

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.

Reference:

The Code of Civil Procedure Art. 106 Para. 1 and Art. 338 Para. 1 Item 3

Facts:

B and C each lent A, X's father-in-law, 5,000,000 yen on October 31, 1997, and November 7, 1997, and every time made X joint guarantor. Y brought an action for 10,000,000 yen and agreed to delay damages to A and X on December 5, 2003, saying he had taken over their loans to A.

A complaint of the action and a writ of summons for the first oral proceedings, etc. were serviced on December 26, 2003, and A received not only the complaint, etc. for himself but also the complaint, etc. for X as his housemate. Because X and A were absent from the first oral proceedings of the action and did not file an answer and other briefs, the oral proceedings were closed and a constructive confession about the facts of statement of a claim was made in the second oral proceedings 1 week after and a judgment to permit Y's claim was given. Services to X and A of records alternative to the judgment document of the action were not made because of their absence, and services by registered mail to their address were dispatched on February 26, 2004. Both X and A did not appeal the judgment, and it was fixed on March 12, 2004.

X filed an action of retrial on March 10, 2006, saying that he had not guaranteed A's obligation jointly on his own free will, but A had entered into a solidarity guarantee contract with B and C using X's name and seal without his permission, and A had not talked about the above facts to X at all until February 28, 2006, so there had been a conflict of interest about the above action between X and A and the supplementary service to X should have been ineffective even if A had received the complaint, etc. for X, therefore the judgment has a ground of retrial in Art. 338 Para. 1 Item 3 of the Code of Civil Procedure, because it had been made without X's chance to be involved in the action for lack of an effective service of the complaint, etc.

Opinions:

The decision was reversed and remanded

(1) Art.106 Para. 1 of the Code of Civil Procedure says that, in cases where an addressee is not found at the place for service other than his workplace, the service has validity to the addressee when the document is delivered to “any employee or any other hired worker or a housemate who possesses a proper understanding with regard to receiving the document” (under “housemate, etc.”), and then whether the document is delivered from the housemate, etc. to the addressee or not and whether the housemate, etc. tells the fact of the delivery above to him or not does not have an impact on the validity of the service (cf. Supreme Court 2nd P.B., May 22, 1970. Case No. (o) 1017 of 1968, 99 Saibanshu-Minji 201).

Therefore when the housemate, etc. who is delivered the document concerning an action for the addressee has, apart from when he is the adverse party of the addressee or similar (cf. Art. 108 of the Code Civil), just a virtual conflict of interest about the action between the addressee, it should derive its validity of supplementary service to the addressee by delivering the above documents to the housemate, etc.

(2) But although the service of the complaint, etc. in this case has validity as supplementary service, a man cannot deny the existence of a ground of retrial of Art. 338 Para. 1 Item 3 immediately. The existence of the ground should be assessed anew, based on whether an opportunity of involvement in a procedure which should be guaranteed to the party is offered or not.

That is to say, when a man cannot expect that the document concerning an action is delivered rapidly from a housemate, etc. to the addressee because there is a virtual conflict of interest about the action between the addressee and his housemate, etc. who is delivered the above documents for the addressee, and when the above document is not really delivered, a man may not say that the addressee is offered an opportunity of involvement in the procedure. So, if this is the case and when the above document is not really delivered from the housemate, etc. to the addressee and therefore a judgment is given without the addressee’s acknowledgment that the action is brought, there should be a ground for retrial in Art. 338 Para. 1 Item 3 of the Code of Civil Procedure because there is no reason for different treatment from the case in which a person who did an act of procedure as an agent of the party had no agency.

Based on X’s opinion, the reason why X was demanded for perfor-

mance of a joint guarantee obligation on the previous action was that A, who had been delivered the complaint, etc. for X as his housemate had entered into a joint guarantee contract with B and C using X's name and seal without his permission, about the obligation of which A had been a principal debtor, and if X's opinion is right, there is a virtual conflict of interest about the previous action between X and his housemate A and it should be the case that a man may not expect that A delivers the document concerning the action for X to him. Consequently, if the complaint, etc. was not really delivered from A to X and therefore the previous judgment was given without X's acknowledgment that the action was brought, there should be a ground of retrial in Art. 338 Para. 1 Item 3 of the Code of Civil Procedure on the previous judgment.

Editorial Note:

(1) This judgment is the first decision of the Supreme Court which states clearly that it adopts an effective theory about the validity of a supplementary service when there is a virtual conflict of interest about an action between an addressee and his housemate, etc. and that in this case a man should assess anew the presence or absence of a ground of retrial in Art. 338 Para. 1 Item 3 of the Code of Civil Procedure based on whether an opportunity of involvement in the procedure which should be guaranteed to the party was offered or not, and I think this has a great influence on praxis.

(2) First, there is no doubt that, when the housemate, etc. is the adverse party of the addressee or similar, he has no right to receive a service and the supplementary service has no validity, even if the document concerning an action for the addressee was delivered to him in view of the aim of a ban on the representation of both parties.

On the other hand, in the case where there is a virtual conflict of interest about an action between an addressee and his housemate, etc., there is a confrontation of judicial precedents which held that the supplementary service is invalid or valid. The former reasons that a man should take it that the housemate, etc. has no authority to receive a document concerning a service when he can not be expected to deliver it to the addressee, so there is a virtual conflict of interest, because a point of a supplementary service is to anticipate normally to be delivered from a person

who has a certain close connection with the addressee to the addressee if the document is delivered to him. On the other hand, the latter reasons that the presence or absence of an authority to receive a document should be assessed objectively and clearly by appearance, but a virtual conflict of interest is not clear for a service institution and it is not appropriate that an effect of service is influenced by such circumstances because it lacks the stability of a procedure.

And, as discussed previously, this judgment held determinately to adopt the latter theory.

(3) About the availability of a retrial in the case of nullity of a service, the Supreme Court held that there was a ground for retrial in Art. 420 Para. 1 Item 3 of the Code of Civil Procedure (old code; now Art. 338 Para. 1 Item 3) when a complaint was not serviced validly and therefore a judgment was given without an opportunity of the person who was a defendant to be involved in the process, because there was no reason for different treatment from the case which a person who did an act of procedure as an agent of the party had no agency (Supreme Court 1st P.B., September 10, 1992. Case No. (o) 589 of 1991, 46 (6) MINSHU 553) and has taken a flexible stance on an expansive interpretation of the ground of retrial. This judgment brings forward a position of the judgment of the Supreme Court in 1992, which has substantiated the opportunity to be involved in the process that should be guaranteed to the party in terms of acknowledging the existence of a ground of retrial in Item 3, even in the case where there is no procedural defect, and this is very important and should be assessed affirmatively.

6. Criminal Law and Procedure

X v. Japan

Supreme Court 2nd P.B., March

26, 2007

Case No. 2003 (A) No. 1033

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