homepage (http://www.corts.go.jp./saikosai/) for the details of this decision.

4. Family Law

X v. Director of Shinagawa Ward
Supreme Court 2nd P.B., March 23, 2007
Case No. (kyo) 47 of 2006
61 (2) MINSHU 619; 1967 HANREI JIHO 36; 1239 HANREI TAIMUZU 120

Summary:

A woman who carries and bears a child, under the construction of the existing Civil Code, should be construed as the mother of the child; a woman who does not carry and bear the one cannot have the mother-child relationship regardless of her donation of an egg.

The judgment of a foreign court which allows the people who do not have a legitimate mother-child relationship under the existing Civil Code to have it is invalid in Japan on the ground that it is contrary to public policy under the Code of Civil Procedure, Art. 118 (3).

Reference:

Civil Code, Article 772, Paragraph 1; Code of Civil Procedure, Article 118 (3)

Facts:

X1 and X2 (hereinafter referred to "X" for both X1 and X2) are a Japanese husband and wife. They had the birth of two children as their own legitimate offspring registered to the Director of Shinagawa Ward (hereinafter referred to "Y"), whom an American woman A, living in Nevada, had conceived by in vitro fertilization of her ovum with the X's sperm and eggs. However, Y rejected it on the ground that there is no fact of X2's bearing them: the fact of the birth on her own.

X filed an application to Tokyo Family Court for the birth of the children registered to Y; the court rejected it (Tokyo Family Court, November

30, 2005). And they appealed against it to the Tokyo High Court (Tokyo High Court, September 29, 2006); it holding that the Nevada judgment for X to be the parents of the children was valid in Japan because of meeting all the requirements of the Code of Civil Procedure Art.118, it overruled the Family Court decision and ordered Y to accept the birth of children on the ground that (a) under the construction of the Civil Code where a woman who carries and bears a child is the legal mother of the child, X should not be the legal ones, while under the Nevada law, the parents of the children could not be A and her husband; they had no legal parents in applying each to the case; (b) X had the blood tie with the children and hoped to continue bringing them up, while the surrogate parents did not do that; (c) the reason why X made the surrogacy agreement was that X had no longer any possibility of carrying a baby because of her illness; (d) the payments to A on the surrogacy agreements were not the price of the children, and the terms of the agreements did not infringe on her dignity; (e) in the light of the particular circumstances, the recognition of the Nevada judgment was not substantively contrary to public policy (Code of Civil Procedure, Art. 118 (3)).

Y made a *kyoka-kokoku* appeal.

Opinion:

The original decision was reversed, and the *kokoku* appeal against the Family Court decision was dismissed.

The substance of a foreign judgment should not be contrary to public policy in Japan in order that the foreign judgment may be valid there; even if it is decided in the foreign court based on the system which is not adopted in Japan, this does not necessarily mean that it may not meet the requirements; if it can be considered as irreconcilable with the basic principle or idea of the legal order in Japan, this means that it is just contrary to public policy under the Code of Civil Procedure, Art. 118 (3).

The parent-child relationship is a more fundamental one than any other. It is the basis of different relationships in the social life and concerned deeply with not only civil matters but also public interest. It also has so much effect on child welfare that the approval of who should have a parent-child relationship is concerned with the basic principle or idea which is the essence of the order of family law in each country. The crite-

ria of the approval must be unambiguous and clear, by which whether that relationship might be established or not should be decided. Therefore, the Civil Code, which lays down the order of family law in our country, should be construed as the effect that the relationship may be approved on the condition that the criteria is provided in it, but if not, it may not be done at all. For all of these reasons, the foreign judgment which allows the people who do not have a parent-child relationship under the Civil Code to have it is irreconcilable with the basic principle or idea of the legal order in Japan, and contrary to public policy under the Code of Civil Procedure, Art. 118 (3).

In our Civil Code, there is not any direct provision of the establishment of the legal relationship between a mother and a legitimate child. But the Civil Code Art. 772(1) is based on the premise that a woman who carries and bears a child is the mother of the child and the mother-child relationship is naturally established by the objective fact of her carrying and bearing one; and it has been obviously construed that the relationship between mother and illegitimate child is established by her bearing one.

There is strong evidence that some authorities concerning the establishment of mother-child relationships naturally suppose that the woman carries and bears one with her own egg. Nowadays, however, a woman can carry and bear one as result of the artificial insemination by assisted reproduction technologies with the egg of anyone but herself. And if the carrying and bearing woman is not the same as the one who donates the egg, it also matters whether the mother-child relationship may be naturally established between the carrying and bearing woman and the resulting child under the construction of the existing Civil Code. On this point, the reason why there is no provision in our Civil Code is that its authors did not suppose such a situation in drafting. However, given that the parent-child relationship is deeply involved in public policy and child welfare and should be established uniformly by unambiguous and clear criteria, it should be construed that the carrying and bearing woman is his or her mother; the establishment of the mother-child relationship can not be recognized between the *not* carrying and bearing woman and the one regardless of her donation of an egg. However, we strongly require the legislature to make some new laws, after taking into the consideration medical and family law, so long as the actually unexpected circumstances arise

under the Civil Code.

Editorial Note:

Although we have no express provision of surrogacy, it has tended to be prohibited generally in both practice and academic theory in our country, and we also have some authorities whose principle recognizes a woman who carries and bears a child as his or her mother under the construction of the Civil Code; some spouses who cannot have one, go to the foreign countries where surrogacy is legal, and after getting their genetic baby and returning home, will make the register of birth, in secret, as their own legitimate child in Japan. This stream of "if impossible in our country but abroad" was gradually coming to the surface. Then X, who are both TV personalities, had to make public the inability to have one because of X2's illness and the future plan of surrogacy in the United States. After all, they have gotten their two genetic babies. Whether Y should accept the register of their birth as legitimate or not is the issue of the case.

In this case, in pursuance of the surrogacy agreement, one of X2's eggs was fertilized in vitro with X1's sperm and transferred to A; the children have two mothers in fact: the carrying mother and the genetic mother. And then, whom should the law regard as the mother?[1] In practice, the carrying mother A, who carried and bore children, is their legal mother. However, we are required to consider again whether the genetic mother could be the legal mother or not under the construction of the existing Civil Code, in the light of the advent of the new assisted reproduction technologies, which its authors could not suppose in drafting.

In the judgment, the carrying mother A was recognized as the legal one, having a mother-child relationship with the children based on the conventional principle. It is difficult that the woman only donating an egg is, pursuant to it, construed as the legal mother; that is a matter of course. Judicial legislation is not desirable concerning the issues which are relat-

[1] We normally use "biological mother" for a carrying and bearing woman, but in this case, although her egg was not used, I hesitate to use the term. "Biological" is normally meant to be a blood tie; but I cannot suggest its meaning obviously. In the editorial note, therefore, I do not use it.

ed to the basic principle of the Civil Code in the stage where a domestic argument does not look for a conclusion. And like the original instance, deciding such issues with a little detour by making use of the general term (public policy) in the procedural framework of the Code of Civil Procedure, is also not desirable. The judgment of the Supreme Court, examining the traditional framework deeply, recognizing the limit of the construction of the existing Civil Code and urging the legislature to an urgent solution, is worthy to be supported.

We have now a problem whether surrogacy in itself should be available or not, before examining the legal relationship with the mother of children who have already been born by surrogacy.

The wish of the spouses, like X, who cannot have a child because of sterility or illness should not be disregarded undoubtedly; in the meantime, if surrogacy is legal, the surrogate mother is designated as an expedient of reproduction and takes the risk of conception and childbirth; that will help induce some problems in ethics and medical science, and also those with respect to the welfare of the child which occurs from the complexity of his birth. However, we must prevent surrogacy from becoming the privileges of some people who are well-informed and rich. Therefore, I conclude that the requirements of its agreement should be obviously provided and that it can be available only if it meets all of them.

Finally, if it is available, then, we must examine how the genetic mother-child relationship should be considered legally.

According to the report of the Science Council of Japan recently published[2], it admits the surrogate mother A to be the mother in this case; the commissioning mother X2 has a relationship with the children by adoption. However, can her dearest wish that she gains the children, whom she bothered the other to bear, in the name of legitimate but adoptive ones, come true?

In the future, how will the resulting child feel about the "genetic tie (commissioning mother-child relationship)" and "266 days tie from conception to delivery (surrogate mother-child relationship)"? And what kind of importance will they have for the child? I do not think that the former is

[2] The details of the Council and its report are available on http://www.scj.go.jp/.

inferior to the latter. If each tie is essential to the child, there is no reason to exclude the genetic mother from the mother-child relationship. If the requirements of surrogacy agreements are clearly provided and its practice is strictly administered, could the commissioning mother be the mother and have the child as the legitimate one, instead of the surrogate mother?

More notice needs to be taken of the future arguments on the legislation concerning reproductive assistance medicine.

5. Law of Civil Procedure and Bankruptcy

X v. Y
Supreme Court 3rd P.B., March 20, 2007
Case No. (kyo) 39 of 2006
61 (2) MINSHU 586; 1432 SAIBANSHO JIHO 3; 1971 HANREI JIHO 125;
1242 HANREI TAIMUZU 127

Summery

1. When there is only a virtual conflict of interest about an action between a person on whom a service is to be made and his housemate, etc. in Art.106 Para. 1 of the Code of Civil Procedure, who is delivered a document concerning the action for the addressee, it derives its validity of supplementary service to the addressee by delivering the above document to the housemate, etc.
2. When a man cannot expect that the document concerning an action was delivered rapidly to a person on whom the service is to be made from his housemate, etc. because there was a virtual conflict of interest about the action between the addressee and his housemate, etc. in Art. 106 Para. 1 of the Code of Civil Procedure, who was delivered the above document for the addressee, and when the above document was not really delivered from the housemate, etc. to the addressee and therefore a judgment was given without the addressee's acknowledgment that the action was brought, there is a ground of retrial in Art. 338 Para. 1 Item 3 of the Code of Civil Procedure.