

No. 35070-0-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

In Re the Marriage of:
PETER P. TOLAND, Petitioner,
and
ETSUKO FUTAGI TOLAND, Respondent

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APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

This case presents an opportunity for the court to consider the application of state, federal, and international law to the dissolution of a marriage in a military family domiciled in Washington but deployed to Japan.

B. ASSIGNMENTS OF ERROR.

Assignment Of Error No. 1

The trial court erred by entering its order of September 15, 2004, that stayed this action pending the resolution of a competing action in Japan.

CP 149-50.

Assignment Of Error No. 2

The trial court erred by dismissing this action in its order of June 2, 2006, after the Japanese court purported to enter a divorce decree.

CP 335-36.

Issues Pertaining To Assignments Of Error

In response to the respondent mother's motion to dismiss, the trial court correctly held that it

had subject matter jurisdiction over this marital dissolution action after the mother filed a separate action for divorce in a Japanese court. Rather than staying this action pending the outcome of the Japanese case, ought the trial court to have determined, first, whether the Japanese court had personal jurisdiction over the father; and second, whether Washington had personal jurisdiction over the mother, custody jurisdiction over the parties' daughter, and subject-matter jurisdiction over the parties' property? (Assignment of Error No. 1.)

Under the laws and treaties that apply to this dispute, the Japanese courts had no personal jurisdiction over the father. Ought the trial court to have asserted its jurisdiction over the parties, the marriage, the child, and the parties' property, rather than dismissing the case after Japan purported to enter a divorce decree? (Assignment of Error No. 2.)

C. STATEMENT OF THE CASE.

The parties were married on March 22, 1995, in Tokyo, Japan. CP 1. At the time, the father had been a member of the United States Navy for over five years and had been based in Japan for two years. CP 3 & 230.

In 1995-96, the parties lived temporarily in Texas so that the father could complete his graduate studies; from 1996 until 1999, they resided in Washington State. CP 14, 36, 68 & 218. In 1999, the parties were deployed to the U.S. Navy base in Yokohama, Japan, where the father worked at the U.S. Naval Dental Center. *Id.* & CP 351-52.

The parties lived in base housing while stationed overseas, CP 230, maintaining strong ties to the United States and to Washington specifically. CP 71. They owned property in Kent, Washington, that they visited in 2001. CP 68 & 149. The mother became a U.S. citizen on April 13, 2003, CP 66, 75 & 218, and renounced her Japanese citizenship under

that country's laws. CP 98, 149 & 228. On her U.S. passport application, the mother represented that her permanent address was in Washington. CP 68 & 78. Her will directed that the Washington courts oversee her affairs. CP 68-69 & 82-86. Both parties also maintained Washington driver's licenses. CP 76 & 105. The father was registered to vote in Washington during the marriage. CP 68. The parties' strong ties to Washington are not surprising in light of the fact that the father was stationed here before the marriage from 1989 to 1992. CP 68.

A daughter, Erika, was born to the parties' union on October 17, 2002, at the U.S. Naval Hospital in Yokosuka, Japan. CP 1, 69, 79, 80 & 104. Erika is a United States citizen, and the application for her Consular Report of Birth Abroad recites that the parties' address in the United States is in Washington. CP 69 & 80. Erika has a U.S. Social Security number. CP 103.

Erika lived with her mother and father on the base until July 13, 2003, when the mother took her to the maternal grandmother's residence in Tokyo without the father's consent. CP 3, 158 & 218. For one year, the mother did not allow the father to share any time with their daughter. CP 70.

During the parties' marriage, they amassed property including employment-related retirement accounts, IRAs, and various liquid accounts having a value of about \$280,000. CP 6-7.

The father filed a petition for dissolution of marriage in this case in September 2003, although he was unable to serve the mother with the petition. CP 14-15 & 147. He filed an amended petition on May 10, 2004, CP 1-9, and served it upon the mother on June 7, 2004, CP 238. The father sought dissolution of the marriage, implementation of a parenting plan awarding him primary residential care of the parties' child, and a division of property. CP 1-9. He asked that the mother's parenting time

with the child be exercised in the United States.

CP 30.

Frustrated by the mother's withholding the child for several months, the father initiated mediation in 2004 in Japan so he that could enjoy some parenting time. CP 218-19. Short of filing his own legal action in Japan, mediation was the only mechanism available to the father to share time with the child. Any agreement that the parties might have achieved as to Erika would be voluntary and unenforceable under Japanese law. CP 308. During mediation, the mother agreed that the father could share time with Erika, facilitated by the "Family Problem Information Center," at least four times for limited periods when he came to Japan. CP 219. That agreement expired of its own terms upon entry of the later Japanese divorce decree. CP 116-17.

On April 1, 2004, the mother initiated a second divorce action in Japan. CP 34. The mother sought

divorce, custody of the child, child support, a division of property, legal costs, and damages for a "marital tort" she claimed to have suffered at the father's hands. CP 34-45. She did not ask the court to allow the father any time with Erika whatsoever. CP 40-41. The father's sole involvement in the Japanese case was to challenge the court's jurisdiction. CP 217 & 307.

In July 2004, the father was transferred from Yokohama, Japan, to Washington D.C., CP 68, and the mother filed a motion to dismiss this case because of a lack of jurisdiction or, alternatively, *forum non conveniens*, CP 10. The mother claimed in her motion that Washington had no jurisdiction over either her or the child. CP 11. She also alleged that a divorce action was pending in Japan; that the Japanese court was the only forum possessing jurisdiction over both parties, the child, and the marriage; and that the father had substantively defended the Japanese action. CP 13 & 24. Finally,

she alleged that Japan was the most convenient forum for resolving the parties' dispute. CP 11 & 29-30.

In response, the father argued that this state's courts provided the only forum that had jurisdiction over the marriage, both parties, and the child. CP 66-72. Alternatively, the father argued that the Washington court should defer a jurisdictional determination until the Japanese court had ruled on its own jurisdiction. CP 70. At the time, the father's Japanese counsel believed there was a strong likelihood that the Japanese court simply would decline jurisdiction because the mother was a U.S. citizen and the parties were a military family. CP 61-62 & 70.

A Washington commissioner initially dismissed this action for want of subject matter jurisdiction, concluding that the father did not meet the residency requirements of RCW 4.28.185 and that it did not have jurisdiction over the child under the Uniform Child Custody Jurisdiction and Enforcement

Act (UCCJEA), RCW 26.27. CP 124-27. The father sought revision of the commissioner's order. CP 128. In an order filed on September 15, 2004, the trial court vacated the commissioner's order and deferred jurisdiction to the Japanese court: "If the court in Japan rules it has jurisdiction over the marriage, the parties, and their property, the action in Japan shall proceed and upon final decree in Japan this matter shall be dismissed." CP 150.

The trial court's precise rationale for staying the Washington case remains mysterious. The court concluded that it had subject-matter jurisdiction over the marriage, CP 150; expressly declined to rule on the questions of Washington jurisdiction over the mother, the child, and the property, CP 150 & 10 Sept. 2004 RP 27; and evaded the *forum non conveniens* issues, see 10 Sept. 2004 RP 26 ("that's not before me"). The court did not consult with the Japanese court; rather, the Washington court appears to have suffered under what later turned out to be a

misapprehension that the Japanese court simply would dismiss the divorce case in that country for want of jurisdiction, or that the mother would return to the U.S. because of her tenuous Japanese immigration status:

So here's where I am: I agree that this thing in Japan should resolve the whole issue. And I agree that if it is resolved there, that this court is going to accept that. But if it's not resolved, and by some chance the statements of the counsel of Japan are accurate that the courts in Japan don't accept these, then we have a pending action in Washington, and I don't think that necessarily resolves everything because she can clearly move elsewhere. She can move [wherever] she wants to establish a domicile. I'm not establishing her domicile here in any way, but I am indicating that he had a domicile here, and, of course, they both did in 1999 and maybe even as far as 2000, if her will has any bearing on it. But I don't think anything should happen in this case. I think this case should be stayed until the Japanese court accepts or rejects their jurisdiction over the marriage and the custody issue.

10 Sept. 2004 RP 27-28. Further emphasizing the potential that the mother would return to the U.S., the court made a factual finding that the mother and

the child "continue[d] to reside in Japan although they [might] be required to leave in the future."

CP 50.

After obtaining a Virginia domicile in September 2004 (two years after he filed the present action), the father filed a third divorce action there. CP 228. He sought dismissal of the Washington case so that the Virginia case could proceed. CP 347-48; 21 Oct. 2005 RP. The Washington and Virginia courts conferred and concluded jointly that "if a divorce action was to proceed in the United States, [then] Washington [was] the appropriate state [to resolve the case]." 21 Oct. 2005 RP 10.

Accordingly, the Washington trial court did not dismiss the case, but rather required the mother to file a response to the father's Washington petition—one that would be considered only if Japan dismissed the mother's divorce action in that country. CP 396. The mother filed her Washington

response on October 27, 2005. CP 151-154. The Virginia court also ruled in October 2005 that it did not have jurisdiction over the mother. CP 164 & 347.

Also in September 2005, the Japanese court ruled upon the mother's divorce action there. CP 216 *et seq.* It recognized that the father sought only dismissal of the case, CP 217, and accepted the facts that the mother presented as true, CP 307. The Japanese court awarded mother full custody of Erika, with no parenting time specifically awarded to the father. CP 232-33. The Japanese court awarded the mother 8,000,000 Japanese yen (JPY) (about \$76,000) as her interest in the parties' property. CP 233 (the court used a JPY-to-dollar exchange rate of 105:1) & 235. The father was required to pay \$476 in monthly child support. CP 233 & 216. Finally, the mother was awarded JPY 1,000,000 (about \$9,500) for her claimed marital tort. CP 230, 233 & 234. The mother submitted the

Japanese decree to the Washington court on March 16, 2006.¹ See CP 326.

Meanwhile, the father brought a motion below for an order lifting the trial court's stay of the Washington divorce action. CP 155-59. He argued that the Washington court needed to determine whether it had jurisdiction over the mother, the child, and the parties' property, and that it needed to decide whether the Japanese court had jurisdiction over the father. CP 155-59. In particular, the father asked the court to take oral testimony concerning whether Japan's courts legally could assert any jurisdiction over him personally. 5 May 2006 RP 11-12. Mother filed a cross-motion to dismiss the case based upon the terms of the previous order and upon the entry of the Japanese decree. See 5 May 2006 RP 5-6.

¹ The delay in entry of the Japanese decree was a result of the father's claim that Japan did not have jurisdiction over him, and the consequent need for his right of appeal to expire, which is a condition of entry of the decree under Japanese law. CP 388-90.

The trial court dismissed the Washington case with prejudice, based simply upon the language to that effect in its previous orders. CP 150, 326-27 & 335. The court took no oral testimony concerning whether Japan had jurisdiction over the father, and it made no findings in that regard. *See generally* 5 May 2006 RP; CP 335-36.

D. SUMMARY OF ARGUMENT.

The father, a member of the U.S. armed forces, domiciled in Washington but deployed to Japan at the time of filing, is suffering under the weight of a Japanese family law system that denies non-custodial parents, and foreign military fathers in particular, any relationship with their children. He sought protection from the Washington courts by being the first to file a marital dissolution action, which was followed by the mother's filing of a Japanese divorce action seven months later.

Although the trial court found that it had jurisdiction over both the father and the marriage,

for unexplained reasons it declined to determine whether it had jurisdiction over the mother, the parties' daughter, or the parties' property. Instead, it deferred to the Japanese court so that it could either dismiss the mother's action for want of jurisdiction or enter a divorce judgment. And, although the father demonstrated that Japan could have no jurisdiction over him, the trial court failed to make a determination in that regard either.

The Japanese court entered a divorce decree awarding the father no parenting time and requiring him to pay child support, a significant property award, and damages for an alleged marital tort he never had a chance to refute. The trial court here then dismissed the father's dissolution action.

Under the circumstances presented, this court should reverse the trial court's dismissal of the case, and the matter should proceed until a Washington divorce decree can be entered.

E. ARGUMENT.

1. Review of the Trial Court's Decision is De Novo in this Court.

This case presents jurisdictional issues that this court reviews *de novo*. See *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995). To the extent that preliminary factual determinations must be made, as a general principle, a "substantial evidence" standard applies when "competing documentary evidence ha[s] to be weighed and conflicts resolved" in family law matters. *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003) (*en banc*). In *Rideout*, the mother argued that the Court of Appeals could review the documentary submissions as well as the trial court; thus, she reasoned, the appellate court should review the trial court's decision *de novo*. *Id.* The Supreme Court disagreed, noting that "trial judges and court commissioners routinely hear family law matters" and that the mother simply had failed to

seek the introduction of oral testimony at the trial court level. *Id.*

The *Rideout* rationale does not apply here, where the legal issues present a complex application of state, federal, and Japanese law, as well as international treaties, and where the father sought to introduce oral testimony regarding the factual underpinnings of those questions but was rebuffed. 5 May 2006 RP 14-16. On the contrary, where, as here, a case has been dismissed for want of jurisdiction based merely upon affidavits, this court must view the father's submissions as accurate. *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wash. App. 414, 418, 804 P.2d 627 (1991). Moreover, review is *de novo* on the paper record below. *Id.*

2. This Case Was the First One to Be Filed.

The father filed this Washington dissolution case seven months before the mother began her competing action in Japan. "Whether an action is

'commenced' for purposes of the [UCCJEA] (RCW 26.27) is determined by reference to the relevant State's procedural rules governing the action." See *In re Marriage of Payne*, 79 Wn. App. 43, 50, 899 P.2d 1318 (1995) (interpreting former statute). In Washington, a domestic relations action is commenced when it has been filed or served. CR 4.1(a); see also RCW 26.27.021(5). The trial court mistakenly assigned no significance to the fact that the Washington case was the first to be filed. That legal error carries a variety of implications under the UCCJEA. See, e.g., RCW 26.27.251(1). It colored all of the subsequent proceedings in this case.

3. Washington Had Subject-Matter Jurisdiction over the Marriage and Japan Did Not.

The trial court correctly concluded that the Washington court had subject matter jurisdiction over the marriage under Washington's long-arm statute, RCW 4.28.185(1)(f), because the father had

been "[l]iving in a marital relationship within this state notwithstanding subsequent departure from this state, [and had] continued to reside in this state"

Residence, within the meaning of statutes establishing subject matter jurisdiction over marriages, is equated with domicile. *Thomas v. Thomas*, 58 Wn.2d 377, 380, 363 P.2d 107 (1961) (interpreting statutory predecessor to RCW 4.28.185(1)(f)). "Where one party is domiciled in the state, the court has jurisdiction over the marriage and may dissolve it, even though the court is unable to obtain *in personam* jurisdiction over the nonresident spouse." *In re Marriage of Tsarbopoulos*, 125 Wn. App. 273, 284, 104 P3d 692 (2004) (citations omitted). That approach is consistent with the United States Supreme Court's holding that jurisdiction over a marriage may be founded on the filer's domicile. *Williams v. North*

Carolina, 317 U.S. 287, 303, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

The father retained his Washington domicile when he filed for dissolution in 2003. When not deployed by the military to Japan, the father had lived only in Washington from 1989 to 1999, except for the single year (1995-96) that he stayed temporarily in Texas to facilitate his graduate studies. He maintained a Washington driver's license and voter's registration, he owned Washington realty jointly with the mother, and he and the mother listed their address in Washington on other significant legal documents, including, for example, passports and the Consular Record of their daughter's birth. As the trial court correctly acknowledged, 10 Sept. 2004 RP 26, it is well established that a military family does not lose its previous domicile by being stationed away from that domicile in the line of duty. *In re Marriage of Jacobs*, 20 Wn. App 272, 276, 579 P.2d 1023 (1978);

see also In re Marriage of Sasse, 41 Wn.2d 363, 367, 249 P.2d 340 (1952).

At the same time, by contrast, when the father filed his petition in September 2003, neither he, nor the mother, nor their child, was a Japanese domiciliary. They could not be, under the international agreement that governs the status of U.S. service personnel and their dependents while stationed in Japan. Agreement Under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, January 19, 1950, U.S.-Japan, 11 U.S.T. 1652 [hereinafter SOFA Agreement] (CP 353-367); *see also Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (status of Forces Agreement in an international treaty). The SOFA Agreement specifically provides that "[m]embers of the United States armed forces . . . and their dependents . . .

shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan." SOFA Agreement, *supra*, art. IX, § 2 (CP 355) (emphasis added). Treaties are "the supreme Law of the Land; and the Judges in every State [are] bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2; *see also* 767 Third Ave. Assocs. v. Permanent Mission of Zaire to U.N., 988 F.2d 295, 297 (2d Cir.), *cert. denied*, 510 U.S. 819 (1993) (landlord-tenant law).

The Japanese court, without explanation, ruled in its divorce decree that the parties were "not appropriately governed by" the SOFA Agreement and that, when the mother initiated her divorce action in Japan in April 2004, the father, the mother, and the child, all were Japanese "permanent residen[ts]". CP 227. That conclusion is patently incorrect and should simply be disregarded by this court. For our purposes, it is sufficient to note

that the mother bore the burden of proving here that the parties' domicile had, at the time of the Washington filing, been changed from Washington to Japan. *State v. Burns*, 59 Wn.2d 197, 200, 367 P.2d 119 (1961); *Sasse*, 41 Wn.2d at 382. She did not, and she could not—it was a legal impossibility under the SOFA agreement.

4. The Father Did Not Subject Himself to Japanese Jurisdiction by Attempting to Visit His Child in That Country.

The trial court found that the father filed "a mediation agreement" in Japan, but it made no findings as to the legal significance of that fact. CP 149. For several reasons, the father did not subject himself to Japanese jurisdiction by participating in parenting time mediation.

First, the nature of the Japanese mediation process itself dispels any conclusion that the father subjected himself personally to Japan's jurisdiction by participating in it. The process is

called, in Japanese, *chotei*. It is a mediation process that gives parents a forum to work out disputes about custodial and visitation rights. Satoshi Minimikata, *Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*, 39 FAM. L.Q. 489, 490-91 (2005) [hereinafter *Resolution in Chotei*] (CP 277). By its very nature, *chotei* must be completed before family court litigation can be filed. *Id.* In an affidavit, the father's Japanese lawyer explained that, "voluntary mediation is completely separate from accepting jurisdiction over [the father] . . . in the Japanese court process in the divorce." CP 307.

The trial court's conclusion that the father filed his request for mediation "in" the mother's Japan divorce action is incorrect. CP 149. In fact, the mother had not yet filed in Japan at the time. As already noted, *chotei* must be completed before

filing litigation. Under the *chotei* process, if the parties do not reach an agreement, either may then file a separate divorce action to litigate the outstanding issues. *Resolution in Chotei, supra*; see also CP 34 (the mother's separate divorce petition). The mother relied below upon the record produced at mediation to show that the parties believed the *chotei* process provided a mechanism to settle the parenting time dispute, CP 114, which, of course, is true—that is the nature of the *chotei* process. Contrary to the mother's suggestion, however, the *chotei* record does not show that the father subjected himself to the *personal jurisdiction* of the Japanese divorce court by participating in *chotei*.

Second, it would be wholly inequitable to conclude that the father submitted to Japan's jurisdiction simply because he sought parenting time with his child. This state has a strong interest in the amicable resolution of family law matters. It

was error for the trial court to characterize the father's participation in the Japanese *chotei* process as a personal appearance in the Japanese legal case. This court should not make the same mistake.

At the time that the father sought *chotei* in Japan, the mother had deprived the father and the child of any time together for several months. Moreover, as will be discussed, Japan accords non-custodial parents few, if any, rights of contact with their children. The father correctly perceived that *chotei* was the only opportunity available to him to share time with the parties' child. Whatever may be this court's view of the Japanese family court system, the father should not be penalized by the Washington courts for seeking contact with his child by the only means available. *Cf.*

RCW 26.27.091 (limited immunity from process in child custody proceeding).

5. Washington Had Personal Jurisdiction over the Mother.

Washington had personal jurisdiction over the mother, because she lived "in a marital relationship" in Washington from 1996 to 1999. RCW 4.28.185(1)(f). There is no need to quibble, as the mother did below, over whether she had changed her own domicile from Washington to Japan. The statute applies "notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party [here, the father] has continued to reside in this state or has continued to be a member of the armed forces stationed in this state." *Id.* As previously discussed, the father was domiciled in Washington while he was deployed to the U.S. base in Japan, and, in particular, when he filed this case. Because Washington had jurisdiction over the mother under the long-arm statute, service upon her in Japan had "the same

force and effect" as if she were served in Washington. RCW 4.28.185(2).

To the extent that the court finds it relevant, it is fair to note once again that, at all times relevant to the jurisdictional issues presented by this dispute, the mother remained a U.S. citizen and was neither a Japanese citizen nor a domiciliary of Japan. CP 148; SOFA Agreement, *supra*. The Japanese court, for its part, engaged in a prolonged soliloquy regarding the family's various contacts with Japan and simply ignored the plain terms of the SOFA Agreement. See CP 216-237.

6. Washington Had Jurisdiction to Enter a Parenting Plan Under the UCCJEA.

Washington is entitled to enter a parenting plan if it has jurisdiction to do so under the UCCJEA. RCW 26.27.201. While "[a] court of this state shall treat a foreign country as if it were a state of the United States" when determining child custody jurisdiction, "[a] court of this state need

not apply [the UCCJEA] if the child custody law of a foreign country violates fundamental principles of human rights." RCW 26.27.051.

As a general matter, Washington possessed UCCJEA jurisdiction if Erika lived in Washington for the six months preceding the father's filing of his petition for dissolution ("home state" jurisdiction), or if any of the other jurisdictional prerequisites listed in RCW 26.27.201(1) were met. See RCW 26.27.021(7). At the time of filing, Erika, like her parents, was domiciled in Washington and could not be domiciled in Japan. See *In re Adoption of Buehl*, 87 Wn.2d 649, 660, 555 P.2d 1334 (1976); SOFA Agreement, *supra*. Moreover, "[a] period of temporary absence of a child, parent, or person acting as a parent is part of the [six-month] period" for determining the child's "home state" under the UCCJEA. RCW 26.27.021(7). Washington is Erika's "home state." See *Lemley v. Miller*, 932 S.W.2d 284 (Tex. App. 1996).

The UCCJEA sets forth specific procedures that must be employed when a Washington court discovers that there are custody proceedings pending simultaneously in two courts. First, the Washington court must stay its proceedings and communicate with the other court. RCW 26.27.251(2). Then, if it determines that the other forum is more appropriate, it must dismiss its case. *Id.*

The trial court erred. It failed to follow the statutory procedures required by the UCCJEA. It elected to leave the question of Washington's jurisdiction over Erika unanswered. It did not communicate with the Japanese court. It did not determine, as required under RCW 26.27.251(2), whether Japan was exercising its jurisdiction "substantially in accordance" with the UCCJEA.

As already noted, even if Washington were not Erika's home state, the court still would be entitled to assert jurisdiction over Erika if Japan's "child custody law . . . violate[d]

fundamental principles of human rights.”

RCW 26.27.051(3). This provision, commonly referred to as the UCCJEA “escape clause,” was based on a concern “that international cases would arise in which UCCJEA would be inappropriate.” D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 565 (2004) (CP 266.)

The trial court could have and should have taken testimony and examined whether Japan’s family court system comported with fundamental principles of human rights. That having been said, it is apparent from the written record that it does not. A U.S. citizen’s right to nurture and care for his child, and to the child’s companionship, is a core and fundamental right. As the United States Supreme Court declared in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of

their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” 530 U.S. at 65. Similarly, the policy statement governing Washington’s domestic relations statutes provides, in part, that “[t]he state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child’s best interests.” RCW 26.09.002.

By contrast, Japan effectively excises the non-custodial parent from a child’s life in the absence of the parents’ agreeing to the contrary. While its statutes contain purely ornamental language suggesting otherwise, in practice the law as applied deprives non-custodial parents of any relationship whatsoever with their children. The United States Department of State warns its citizens:

Japan is not a party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

Japanese law stresses that in cases where custody cannot be reached by agreement between the parents, the Japanese Family Court will resolve the issue based on the best interests of the child. *However, compliance with Family Court rulings is essentially voluntary, which renders any ruling unenforceable unless both parents agree.*

* * * * *

Although visitation rights for non-custodial parents are not expressly stipulated in the Japanese Civil Code, court judgments often provide visitation rights for non-custodial parents.

In practical terms, however, in cases of international parental child abduction, foreign parents are greatly disadvantaged in Japanese courts, both in terms of obtaining the return of children to the United States, and in achieving any kind of enforceable visitation rights in Japan. The Department of State is not aware of any case in which a child taken from the United States by one parent has been ordered returned to the United States by Japanese courts, even when the left-behind parent has a United States custody decree. In the past, Japanese police have been reluctant to get involved in custody disputes or to enforce custody decrees entered by Japanese courts.

CP 287 (emphasis added).

Japan is unwilling to more actively support non-custodial parents' rights, particularly because of its perception that this issue relates only to U.S. military personnel, who are, by inference, not worthy of protection. CR 324. Even those orders that Japanese courts do enter, which in practice are unenforceable, provide fathers with very little time with their children unless the mothers are deemed unfit. CP 62.

The specific facts of our case serve to amplify the concerns related to the lack of value Japan attaches to non-custodial parents generally. The Japanese decree contains absolutely no provision that allows the father time with Erika. The July 2004 mediated parenting time agreement expired of its own terms upon entry of the Japanese decree.

Even though it was unenforceable, the mediated agreement in any event permitted the father a shockingly limited amount of parenting time—supervised visits for a couple of hours, on

four days of each long journey the father made to that distant country, and then only upon three months' advance notice. And, as already observed, the court decree failed to incorporate even that negligible parenting time. For all intents and purposes, the Washington trial court's dismissal of this action has severed the parental relationship between Erika and her father.

As a practical matter, the mother will never allow the father parenting time because of her concern that he would turn the tables and remove Erika to a jurisdiction—such as the U.S. naval base—over which Japan could exert no legal authority. She naturally would expect such conduct, because it is the precise strategy she employed when she removed Erika from the U.S. base in Japan in the first place. Ironically, however, unlike the Japanese court, this court at least would permit her to see her child.

Washington would not enforce a Japanese custody judgment if it determined that Japanese law was, in practice, contrary to Washington's strong public policy and was not protective of the child's best interests. See *In re Custody of R.*, 88 Wn. App 746, 761 & n. 14, 947 P.2d 745 (1997) (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 90 (1971)). By extension, Washington should not have stayed its case pending entry of the Japanese decree if it would refuse to enforce the Japanese decree in any event.

The father is a member of the military, called upon by the U.S. government to serve in Japan. The unique circumstances related to his fulfillment of those legal duties facilitated the mother's abduction of the child to Japan proper. That country employs empty rhetoric that ostensibly protects the rights of non-custodial parents. In practice, however, Japan endorses the custodial parent's unilateral deprivation of those rights. This court should not cooperate in the mother's

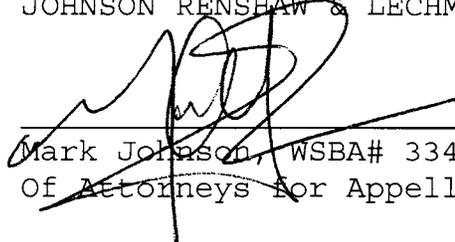
actions by failing to employ statutory remedies available in Washington to protect the father's constitutionally guaranteed rights. It was error for the trial court first to stay and then to dismiss this case without entering a judgment that adjudicated the father's custodial rights rather than ignoring them.

F. CONCLUSION.

The judgment dismissing this case and the order staying it should both be vacated and the case should be remanded for trial.

Respectfully submitted this 17 day of
January, 2007.

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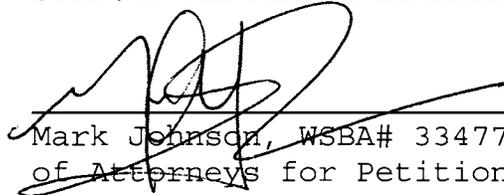
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DATED this 17 day of January, 2007.

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