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DIVISION II

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

No. 41388-4-II

In re the Estate of Etsuko Toland

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

BRIEF OF APPELLANT

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I. Introduction

Commander Peter Paul Toland, Jr. is the sole surviving parent of eight year old Erika Toland. While stationed in Japan by the U.S. Navy in 2003, Commander Toland's wife, Etsuko Toland, unilaterally removed Erika from Navy housing and later filed for divorce. On October 31, 2007, Etsuko committed suicide. Despite promises to return Erika to Commander Toland, Erika has been kept by Erika's maternal grandmother, Akiko Futagi, and aunt, Yoko Futagi. The United States federal government and Commander Toland consider Erika abducted.

Without notice to Commander Toland, Akiko Futagi obtained guardianship of Erika in Japan in 2008. Also without notice to Commander Toland, Yoko Futagi commenced this probate case in Washington in 2009. When Commander Toland learned of the probate case about one year later, he filed a request for special notice of proceedings and a TEDRA petition raising several issues. The trial court dismissed all of Commander Toland's claims on October 8, 2010, by summary judgment.

As the only living parent of Erika, it is Commander Toland's position that he should be allowed to participate in the probate case in which his daughter is the only heir. While Commander Toland pointed out several irregularities in the probate proceedings and raised several issues in his TEDRA petition, his overriding concern is the best interest of his daughter. The trial court may ultimately deny Commander

Toland's requests for relief. But it was error for the trial court to dismiss his entire petition on summary judgment, thereby denying him any participation or input in the case.

II. Assignments of Error

A. Assignments of Error

1. The trial court erred in determining that Commander Toland had no right to participate in a probate in which it is alleged that his minor daughter is the sole beneficiary, where Commander Toland is the child's only surviving parent. CP 630-631.

2. The trial court erred in denying Commander Toland's motion to compel mediation where he properly filed and served a demand for mediation of the issues raised in his TEDRA petition. CP 628-629.

3. The trial court erred by not addressing Commander Toland's claim that the Personal Representative and his counsel failed to meet their fiduciary duties by, among other things, filing a creditor claim on behalf of a creditor and failing to respond to that creditor claim. CP 630-631.

4. The assigned trial judge in this case is prejudiced against Commander Toland because she has concluded Commander Toland's statements that he wishes to ensure the estate funds reach his daughter amounts to blackmail. RP 17-18.

B. Issues Pertaining to Assignments of Error

1. Is Commander Toland entitled to participate in a probate case in which his minor child is the sole beneficiary where he is the only surviving parent and where there has been no claim that he is an unfit parent? Assignment of Error 1.

2. Should this case have been set for mandatory mediation before the court dismissed Commander Toland's petition where Commander Toland properly filed and served his request for mediation pursuant to the Trusts and Estates Dispute Resolution Act? Assignment of Error 2.

3. Was it error for the trial court to not rule on Commander Toland's claims that the best interests of his daughter were not being protected where the Personal Representative violated his fiduciary duties by filing a creditor claim for a creditor and by failing to respond to that creditor claim? Assignment of Error 3.

4. Is the trial judge in this case prejudiced against Commander Toland where she stated that Commander Toland's concerns that his daughter be the actual recipient of estate funds is perhaps considered blackmail? Assignment of Error 4.

III. Statement of the Case

Commander Peter Paul Toland, Jr. is the only surviving biological parent of Erika Toland. CP 84 (paragraph 2.5), 95, 133. Erika is eight years old. CP 95. Her mother, Etsuko Futagi Toland, committed suicide on October 31, 2007. CP 93, 131.

Commander Toland is an officer in the United States Navy and has been for over twenty-one years. CP 84, 132. The Navy stationed Commander Toland, and his wife, Etsuko Futagi Toland, in Japan in 1999. CP 84. Although formerly a Japanese citizen, Ms. Toland became a United States citizen on April 18, 2003. CP 99.

On July 13, 2003, Ms. Toland left Navy housing without notice to Commander Toland, taking Erika with her. CP 85. Commander Toland filed a marriage dissolution action in Washington State in September 2003, which was where the Tolands were stationed before being sent to Japan in 1999. CP 84-85, 133. Ms. Toland filed a marriage dissolution action in Japan in November of 2003. CP 85, 133. In an unpublished opinion filed August 21, 2007, this Court of Appeals affirmed the dismissal of Commander Toland's marriage dissolution action in Washington. CP 180-195. About fifteen days before the mandate was issued in that case, Ms. Toland committed suicide. CP 93, 178-179.

Since Ms. Toland's death, Erika has been residing with her maternal grandmother, Akiko Futagi, in Japan. CP 53-54, 260. Erika is considered abducted by the United States federal government, with the abduction documented through the National Center for Missing and Exploited Children, case number 1121552. CP 85, 260. A representative of the United States State Department says Erika's abduction is one of the more egregious cases of child abduction currently being dealt with by the State Department. CP 278. Senator John McCain wrote to the

Ambassador of Japan on June 28, 2010, asking for assistance in reuniting Commander Toland with his daughter. CP 374. Senator McCain also wrote Secretary of Defense Gates asking for assistance in this matter. CP 376.

Erika's abduction and others like it have drawn the attention of many in the United States government. CP 260. Twenty-two Senators wrote President Barack Obama asking that his administration give the problem of international child abduction in Japan special attention. CP 373-330. The Tom Lantos Human Rights Commission in the House of Representatives has done the same. CP 332-336. These cases have also led to H. Res. 1326. Appendix A (passed House September 29, 2010). As originally introduced, the bill specifically referred to the abduction of Erika. CP 101-112.

Since Ms. Toland's death, Commander Toland has personally taken steps to secure the return of his daughter. CP 259-260 (paragraph 11). On December 4, 2007, Ms. Toland's sister, Yoko Futagi, informed Commander Toland of Ms. Toland's death. CP 282. Yoko Futagi asked Commander Toland to cancel his December visit to Japan since Erika would be returned to the states by Christmas. *Id.* During the months of December 2007 and January 2008, Commander Toland and Yoko Futagi had discussions and negotiations regarding the return of Erika to her father in the United States. CP 283-284, 287-312. These negotiations progressed to the point of Yoko Futagi asking Commander Toland to prepare an agreement outlining the return of Erika to her

father. CP 304-305. While these negotiations were going on, Commander Toland was unaware that Akiko Futagi was obtaining an order of guardianship over Erika in Japan. CP 231-232¹, 314-315. The guardianship order in Japan appears to have been entered January 29, 2008. CP 314-315.

In the days that followed entry of the Japanese guardianship order, Yoko Futagi stopped communicating with Commander Toland. CP 318-320, 324-325, 327-329. Throughout the spring and summer of 2008, Commander Toland continued efforts to speak with the Futagis regarding the return of his daughter. CP 331-342. In August of 2008, the United States State Department conducted a welfare and whereabouts visit with Erika and her grandmother. CP 344-348. On the first anniversary of Ms. Toland's death, Commander Toland contacted Yoko Futagi and indicated he was attempting to retain Japanese counsel to facilitate reunification with his daughter, as requested by the Futagis during the State Department welfare visit. CP 350-351. By February 2009, Commander Toland's Japanese counsel had been unsuccessful in arranging reunification, and Commander Toland again contacted Yoko Futagi directly. CP 353-354. In March of 2009, Yoko Futagi's attorney, Judy Dugger, instructed Commander Toland to stop contacting Ms. Futagi directly, among other things. CP 356-357. From that point

¹ This citation to the record refers to a transcript from a hearing in a companion case filed in Pierce County Superior Court Cause No. 10-2-07487-8, in which the Personal Representative is seeking to enforce the Japanese Divorce Decree. That case is still pending.

forward, Commander Toland continued efforts through legal counsel to see his child, and even attempted to take steps to pay child support to the maternal grandmother. CP 359-370. Such attempts were unsuccessful. *Id.* In April of 2009, a State Department welfare visit with the child was denied by the maternal grandmother. CP 114-115, 372. In October 2009, Commander Toland received notice that the family also rejected a visit by the Japanese Ministry of Foreign Affairs in September 2009, which the State Department was helping to coordinate. *Id.* During attempts to arrange a welfare visit in September 2009, the maternal grandmother made reference to pending cases in the United States. CP 372. Apparently this referred to the present case, which was filed by Yoko Futagi and her attorney, Judy Dugger, on May 11, 2009. CP 1-54.

Yoko Futagi filed the initial petition for probate in this case seeking to be appointed personal representative of the estate. CP 1-54. In her petition, Ms. Futagi alleges that Erika is the sole beneficiary of the estate. CP 3. Ms. Futagi was appointed personal representative on the condition that she post a bond. CP 55-57. When Ms. Futagi could not post a bond, she asked to be appointed without bond. CP 62-65. When that motion was denied, she filed a motion for revision, which was also denied. CP 66-69. On September 23, 2009, the court appointed Bryce Dille as substitute personal representative. CP 71-72. At that time the court also appointed Michael B. Smith as guardian ad litem for Erika. CP 74.

Commander Toland did not learn of the present case until approximately April of 2010, nearly a year after it was filed. CP 87, 261. Michael B. Smith was not notified of his appointment as guardian ad litem for the child until May of 2010, about nine months after his appointment, when he learned of it through Commander Toland's attorney. CP 74, 97. It is unclear from the record if anything happened in the estate between Mr. Dille's appointment in September 2009, and Commander Toland's discovery of the case in April 2010. The inventory filed in the case was prepared and signed by Ms. Futagi in May of 2009. CP 60-61. Among the assets listed in the inventory are judgments entered against Commander Toland in Japan. CP 61. Whether these judgments are recognizable under Washington law is the subject of pending litigation. CP 221-234; *See also* RCW 6.40A.020(2). There was no evidence that notice of the probate was ever provided to the Washington State Department of Social and Health Services. CP 97. The Notice to Creditors was not provided until June 3, 2010. CP 128-129. This did not take place until after the deficiency was pointed out by the guardian ad litem. CP 97. The Notice to Creditors has not been published. CP 128-129.

Upon learning of the probate case, Commander Toland filed a Request for Special Notice of Proceedings. CP 78-80. When the personal representative indicated he would not honor the Request for Special Notice of Proceedings (CP 127), Commander Toland filed a TEDRA Petition to intervene in the probate. CP 83-127. Commander

Toland raised several issues in his TEDRA petition. CP 83-89. The primary issue raised in the TEDRA petition relevant to this appeal is Commander Toland's claim that, as Erika's only surviving parent, he is the proper manager of her estate. CP 88-89 (paragraph 2.31; Prayer for Relief paragraphs 8, 9, and 11).

Commander Toland sought mediation of the issues raised in the TEDRA petition by a notice dated August 30, 2010, pursuant to RCW 11.96A.300. CP 517. On September 10, 2010, the estate filed a motion for summary judgment seeking dismissal of Commander Toland's TEDRA petition. CP 393-492 (excluding CP 425-471 which was inadmissible and stricken at RP 18). On September 20, 2010, the estate also objected to Commander Toland's request for mediation. CP 493-510. Commander Toland responded the next day by filing a motion to enforce mediation. CP 519-522. All motions were heard on October 8, 2010. RP 1-21. Following argument, the court granted summary judgment dismissing Commander Toland's TEDRA petition and denied Commander Toland's request for mediation CP 628-631; RP 17-18. With regard to Commander Toland's expressed concern that his daughter, and not her abductors, actually receive the estate distribution (including the court of appeals judgment owed by him), the trial court observed that "an offer to pay that which is ordered under a valid court order, conditioned on sum [sic] assurances, is perhaps considered blackmail...." RP 17-18. Commander Toland appeals these orders. CP 638-641.

IV. Argument

Because this case was decided on summary judgment, this court reviews the trial court's decision de novo. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 906 P.2d 336 (1995). This court engages in the same inquiry as the trial court, reviewing the facts in the light most favorable to the non-moving party, in this case Commander Toland. *Id.* This is particularly so in the present case, where there was no evidence submitted by the estate in support of its summary judgment motion. The estate only submitted legal memoranda in support of its motion. CP 235-253, 393-432.

1. **Commander Toland's TEDRA petition should not have been dismissed because parents have a statutory and constitutional right to manage the estates of their children.**

As the only living parent of Erika Toland, the sole heir of the estate, Commander Toland should be permitted to participate in the proceedings. In Washington, upon the death of one parent, the surviving parent comes, "into full and complete control of the children and their estate." RCW 26.16.125. Similarly, RCW 11.114.060 provides that when there are funds to be paid to a minor, the personal representative, the trustee, or a member of the child's family can select the custodian of those funds with the court's approval. RCW 11.114.060(1). If no account has been set up, a member of the minor's family can ask the court to establish such an account. RCW 11.114.060(2).

These statutory rights are consistent with the constitutional liberty rights of parents. In *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the Supreme Court held:

The 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.

Id. at 65. The Supreme Court went on to say, “...the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Id.* at 72-73. These constitutionally protected parental rights have been discussed by the Supreme Court in several cases including: *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the Due Process Clause of the United States Constitution protects the rights of parents to bring up their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) (the liberty of parents to direct the upbringing of their children is protected); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (confirming that parents have a constitutionally protected right to direct the upbringing of their children); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (parents have a fundamental liberty interest in the “care, custody, and management of their children.”); and *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“the ‘liberty’ specially protected by the Due

Process Clause includes the right . . . to direct the education and upbringing of one's children.”).

Washington's constitution also protects the liberty interests of parents. *See* Const. art. I, § 3. The Washington Supreme Court refers to parental rights as “sacred rights,” which must be accorded close scrutiny. *Moore v. Burdman*, 84 Wn.2d 408, 526 P.2d 893 (1974).

The personal representative argues that the question of who should be the custodian of Erika's estate is not an issue raised by anyone or otherwise put before the court. CP 402; RP 9. But in the present case, Commander Toland alleged that he was the proper custodian of his daughter's estate, and requested a court order determining who the proper heirs of the estate were. CP 88 (paragraph 2.31, and paragraph 8 of the Prayer for Relief). He also asked that if his daughter were determined to be the sole heir of the estate, that he be appointed custodian of that estate pursuant to the provisions of RCW 11.114. CP 89. He also asked for any additional relief the court deemed just and equitable. CP 89. This was a proper and reasonable request in light of RCW 11.114.060(2) and RCW 26.16.125. Further, as the only individual with full and complete control over his daughter's estate, Commander Toland properly filed a TEDRA petition to determine the rights of the parties to the action. RCW 11.96A.030(5)(d), (f), (i), (l); RCW 11.96A.080(1); RCW 26.16.125.

Commander Toland is concerned that as the case presently stands, for all practical purposes, control over his daughter's estate rests

or will rest with his child's abductors. CP 260-261. The Futagi family's interests in the case are represented by Judy Dugger, and have been for years. CP 347, 356-363. Ms. Dugger represents both the personal representative of the estate, and a creditor of the estate, Ms. Futagi. CP 130-131, 356-357. According to Ms. Dugger, "All of us are in agreement with how the Estate is proceeding within the cases and the arguments that are being presented. At no time are any of us discussing these matters with Mr. Toland or his [a]ttorneys." CP 532. Commander Toland is the only individual to have expressed concern over this situation, and as Erika's only surviving parent, he is entitled to do so. RCW 26.16.125; *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

The estate has argued that because Commander Toland is a debtor of the estate, he is barred from participating in the probate. CP 401. However, there is no "debtor exception" to either RCW 26.16.125 or *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Commander Toland's status as a debtor may be a factor for the court to consider in deciding what to do with the estate assets, how to preserve them for Erika's benefit, and who a proper custodian of those funds would be. But the trial court did not do that. Instead, the trial court ruled that Commander Toland cannot participate in the probate whatsoever. CP 254, 630-631. As the case now stands, none of Commander Toland's concerns about whether his daughter's abductors will be put in charge of his daughter's funds will be heard. Under the

circumstances, Commander Toland cannot even suggest that some independent third party be put in charge of his daughter's estate.

The estate may argue that because the Personal Representative is a court appointed representative, or because Erika's court appointed guardian ad litem, Mr. Smith, are parties to the case, there is no need to consider, much less seek, the input of Commander Toland on the affairs affecting Erika's interest in the estate. But the Supreme Court in *Troxel* made it clear that it is not for the court or its appointed representatives to substitute their judgment for that of a parent. *Troxel v. Granville*, 530 U.S. at 72-73. To do so in this case would violate Commander Toland's constitutional liberty interest. As in *Troxel* there are no allegations that Commander Toland is an unfit parent. CP 259.

By granting summary dismissal of Commander Toland's petition, the trial court denied him the opportunity to have any input into fundamental issues such as who will be responsible for managing his daughter's assets. This result violates Commander Toland's statutory rights under RCW 26.16.125, and his fundamental liberty rights under the Washington and United States Constitution. For these reasons, the summary judgment entered by the trial court dismissing Commander Toland's TEDRA petition should be reversed.

2. **Issues raised by Commander Toland regarding who the proper custodian of his minor child's estate should be should have been mediated prior to the court considering the estate's motion for summary judgment.**

Before the estate filed its summary judgment motion, Commander Toland served a notice for mediation dated August 30, 2010, pursuant to the provisions of TEDRA. CP 517; RCW 11.96A.300. If the notice for mediation is served prior to a hearing being set, the procedures in subsection (2) of the statute apply. RCW 11.96A.300(2). On September 20, 2010, the Personal Representative objected to Commander Toland's notice for mediation. CP 493-510. At the hearing on the objection to a notice for mediation,

the court shall order that mediation proceed except for good cause shown. Such order shall not be subject to appeal or revision. If the court determines that the matter should not be subject to mediation, the court shall dispose of the matter by: (i) Deciding the matter at that hearing, but only if the petition objecting to mediation contains a request for that relief, (ii) requiring arbitration, or (iii) directing other judicial proceedings.

RCW 11.96A.300(2)(d).

For the reasons stated in the preceding section of this brief, it was error to dismiss Commander Toland's TEDRA petition. The Personal Representative opposed mediation on the grounds that Commander Toland was not a proper party to the case and therefore his TEDRA petition should be dismissed. CP 493-495. But as Erika's sole surviving parent, Commander Toland was a proper party as the person entitled to control the estate of Erika. RCW 26.16.125. Having shown no other good cause why mediation was not proper, the Personal

Representative's objection to mediation should have been rejected and an order directing the parties to engage in mediation should have been entered. RCW 11.96A.300(2)(d).

3. Filing a creditor's claim for a creditor and failing to respond to that claim constituted breach of fiduciary duty by the personal representative.

Commander Toland's concerns for the financial wellbeing of his daughter, as discussed above, are only reinforced by the fact that the Personal Representative assisted a creditor – who is also represented by the Personal Representative's attorney – in filing a claim against the estate. Yoko Futagi filed a creditor claim in this matter on a form prepared by the Personal Representative, and his attorney. CP 130-131. The claim is for a loan dating back more than three years. *Id.* (a loan which had to predate the decedent's death on October 1, 2007). Allegedly this loan was used to pay attorney fees to counsel for the Personal Representative. *Id.* There is no proof submitted that the loan agreement was in writing. *Id.* It appears to be a claim that is therefore barred by the statute of limitations. RCW 4.16.080(3). But the claim has not been accepted or rejected by the personal representative. CP 130-131.

A personal representative has a duty to accept or reject creditor claims. RCW 11.40.080(1). A claim cannot be allowed if it is barred by the statute of limitations. RCW 11.40.090(4). "The intent of the probate code is to limit claims against the decedent's estate, expedite closing the

estate, and facilitate distribution of the decedent's property." *Nelson v. Schnautz*, 141 Wn. App. 466, 475, 170 P.3d 69 (2007).

Compliance with the statute [RCW 11.40] is mandatory. A debt which accrued during the lifetime of the decedent is barred and may not be paid unless a claim for its payment was filed within the 4-month period. *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969); *In re Estate of Dorey*, 62 Wn.2d 152, 381 P.2d 626 (1963). Equitable considerations may not mitigate the strict requirements of the statute where a timely claim has not been filed by the creditor or by the executor. *In re Mayou*, 6 Wn. App. 345, 492 P.2d 1047 (1972); *In re Estate of Hayes*, 2 Wn. App. 961, 471 P.2d 691 (1970)

Wilson's Estate v. Livingston, 8 Wn. App. 519, 525, 507 P.2d 902, 907-08 (1973) (discussing the Personal Representative's duty to reject claims not filed within the time limits set forth in RCW 11.40). "Whenever the court has reason to believe that any personal representative has ... neglected to perform any acts as such personal representative, *or for any other cause or reason which to the court appears necessary*, it shall have power and authority, after notice and hearing to revoke such letters." *In re Estate of Jones*, 152 Wn. 2d 1, 10, 93 P.3d 147 (2004) (emphasis in the original).

If accepted (or not rejected), the creditor claim filed by the Personal Representative on behalf of Yoko Futagi will reduce the estate payable to Erika. If this claim is barred by the statute of limitations then the Personal Representative has a duty to reject it. RCW 11.40.090(4). This is not a decision left to the discretion of the Personal Representative. Recognizing and paying an invalid creditor claim at the expense of reducing the estate payable to the beneficiary constitutes a

breach of the Personal Representative's fiduciary duties, as well as those of the attorney for the Personal Representative. *Matter of Estate of Larson*, 103 Wn.2d 517, 520-521, 694 P.2d 1051 (1985).

It may be argued that since no action has been taken with regard to Ms. Futagi's creditor claim, it may still be rejected and therefore there has been no breach of a fiduciary duty at this time. However, in the present case the Personal Representative has 30 days to accept or reject the creditor claim. RCW 11.40.080(2) (The Notice to Creditors in this case was not published. CP 129). Failure to do so potentially exposes the estate to liability for the creditor's attorney fees. RCW 11.40.080(2).

Commander Toland's concern is protecting the estate that is payable to his daughter, and trying to keep those assets out of the hands of his daughter's abductors. CP 261. No other party involved in this case has expressed any such concern. The Personal Representative's failure to notify the guardian ad litem of his appointment for a period of approximately nine months, assisting a creditor in filing an untimely creditor's claim on behalf of an individual involved in the continued abduction of the beneficiary of the estate who is represented by his own attorney, and failing to respond to that untimely claim, demonstrate the inability of the Personal Representative to keep the competing interests of creditors and the beneficiary separate. It also demonstrates that there are no parties involved in the case expressing any concern for the interests of Erika. For these reasons, the trial court erred in denying

Commander Toland's request that a new Personal Representative be appointed.

- 4. By characterizing Commander Toland's concern about paying a judgment to his child's abductors as blackmail, the trial court has indicated that it is biased against Commander Toland and will not be able to fairly and impartially decide issues before it in this case.**

The trial court judge's comments following summary judgment indicate that if this case is remanded, she will not be able to fairly and impartially rule in this case. A case can be transferred to another judge if it is shown that the assigned judge is prejudiced against a party. RCW 4.12.040(1). A judge is prejudiced against a party if he or she has a preconceived adverse opinion, without sufficient grounds or cause, with regard to a person's case. *Application of Borchert*, 57 Wn.2d 719, 359 P.2d 789 (1961).

In the present case, with regard to a court of appeals judgment Commander Toland admits is payable to his daughter's estate, Commander Toland stated he had no problem paying it to his daughter, but he would not pay it to her abductors. CP 512; RP 12-13. The trial judge's response to Commander Toland's position in this case is that it is, "perhaps considered blackmail." RP 17-18. According to Black's Law Dictionary, blackmail is a crime often called extortion. Black's Law Dictionary 170 (6th ed. 1990). In Washington the crime of extortion is defined as, "knowingly to obtain or attempt to obtain by threat property or services of the owner...." RCW 9A.56.110. Commander Toland was

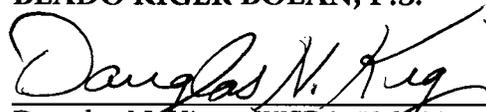
offering to discharge a debt, while expressing concern that the funds reach the creditor. He was not trying to obtain property by threat. The judge's comment about Commander Toland's position being tantamount to blackmail was unnecessary for the trial court's decision, and reveals the judge's unwillingness or inability consider Commander Toland's legal arguments in an unprejudiced manner. The trial judge has concluded that not only are Commander Toland's legal positions inappropriate, but that he may be a criminal for advancing them. If this court agrees that Commander Toland is entitled to participate in this case as Erika's only surviving parent, he requests that the case be remanded to a different trial court judge.

V. Conclusion

Commander Toland respectfully requests that the order dismissing his TEDRA petition be reversed, his petition be reinstated, and the case be remanded to a different trial court judge for further proceedings, including mediation.

Dated this 15th day of February, 2011.

BLADO KIGER BOLAN, P.S.


Douglas N. Kiger, WSBA #26211
Attorney for Peter Paul Toland, Jr.

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Certificate of Delivery

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 15th day of February, 2011, she placed with ABC Legal Messengers, Inc. an original Brief of Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

STATE OF WASHINGTON
DEPUTY

Attorney for Respondent, Bryce Dille, as Personal Representative, by first class U.S. Mail:

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Mr. Michael B. Smith
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Dated this 15th day of February, 2011, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.


Heather Medina, Paralegal

Appendix A

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HRES 1326 EH

H. Res. 1326

In the House of Representatives, U. S.,

September 29, 2010.

Whereas Japan is an important partner with the United States and shares interests in the areas of economy, defense, global peace and prosperity, and the protection of the human rights of the two nations' respective citizens in an increasingly integrated global society;

Whereas the Government of Japan acceded in 1979 to the International Covenant on Civil and Political Rights that states `States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children [Article 23]';

Whereas since 1994, the Office of Children's Issues (OCI) at the United States Department of State had opened over 214 cases involving 300 United States citizen children abducted to or wrongfully retained in Japan, and as of September 17, 2010, OCI had 95 open cases involving 136 United States citizen children abducted to or wrongfully retained in Japan;

Whereas the United States Congress is not aware of any legal decision that has been issued and enforced by the Government of Japan to return a single abducted child to the United States;

Whereas Japan has not acceded to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), resulting in the continued absence of an immediate civil remedy that as a matter of urgency would enable the expedited return of abducted children to their custodial parent in the United States where appropriate, or otherwise immediately allow access to their United States parent;

Whereas the Government of Japan is the only G-7 country that has not acceded to the Hague Convention;

Whereas the Hague Convention would not apply to most abductions occurring before Japan's ratification of the Hague Convention, requiring, therefore, that Japan create a separate parallel process to resolve the abductions of all United States citizen children who currently remain wrongfully removed to or retained in Japan, including the 136 United States citizen children who have been reported to the United States Department of State and who are being held in Japan against

the wishes of their parent in the United States and, in many cases, in direct violation of a valid United States court order;

Whereas the Hague Convention provides enumerated defenses designed to provide protection to children alleged to be subjected to a grave risk of physical or psychological harm in the left-behind country;

Whereas United States laws against domestic violence extend protection and redress to Japanese spouses;

Whereas there are cases of Japanese consulates located within the United States issuing or reissuing travel documents of dual-national children notwithstanding United States court orders restricting travel;

Whereas Japanese family courts may not actively enforce parental access and joint custody arrangements for either a Japanese national or a foreigner, there is little hope for children to have contact with the noncustodial parent;

Whereas the Government of Japan has not prosecuted an abducting parent or relative criminally when that parent or relative abducts the child into Japan, but has prosecuted cases of foreign nationals removing Japanese children from Japan;

Whereas according to the United States Department of State's April 2009 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, abducted children are at risk of serious emotional and psychological problems and have been found to experience anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, guilt, and fearfulness, and as adults may struggle with identity issues, their own personal relationships, and parenting;

Whereas left-behind parents may encounter substantial psychological, emotional, and financial problems, and many may not have the financial resources to pursue civil or criminal remedies for the return of their children in foreign courts or political systems;

Whereas, on October 16, 2009, the Ambassadors to Japan of Australia, Canada, France, Italy, New Zealand, Spain, the United Kingdom, and the United States, all parties to the Hague Convention, called upon Japan to accede to the Hague Convention and to identify and implement measures to enable parents who are separated from their children to establish contact with them and to visit them;

Whereas, on January 30, 2010, the Ambassadors to Japan of Australia, France, New Zealand, the United Kingdom and the United States, the Charges d'Affaires ad interim of Canada and Spain, and the Deputy Head of Mission of Italy, called on Japan's Minister of Foreign Affairs, submitted their concerns over the increase in international parental abduction cases involving Japan and affecting their nationals, and again urged Japan to sign the Hague Convention;

Whereas the Government of Japan has recently created a new office within the Ministry of Foreign Affairs to address parental child abduction and a bilateral commission with the Government of the United States to share information on and seek resolution of outstanding Japanese parental child abduction cases; and

Whereas it is critical for the Governments of the United States and Japan to work together to prevent future incidents of international parental child abduction to Japan, which damages children, families, and Japan's national image with the United States: Now, therefore, be it

Resolved, That--

(1) the House of Representatives--

(A) condemns the abduction and wrongful retention of all children being held in Japan away from their United States parents;

(B) calls on the Government of Japan to immediately facilitate the resolution of all abduction cases, to recognize United States court orders governing persons subject to jurisdiction in a United States court, and to make immediately possible access and communication for all children with their left-behind parents;

(C) calls on the Government of Japan to include Japan's Ministry of Justice in work with the Government of the United States to facilitate the identification and location of all United States citizen children alleged to have been wrongfully removed to or retained in Japan and for the immediate establishment of procedures and a timetable for the resolution of existing cases of abduction, interference with parental access to children, and violations of United States court orders;

(D) calls on the Government of Japan to review and amend its consular procedures to ensure that travel documents for children are issued with due consideration to any orders by a court of competent jurisdiction and with notarized signatures from both parents;

(E) calls on Japan to accede to the 1980 Hague Convention on the Civil Aspects of International Child Abduction without delay and to promptly establish judicial and enforcement procedures to facilitate the immediate return of children to their habitual residence and to establish procedures for recognizing rights of parental access; and

(F) calls on the President of the United States and the Secretary of State to continue raising the issue of abduction and wrongful retention of those United States citizen children in Japan with Japanese officials and domestic and international press; and

(2) it is the sense of the House of Representatives that the United States should--

(A) recognize the issue of child abduction to and retention of United States citizen children in Japan as an issue of paramount importance to the United States within the context of its bilateral relationship with Japan;

(B) work with the Government of Japan to enact consular and passport procedures and legal agreements to prevent parental abduction to and retention of United States citizen children in Japan;

(C) review its advisory services made available to United States citizens domestically and internationally from the Department of State, the Department of Defense, the Department of Justice, and other government agencies to ensure that effective and timely assistance is given to United States citizens in preventing the incidence of wrongful retention or removal of children and acting to obtain the expeditious return of their children from Japan;

(D) review its advisory services for members of the United States Armed Forces, particularly those stationed in Japan by the Department of Defense and the United States Armed Forces, to ensure that preventive education and timely legal assistance are made available; and

(E) call upon the Secretary of State to establish procedures with the Government of Japan to resolve immediately any parental child abduction or access issue reported to the United States Department of State.

Attest:

Clerk.

END

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