only allowed to lawfully wed a man and a woman, to same-sex union, too; b) in regards to instances where a legally-protected same-sex union dissolves, what will be the terms regarding the procedures and elements? c) in regards to same-sex union, whether to recognize relatives by affinity based on family law, and, if so, how far its scope should extend; etc. Likewise, the necessity of regulations in various legal areas is expected — which is not a matter that can be decided within the Court's authority on the interpretation of the law. Matters such as same-sex union which cannot be subsumed into the existing marriage institution should be dealt with new ways through new legislations with the purpose of regulating it appropriately.

7) In the end, although the circumstances of our times have somewhat changed, without a separate legislation, it is difficult to view that same-sex marriage is allowed on the sole basis of the interpretation of current laws, and the arguments of the applicants which discuss this issue is without grounds.

5. Conclusion

If that is so, the application for this case is without grounds and, in accordance with Article 111 of the Act on the Registration, etc. of Family Relationship, shall be rejected, and decided as the order.

2016. 5. 25.

Judge Lee Tae-jong