

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRYCE H. DILLE, as Personal)	
Representative of the Estate of)	
Etsuko Futagi Toland,)	Case No. 42187-9-II
)	
Appellant,)	(Consolidated with Case No.
)	41388-4-II)
v.)	
)	
PETER PAUL TOLAND, JR.,)	
)	
Respondent.)	

RESPONDENT'S BRIEF

Appeal from the Order Granting Summary Judgment
of the Superior Court of the State of Washington
in and for the County of Pierce
Hon. Ronald E. Culpepper

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
BY [Signature] DEPUTY

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INTRODUCTION

The trial court properly granted summary judgment denying recognition of the Japanese divorce decree on public policy grounds. Enforcement of the decree would be unjust to Father because it would deprive him of his fundamental right to parent his daughter as he deems fit.

The parties to this case (Father and the Estate) are different than in the Japanese divorce (Father and Mother). Following entry of the decree, Mother committed suicide, and Grandmother secretly obtained a guardianship over the child born to the marriage. Two years after obtaining the guardianship, Grandmother sought to enforce the decree's terms against Father.

While the child is the sole beneficiary of the estate, the Estate, in fact, is advocating Grandmother's interests. She is hostile to Father and has stated she will not allow Father to have a relationship with the child. Japanese law will allow her to achieve this objective. The ostensible legal standard governing any case Father might bring against Grandmother is a best interests standard. It gives strong preference to perpetuating the child's current living arrangements, and does not presume Father should have custody as

the child's sole surviving parent. Even in the palpably unlikely event he obtains a custody judgment in Japan, Father will never be able to enforce such a custody judgment, as none of the over 300 American parents who have sought to bring their children from Japan to the United States have been able to do so since 1994.

Finally, it would be supremely inequitable to require Father to pay the monies owed under the Japanese decree to Grandmother so that she can manage the child's funds, raise her with no input or guidance from him, and use the monies he pays her to finance her continuing efforts to deny Father his relationship with his daughter .

STATEMENT OF THE ISSUES

1. Should the court enforce a Japanese dissolution decree in an action brought by Mother's estate following her suicide when the maternal Grandmother has obtained a secret Japanese guardianship of the child that was a product of the marriage, and Father, who is a fit parent, has no realistic opportunity to obtain custody of the child there, in part because the governing Japanese legal standards are inconsistent with his U.S. Constitutional right to raise his child as her sole surviving parent?

2. Should the doctrine of comity be used to enforce a Japanese divorce judgment when Mother has committed suicide, and her surviving family seeks to collect debts owed by Father to Mother, when the sole beneficiary of her estate is the child that was a product of the marriage and payment of the monies by Father will infringe on his constitutional right to guide her upbringing by expending financial resources for her in the way he deems appropriate?

3. Does the legal doctrine of comity require that a court artificially examine the validity of the foreign judgment in a temporal vacuum limited to the time of entry, or does it require the court to determine the practical effect of the judgment's application to the obligor, including the effect of the obligee's death and the quality of the party who is the obligor's successor in interest, to assess whether the judgment is inequitable to him?

4. Is it equitable to require Father to pay a non-parent to raise his child, and to pay the non-parent's expenses incurred to deprive him of a relationship with his child, when he is fit and has no realistic ability of having contact with his child or of obtaining custody from the non-parent?

STATEMENT OF THE CASE

Appellant's statement of facts is supplemented and clarified as follows:

Entry of Japanese Decree. Peter Paul Toland, Jr. (Father) is a Commander in the U.S. Navy, and has been a member of the U.S. military for over 22 years. *See* CP 52, 64, 467. He relocated to Japan in 1993 under active military orders. CP 52, 64. He married Etsuko Futagi (Mother) on March 22, 1995. CP 52. They lived both in Japan on a military base and in the United States during the marriage. CP 52-53, 64. On October 17, 2002, their daughter, Erika, was born. CP 468. On April 18, 2003, mother naturalized as a U.S. citizen. CP 64.

Following Erika's birth, Mother "sunk into a severe postpartum depression" but she "refused treatment in a military hospital and her untreated condition rapidly deteriorated." CP 64. In July 2003, Mother moved off the military base with Erika into her mother's (Grandmother's) home in Tokyo, as Grandmother wanted Mother and Erika to remain in Japan with her. CP 18, 53, 64.

Father and Mother filed competing divorce cases, with Father filing in Pierce County, Washington on September 29, 2003,

and Mother filing for divorce mediation in Japan on November 6, 2003. CP 53. Mother's case was served first. *Id.*

Father's military attorney was inexperienced and misguided, and advised him to participate in the Japanese mediation process. CP 53, 64. Father entered mediation hoping he could then "maintain contact with Erika." CP 64. He did not realize that Japan's legal system would not protect his relationship with Erika, nor did he appreciate that Washington later would deem his attempts to mediate subjected him to the jurisdiction of the Japanese divorce court.¹ CP 64; *see also* Robin S. Lee, "Bringing Our Kids Home: International Parental Child Abduction & Japan's Refusal to Return Our Children," 17 *CARDOZO JL & GENDER* 109, 132 (2010); *Toland and Toland* (August 21, 2007 Wash. App. No 35070-0-II), at CP 126-127.

Mother proceeded with her Japanese case, and the Japanese court issued a divorce decree (Japanese decree) on September 29,

¹ In Washington, such efforts do not subject litigants to jurisdiction, in part to promote settlement of parenting disputes. See RCW 26.27.091. At the time Father's appeal of the trial court's denial of his motion seeking leave from the stay of his Washington divorce was heard, it was not broadly known that the Japanese legal system was fundamentally biased against non-custodial parents and, in particular, foreign fathers. *See* discussion, *infra*.

2005. CP 53. Father was represented by one firm the Satsuki Law Office, during the mediation process.² CP 283-284. He did not otherwise participate in the case. CP 119-22. The Japanese Decree contains the following provisions:

1. Mother was awarded custody of Erika (CP 3);
2. Father was to pay ¥50,000 (\$432 per month) per month in child support to Mother (CP 3, 17, 587);
3. Father was to pay ¥8,000,000 (\$69,085) as a property division judgment (CP 1, 3, 15, 587);
4. Father was to pay ¥1,000,000 (\$8,636) for Mother's fault-based tort claim, called solatium (CP 3, 4, 17, 22, 587). In Japan, one cannot obtain a divorce unless fault is asserted. CP 53; and
5. Father was to pay 70 percent of Mother's attorneys fees (CP 4).

Following the parties' separation, Mother allowed Father only two supervised and videotaped visitation periods (in May and

² Attorney Dugger has repeatedly stated that Father was represented by "four lawyers" during the Japanese mediation, apparently trying to generate the inference that he had adequate counsel. Her inference, however, is fallacious both from the standpoint that a cadre of lawyers could not change Japanese law, and because, if she is correct, the Estate is currently represented by ten lawyers.

June 2004) at a Japanese courthouse with Erika. CP 53-54, 65.

Father has been allowed no direct contact with Erika since 2004. *Id.*

Mother's Suicide. From September 2003 onward, Father paid his child support into an account to which Mother had access. CP 280 (companion case no. 41388-4-II). In 2009, Father furthermore requested Grandmother's banking details for the payment of child support, but she never provided them. CP 359-63 (companion case). Grandmother expected to receive child support after Mother passed even though the Japanese decree only entitled Mother to receive child support.³ CP 357 (companion case); *see* CP 587.

On October 31, 2007, Mother committed suicide. CP 54, 65, 471-472. Mother's sister told Father about her suicide on December 4, 2007. CP 54, 302, 331. Father then met with Mother's sister in New Jersey and developed a plan to transition Erika to his care. CP

³ Ironically, unlike in the United States, neither Mother nor Grandmother would likely be able to effectively enforce the child support judgment against Father in Japan. Colin P.A. Jones, "In the Best Interests of the Court: What American Lawyers Need to Know about Child Custody and Visitation in Japan," 8 A.P.L.P.J. 168, 247 n.314 (Spring 2007); *see also* Satoshi Minamikata, "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, 503, 503 n.84 (2005).

319-322, 325, 472-473, 491-492. He arranged visitation with Erika for the 2007 holiday season, but, at the request of Mother's sister, terminated the plans because he understood Erika was transitioning to the U.S. *See* CP 319-322, 325. Mother's family abruptly terminated those discussions in late January 2008. *See* CP 323.

Unbeknownst to Father, Grandmother secretly obtained guardianship of Erika⁴ without notice to Father on January 28, 2008. CP 168, 303, 507, 587. Father learned about the guardianship action two years later. CP 303, 478-481. The family misled Father by entering into the discussions so that Father would not come to Japan and learn of the guardianship proceeding. CP 250-252, 518.

While the Estate claims that Grandmother was forced to file the guardianship case, App. Br. at 16, there is no evidence in the record supporting this claim. Grandmother easily could have respected the plans she made through Mother's sister to transition Erika to Father's care. Certainly, if Grandmother's intention is to

⁴ The Estate will invariably argue that Japan does not require Father be provided notice of the guardianship action. The fact of the matter is that Grandmother never told Father about the case, and that means she kept it a secret from him. He learned about the Japanese guardianship only after he had been served with this case, which led him to conduct an independent search of the court records to find related cases, one of which was the probate case which attached the final guardianship document. CP 303, 478-481.

facilitate Father raising Erika, this case would have resolved long ago. Her failure to reunify Erika and Father belies her true motive to keep Erika from Father, her confidence that Japan will help her achieve that objective, and her desire to benefit from the financial windfall of Mother's estate.

Father testified before the United States Congress detailing his extraordinary efforts – physical, emotional, and financial – to have any contact with Erika.⁵ In 2009, he had spent over \$200,000, been afforded only two, 20 minute, supervised and videotaped visitation periods at a Japanese courthouse with Erika, and traveled to Japan only to see Erika for a few seconds, among other efforts. CP 53, 65, 248, 331-332, 468. On April 2009, the U.S. State Department attempted to arrange for a welfare visit with Erika and Grandmother, but Grandmother refused it, claiming she was “too busy.” CP 55, 92-93. Father also went to Japan following the tsunami in 2011 to determine whether Erika was safe and secure in Grandmother's residence, and was criticized and rebuffed by

⁵ The testimony can be watched at <http://www.youtube.com/watch?v=f9lfTWFX0f8>, and read at CP 63-66.

Attorney Dugger for such actions. CP 542, 547; 3/25/11 RP.⁶

Attorney Dugger also has refused to allow the U.S. Department of State to conduct any welfare checks of Erika following those tragic events. CP 629. She indicated that Father would only see Erika in a supervised setting and at the direction of the court. CP 248, 271-272. Grandmother stated that she would not allow Father any contact with Erika. CP 471.

Attorney Dugger has professionally dedicated herself to ensuring that Father's contact with Erika be limited by representing Mother, Grandmother, Mother's sister and now, at least in theory, Erika as the sole beneficiary of the Estate.⁷ CP 54, 92-93, 327, 618 n.1; *see also* CP 130-131, 347, 356-363, 532 (companion case). She has sought compensation for many of the resulting fees through the Estate. CP 618 n.1.

**The Estate Is Advancing The Interests Of Erika's
Abductors Rather Than Erika's Interests.** A host of

⁶ Washington Rule of Appellate Procedure 9.2(a)(1) required the Estate to provide a copy of the Verbatim Report of Proceedings to Father, but the Estate has not done so. As a result, Father cannot, as of the date of this brief, provide pinpoint citations to the March 25, 2011 verbatim report of proceedings.

⁷ At no time has Attorney Dugger explained her ability to represent clients with such potentially-divergent interests.

governmental and private bodies specializing in international child abduction widely acknowledge that Mother and Grandmother abducted Erika. The U.S. Congress wrote President Barack Obama urging him to consider ways to convince the Japanese government to respect the rights of foreign parents. CP 54, 68-70. The Tom Lantos Human Rights Commission of the House of Representatives asked that President Obama meet personally with Father to discuss the specifics of this case to learn about his severe circumstances. CP 54, CP 72-73. The National Center for Missing and Exploited Children has validated Erika Toland as an abducted child under case number 1121552. CP 497. A House Resolution, No. 1326 (May 10, 2010), acknowledges that Erika is an abducted child:

Whereas Erika Toland was abducted in 2003 from Negishi United States Family housing in Yokohama, Tokyo, Japan, by her now deceased mother and is being held by her Japanese maternal grandmother, while being denied access to her father since 2004.

CP 81-82. The State Department Office of Children's Issues also has declared Father's case to be "one of our more egregious cases." CP 55, 90.

Father's plight also has been the feature of a number of nationally syndicated news organizations, including Associated

Press, Dateline NBC, ABC, CNN Primetime, MSNBC, Fox and others. CP 95-96. Senator John McCain wrote the Japanese Ambassador seeking intervention so that Father could be reunited with Erika. CP 98. Congressman Moran twice met with the Japanese Ambassador about his case. CP 498.

Japan Does Not Presume That Father Should Have Custody Of Erika. The U.S. House of Representatives passed a resolution condemning the Japanese family law system because it “does not . . . actively enforce parental access agreements for either its own nationals or foreigners.” U.S. H.R. Res. 1326, 111th Cong. (May 5, 2010). In Japan, non-custodial parents are uniformly denied visitation. Takao Tanase, “Divorce And The Best Interests Of The Child: Disputes Over Visitation And The Japanese Courts,” 20 PAC. RIM LAW & POLICY J. 563, 569 (2011). Japanese courts give great deference to perpetuating the child’s current established lifestyle, relying on the child’s stated desired custodial relationship, and complete severance of the non-custodial family from the custodian’s family. *Id.* at 570, 573, 581.

The U.S. Department of State has issued the following travel warning:

[I]n 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.

CP 100.

Japan is the only G8 industrialized nation that refuses to adopt the 1980 Hague Convention on the Civil Aspects of International Child Abduction.⁸ CP 79-80, 100. It has not done so because it has a

“tradition of sole-custody divorces, ‘wherein one parent makes a complete and lifelong break from his or her children when a couple splits . . . [and] the parent who has physical custody at the time of the divorce tends to keep the children.’ Furthermore in accordance with tradition and law, Japanese police will not intervene in custody cases.”

Lee, “Bringing Our Kids Home,” at 114 (footnotes and quotation omitted).

⁸ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89, S. Treaty Doc. No. 99-11. The Hague Convention currently has 82 contracting states. http://www.hcch.net/index_en.php?act=conventions.status&cid=24#mem.

“As a result of Japan’s refusal to ratify the Hague Convention, Japan serves as a haven for Japanese citizens of international marriages who seek sole-custody by absconding with their children back to Japan.”

Id. at 109 (footnote omitted). Over 300 American children have been abducted to Japan since 1994, and none have been effectively returned. *Id.* at 110; CP 496.

Japanese courts simply do not enforce visitation rights, even when the child is in the custody of a legal guardian and not a parent. Jones, “In the Best Interests of the Court,” at 245-258; CP 80-81. Resorting to the court “offers no guarantees of visitation,” and can be used as a basis for terminating the parent-child relationship altogether. Lee, “Bringing Our Kids Home,” at 118 (footnote and quotation omitted). Any visitation ordered is not enforceable in the absence of the custodian’s consent. *Id.* at 119, 125; Matthew J. McCauley, “Divorce and the Welfare of the Child in Japan,” 20 PAC. RIM LAW & POLICY J. 589, 591-92, 600-01 (2011).

When a case involves a Japanese element (e.g., a custodial parent seeking to relocate to Japan, a non-custodial parent seeking to take a child back to Japan for visitation with relatives, or any parent seeking relief from a Japanese custody or visitation order), American practitioners should know that Japan’s legal system cannot be expected to provide the same

level of protection of the rights of parents and children in divorce as would be expected in American proceedings.

Jones, “In the Best Interests of the Court,” at 168. There is also a significant bias against fathers and non-Japanese litigants.

McCauley, “Divorce and the Welfare of the Child in Japan,” at 594-595; HR 1326 (May 10, 2010), CP 79-81.

Father has no realistic means to obtain custody of Erika in a case he might bring against Grandmother in Japan. *See* CP 398. Attorney Otani, a Japanese family lawyer with 21 years of experience, attested that the standard governing Father’s potential Japanese custody case is a best interests standard, and that there is no presumption that he, as Erika’s sole surviving biological parent, would be awarded custody. CP 418-420, 423, 443-446; *see also* CP 375 (even Estate’s expert acknowledged). Grandmother’s custodianship of Erika for the last four years is a significant factor militating against Father’s case. CP 431. Even *if* Father had a realistic opportunity to obtain a custody order in Japan, however, he will have no means to enforce it. *See* discussion, *supra*. The Estate suggests Father should file an action in Japan only because it is supremely confident he will not prevail.

Procedural Background. A year and a half after Mother committed suicide, Grandmother and Mother's sister initiated a probate proceeding in Pierce County, Washington even though Father resided in Maryland. CP 1-54 (companion case); CP 467. The Estate's sole beneficiary is Erika. CP 167. Initially, Mother's sister, who resides in New Jersey, sought appointment as the personal representative of Mother's estate. CP 55-57 (companion case). However, Mother's sister could not obtain a bond and she could not serve in that capacity. CP 62-65, 66-69 (companion case).

The Estate realized it could not enforce the Japanese decree unless it was registered. Nearly a year after filing the probate proceeding, it attempted to register the Japanese decree, purportedly pursuant to RCW Chapters 6.36 and 6.40. CP 25. It did not plead comity as a basis for registration. *See id.* The Estate has cluttered the court file with multiple copies of the Japanese decree. *See, e.g.,* CP 3-21, CP 136-156, CP 173-193, CP 564-585 (the Japanese decree monopolizes nearly 16 percent of Clerk's Papers).

On April 19, 2010, Father filed an Answer and Motion to Dismiss and for Non-Recognition of Japanese Divorce Decree. CP 28-33. Father's motion was heard on August 6, 2010. CP 291. The

trial court then expressed grave reservations that Father did not receive notice of Grandmother's guardianship action. CP 259, 262-263, 265-266, 273. On December 8, 2010, the trial court signed its Order on Father's Motion to Dismiss and for Non-Recognition of the Japanese Divorce Judgment. CP 293. It found the only legally cognizable theory for recognition of the Japanese Decree was comity, even though the Estate failed to plead it, as the statutes contained in its pleadings were inapplicable. CP 292-293.

Father then brought a motion for summary judgment, which the Court heard on March 25, 2011. 3/25/11 RP, *passim*. Relying on the Court's December 8, 2010 order, Father observed that the Court required the Estate – at a minimum – to establish that Father was served with the Japanese guardianship proceeding. CP 293. If the Estate could demonstrate that Father received actual notice of the Japanese guardianship case before it was litigated, it then would need to prove “that fundamental due process and fairness was available to Father in any Japanese guardianship proceeding.” *Id.*

The trial court contemplated that the Estate might never be able to satisfy both of these requirements. *Id.* If the Estate was unable to satisfy either of the two standards set forth in Section 1 of

its Order, then the trial court concluded the Estate would “not be able to collect any of the money judgments it seeks under the Japanese Divorce Decree.” *Id.*

The parties agreed that Father never received notice of the Grandmother’s Japanese guardianship case. CP 309, 481. The trial court granted Father’s motion for summary judgment, reasoning as follows:

It’s clear that Mr. Toland was not served. But if, in fact, I were convinced that fundamental due process rights had been shown to him in some other way, if there had been no prejudice or something, that might be an issue. However, in this case I don’t think there is. I’m going to grant the motion for summary judgment.

Mr. Toland, who’s the father of this daughter, was not even given notice that a guardianship over his daughter – where she would live, who would raise her, all of those kind of things – was even proceeding for some time.

* * *

But he was never given notice so he had no opportunity to even enter any kind of action there. And from what I understand from the expert opinions of Ishikawa, Otani, [Jones] . . . and the other things, it appears to me that his chances of prevailing in Japan are slim to none. Especially after we now have a – something of a *fait accompli* of the girl being raised by grandmother for the last three years.

So it appears to me that the procedures in Japan offend the fundamental feelings of due process in the United States, the Troxel case, and the Washington cases, similarly, so I am going to deny the motion to register the Japanese Judgment. I'm going to grant the motion to dismiss.

3/25/11 RP.

If the Estate is successful in enforcing the Japanese decree, all of the monies Father owes Mother will be paid to Grandmother. These will assist her with continuing to prevent Father from having any contact with Erika.

ASSIGNMENT OF ERROR NO. 1

Did the trial court err when it denied comity to enforce a valid, Japanese divorce decree entered officially in March 2006 based on what occurred in a separate Japanese Guardianship established in January 2008?

ARGUMENT

There Is No Statutory Basis For Recognition Of The Japanese Decree. The Estate originally plead two statutory bases for recognition of the Japanese decree, Washington's Uniform Enforcement of Foreign Judgments Act (codified at RCW 6.36) and

Washington's Uniform Foreign-Country Money Judgments Act⁹ (codified at RCW 6.40A). CP 25. A judgment issued by a foreign country is not enforceable under the Uniform Enforcement of Foreign Judgments Act. *Rains v. State, Dept. of Soc. & Health Services, Div. of Child Support*, 98 Wn. App. 127, 132-33, 989 P.2d 558 (1999) (citing RCW 6.36.010(1)). Moreover, a divorce judgment is not enforceable under the Uniform Foreign-Country Money Judgments Act. *Id.*; RCW 6.40A.020(2)(c).

In addition, the child support provisions of the Japanese decree are unenforceable under Washington's Uniform Interstate Family Support Act (UIFSA), codified at RCW Chapter 26.21A. Japan's child support orders are enforceable in Washington only if it is a foreign reciprocating country, which Japan is not. RCW 26.21A.010(21)(b); 73 Fed. Reg. 72555 (Nov. 28, 2008).

Thus, unless the Japanese decree is entitled to recognition under the doctrine of comity, it is not enforceable in Washington. The question of whether to allow the Japanese decree to be enforced under the principle of comity is one committed to the discretion of

⁹ The Estate originally plead RCW 6.40 *et. seq.* In fact, this statute was amended, effective July 26, 2009, and now is codified at RCW 6.40A *et. seq.*

the trial court. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 161, 744 P.2d 1032 (1987). This question is a question of law. *See id.*; *Glover v. State of Alaska Transp.*, 142 Wn. App. 442, 446, 174 P.3d 1246 (2008).

The Doctrine Of Comity. The Estate asserts that this Court is constrained temporally to analyzing the decree at the time of its entry, rather than considering how enforcement of the judgment might be unjust when the decree is enforced in an Estate action after the Mother committed suicide. Such a position is not legally-supportable.

The recognition of foreign judgments is governed by principles of comity. *Société Nat. Ind. Aéro. v. U.S. Dist. Court*, 482 U.S. 522, 543 n.27 (1987); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411-412 (1964); *Hilton v. Guyot*, 159 U.S. 113 (1895). The United States Supreme Court explored these principles in *Hilton*, observing:

“No law has any effect, of its own force, beyond the limits of sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have

been content to call ‘the comity of nations.’ Although the phrase has often been criticized, no satisfactory substitute has been suggested.

“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both the international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”

159 U.S. at 163-164.

The court may deny recognition and enforcement of foreign judgments that are inconsistent with the public policies of the forum state.

“Under the comity doctrine, a court has discretion to ‘give effect to the laws [and resulting judicial orders] of another jurisdiction out of deference and respect, considering the interests of each [jurisdiction].” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 160-61, 744 P.2d 1032 (1987). Orders “will be recognized and given force if it be found that they do not conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state.” *Reynolds v. Day*, 79 Wash. 499, 506, 140 P. 681 (1914) (quoting *State v. Nichols*, 51 Wash. 619, 621, 99 P. 876 (1909)). Comity rests on considerations of practice, convenience, and expediency in the judicial system. *Haberman*, 109 Wash.2d at 160, 744 P.2d 1032.”

MacKenzie v. Barthol, 142 Wn. App. 235, 240, 173 P.3d 980 (2007) (italics supplied). As explained by the Supreme Court in *Hilton*, 159 U.S. at 164-165, quoting Story, Conflict of Laws, § 28:

“[comity] must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger.”

Comity is a rule of “practice, convenience, and expediency,” and is not “an imperative or obligation.” *Mayekawa Mfg. Co., Ltd. v. Sasaki*, 76 Wn. App. 791, 799, 888 P.2d 183 (1995) (citing *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir.1971), *cert. denied*, 405 U.S. 1017 (1972); *see also Haberman*, 109 Wn.2d at 160-61.

In *Untersteiner v. Untersteiner*, 32 Wn. App. 859, 863, 650 P.2d 256 (1982), husband alleged wife could not enforce an Austrian support order in Washington on public policy grounds “because the [agreed order] does not consider his wife's financial

condition or her future employability nor does it provide a definite termination date.” *Id.* The court held the agreement did not violate public policy because it did not generate a non-modifiable support obligation. *Id.*

The *Untersteiner* court, in turn, cited *Richardson v. Pacific Power & Light Co.*, 11 Wn.2d 288, 300, 118 P.2d 985 (1941) favorably. *Id.* at 259. The *Richardson* court further explained the role of public policy considerations:

“a foreign cause of action will not be enforced where to allow suit thereon would be contrary to the strong public policy of the state in which enforcement is sought. 3 Beale, Conflict of Laws § 612.1; Goodrich, Conflict of Laws §§ 8, 94; Restatement, Conflict of Laws § 612; *Reynolds v. Day*, *supra*; *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597, 108 A.L.R. 1120; *Poling v. Poling*, 116 W.Va. 187, 179 S.E. 604.”

11 Wn.2d at 300 (italics supplied). The foreign judgment must not “conflict with the local law, inflict injustice on our own citizens, or violate the public policy of the state.” *Reynolds v. Day*, 79 Wash. 499, 506, 140 P. 681 (1914) (quoting *State v. Nichols*, 51 Wash. 619, 621, 99 P. 876 (1909)).

In *In re Custody of R.*, 88 Wn. App 746, 947 P.2d 745 (1997), the court remanded a dispute concerning the enforcement of

a Philippine custody judgment to determine whether it was based upon a best interest of the child analysis. In so deciding, it favorably cited the RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 90 (1970), which provides: “No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.” 88 Wn. App at 753 n.14.

“The Estate,” And Not Mother, Seek To Enforce The Japanese Decree. In the case at bar, the parties are different than those in the original Japanese decree. Obviously, Mother is not a party to this action. The Estate ostensibly is representing Erika’s interests, as she is its sole beneficiary. CP 167. However, Grandmother and Mother’s sister, through Attorney Dugger, are making all of the decisions concerning the matter without consulting Father. Even Erika’s Guardian ad Litem has been excluded from decision-making. Attorney Dugger stated:

“All of us [Mother’s sister, Grandmother and Attorney Dugger] 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 (companion case).

The fact that the parties to the Japanese divorce case and this case are different has great legal significance, as explained in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971):

“A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States *so far as the immediate parties* and the underlying cause of action are concerned.”

(emphasis supplied) (cited favorably in *Rains*, 98 Wn. App. at 135).

In this sense, the case at bar is distinguishable from those the Estate cites when it asserts there is no reported Washington decision involving the “consideration of a separate legal proceeding.” App. Br. at 16. Also, for this reason, the Estate’s reliance upon cases in which a former spouse seeks to enforce a foreign decree are inapposite. *See, e.g., MacKenzie v. Barthol*, 142 Wn. App. 235, 173 P.3d 980 (2007) (former spouse entitled to enforce Canadian divorce judgment awarding ex-spouse Washington property); *Rains*, 98 Wn. App. 127 (enforcing Italian child post-majority support order).

The fact that the parties to the Japanese divorce proceeding and this case are different requires the court to examine supervening events to determine whether comity should be granted, and whether enforcement of the Japanese decree would be unjust to Father. In

this case, Mother's suicide is a fact that dramatically changes the contours of the case. Father's interests are now adverse to Grandmother's and Grandmother seeks to have Father finance the care and custody of a daughter Father will likely never see again. Therefore, the question of whether Father's fundamental right to parent Erika is protected when the Japanese decree is enforced is squarely before the court.

Enforcement Of The Japanese Decree Would Violate Washington's Public Policy. Washington has a strong public policy in favor of fostering the relationship between a child and her parent. *See* RCW 26.09.002. "The state recognizes the fundamental importance of parent-child relationship to the welfare of the child . . . Residential time and financial support are equally important components of parenting arrangements." *Id.*

Among the oldest fundamental liberty interests recognized by the U.S. Supreme Court are individuals' rights "in the care, custody and control of their children," which is protected under the Fourteenth Amendment of the U.S. Constitution. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000). In *Troxel*, a plurality of the Supreme Court held that Washington's

non-parent visitation statute was unconstitutional as applied because it was overly-broad, allowing any person to petition for visitation rights at any time. *Id.* at 67. The *Troxel* court defined the implicated liberty interest, in part, as the right of U.S. citizens to “direct the upbringing of their children.” *Id.* at 65-66. It further explained that a parent has a fundamental liberty interest in “maintaining a relationship with his or her child,” in “preserving such intimate relationships,” and “caring for and guiding their children.” *Id.* at 86-87; *see also id.* at 77 (J. Souter concurrence). This right includes a parent’s right to control who the child associates with:

“It would be anomalous, then, to subject a parent to any individual judge’s choice of a child’s associates from out of the general population merely because the judge might think himself more enlightened than the child’s parent.”

Id. at 78 (J. Souter concurrence). Maintaining relationships with children protects a “basic right of parenthood.” McCauley, “Divorce and the Welfare of the Child in Japan,” at 597 (*citing* Judith Wallerstein & Joan Kelly, “Surviving the Breakup: How Children and Parents Cope with Divorce,” 230 (1980)).

Under the *Troxel* analysis, a parent should be deprived of the right to make decisions concerning the rearing of his child only if he

is deemed unfit. 530 U.S. at 67, 73. In addition, there is a presumption that a fit parent acts in his child's best interests. *Id.* at 68-69.

Father's liberty interests in guiding Erika's interests will be undermined if the Court enforces the Japanese decree. He will not be able to ensure that the Estate will expend these funds consistently with his assessment of her needs. His ability to share *any* relationship with Erika will be placed in further jeopardy because the funds will be used to fund Grandmother's campaign to prevent him access to her.

Enforcement of the Japanese decree also would require Father to pay Grandmother to raise Erika even though he would have absolutely no input or influence upon Grandmother's choices. In Japan, if Father can prevail at all in a contested custody case (which is questionable), he must demonstrate that a change in custody is in Erika's best interests. *See* discussion, *supra*. The length of time Erika has lived with Grandmother pursuant to her secret guardianship case is a significant factor militating against him. *See id.* In Japan, there also is no presumption that Father should be awarded custody in any case he might bring against Grandmother.

See id. Moreover, even if he prevails, Father cannot enforce such a judgment. *See id.* The legal impediments Japan has erected legally and culturally to Father's custody action are at odds with his fundamental rights to parent Erika as delineated in *Troxel*, described above.

While it is true that a mere difference in the countries' legal approaches is not by itself sufficient to deny comity to the foreign judgment, *Untersteiner*, 32 Wn. App. at 863 n.3, in the case at bar the difference impermissibly infringes upon Father's fundamental right to parent his daughter as her sole surviving parent.

Finally, the fault/tort-based claim embodied in the Japanese decree, called solatium, is contrary to Washington's policy of no-fault divorce, and should not be subject to enforcement in this state. *In re Marriage of Littlefield*, 133 Wn.2d 39, 50, 940 P.2d 1362 (1997) (*en banc*).

Enforcement Of The Japanese Decree Would Inflict An Injustice On Father. If the Estate is able to enforce the Japanese decree, Father will be required to pay significant sums effectively to Grandmother. Payment of these sums would be inequitable to him on multiple levels. First, he would no longer have the ability to

apply the monies to support Erika in the ways he deems appropriate *as her biological parent*. Amongst the bundle of fundamental rights to which Father is entitled is the right to dedicate funds in a way consistent with his perception of what Erika needs to become a successful adult. Second, the funds will be used to fund Grandmother's continuing efforts to deny him any relationship with Erika. Third, the funds will be used to compensate Attorney Dugger for her previous efforts to deny him a relationship with Erika.

The Estate, in theory at least, is supposed to protect Erika. Instead, it is protecting Grandmother's perspective on how to best parent Erika. Grandmother, in turn, perceives that it is unnatural for Erika to maintain a relationship with Father. To require Father to pay Grandmother to parent Erika in ways inconsistent with her biological father's views on parenting is unjust in the extreme.

ASSIGNMENT OF ERROR NO. 2

Did the trial court err when it denied comity based on a separate Japanese guardianship proceeding because the guardianship had no effect on the father's legal ability to bring a custody action in Japan?

ARGUMENT

The Estate vastly oversimplifies the testimony concerning the effect of Grandmother's secret Japanese guardianship case. While it is true that Father is entitled to bring a custody case in Japan, he will not be presumed to be Erika's legal custodian, as required by *Troxel*. CP 418-420, 423, 443-446. Moreover, the fact that Grandmother has had guardianship of Erika for four years will undermine his custody case. CP 431.

The Estate furthermore admits that the standard governing Father's custody case in Japan would be a best interests standard. App. Br. at 19. It cites *In re Ieronimakis*, 66 Wn. App. 83, 831 P.2d 172 (1992), in support of its proposition that a foreign custody judgment predicated on a best interest standard is enforceable in Washington. App. Br. at 19. *Ieronimakis*, however, was an action between parents, and this matter is one between Father and non-parents. *Troxel* demands that a biological parent be presumed to receive custody in a custody case with a non-parent. See discussion, *supra*. Therefore, any Japanese custody judgment awarding Grandmother custody on a best interest standard should not be enforceable in Washington due to public policy considerations.

Moreover, even if Father prevails, Japan has not facilitated the return of over 300 children to their American parents since 1994, including those parents who had valid court orders for custody. *See* discussion, *supra*. If Grandmother were not supremely confident she would prevail in any custody case Father initiated, this case would have long since ceased to occupy the court docket.

ASSIGNMENT OF ERROR NO. 3

Did the trial court err in finding that the separate Japanese guardianship offended substantial due process rights?

ARGUMENT

The Estate admits that there are no genuine issues of material fact impacting whether the Japanese decree should be enforced by the Estate in Washington. App. Br. at 21. As such, it has judicially admitted there is no need to remand this matter to the trial court for consideration.

The Estate improperly characterizes the law governing enforcement of foreign judgments in Washington. It fails to acknowledge that the party seeking enforcement of the decree is not the same party that obtained the decree. *See* App. Br. at 21. It

furthermore artificially restricts the court's analysis to the validity of the decree, rather than the injustice that it effects upon Father.

The trial court denied comity because the *effect* of enforcement of the Japanese decree offended Father's due process rights by requiring him to pay monies to Grandmother even though he has no realistic opportunity to obtain custody of Erika. As such, it requires Father to pay a third party to raise his child over his objection. The decisions Father makes regarding the care and upbringing of Erika are subject to the highest level of protection afforded by U.S. law as reflected in its Constitution.

The Estate argues that Father effectively waived his rights to assert these constitutional rights because he did not raise them in the divorce case against Mother. *See* App. Br. at 21. However, he participated only in the mediation aspect of the divorce case. *See* discussion, *supra*. Moreover, he could not raise constitutional arguments concerning Grandmother's right to raise Erika against his objection, as Mother was still alive when the divorce action was pending. There is no colorable basis to argue that Father waived his constitutional arguments during the Japanese divorce case.

ASSIGNMENT OF ERROR NO. 4

Did the trial court err by denying comity to enforce the Japanese divorce decree because (a) the Japanese court had jurisdiction to enter the divorce decree, (b) there was notice to the husband/father and he participated in the Japanese divorce, and (c) the Japanese court was competent to issue the judgments contained in the divorce decree?

ARGUMENT

The Estate mis-states the standards governing the court's recognition of a foreign judgment. Perhaps the standard asserted would be appropriate in any action as between Mother and Father. However, since Mother's death, the action now is effectively one between Grandmother and Father.

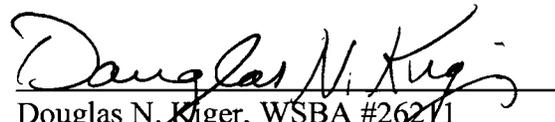
Washington may refuse to acknowledge the Japanese decree if it would be inequitable to Father, or it would be against Washington's public policy. For the reasons detailed at length above, forcing Father to pay Grandmother to care for his daughter is not only manifestly inequitable, but it violates Father's fundamental rights to take care of Erika, to make decisions about her upbringing, and to share in the intimate relationship of parenthood held so

sacred under the U.S. Constitution. To magnify this injury, it provides Grandmother and her attorneys additional resources to ensure that he will never be able to successfully assert these rights.

CONCLUSION

For the foregoing reasons, Father respectfully requests that the Court affirm the trial court's order on summary judgment.

DATED this 20 day of January, 2012.



Douglas N. Kiger, WSBA #26211
Kimberly A. Quach, WSBA #19781
of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I filed the original of RESPONDENT'S BRIEF by hand-delivery to the following:

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I further certify that I served 1 copy of the foregoing document(s) upon:

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by ~~hand-delivery~~ on the date indicated below.

COURT OF APPEALS
DIVISION II
12 JAN 23 AM 9:52
STATE OF WASHINGTON
BY AK
CERTIFY

DATED this 20 day of January, 2012.

BLADO KIGER BOLAN, P.S.

Douglas N. Kiger

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