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No. 42187-9-II

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

BRYCE H. DILLE, as Personal Representative of the Estate of
Etsuko Futagi Toland,

Petitioner,

v.

PETER PAUL TOLAND, JR.,

Respondent.

PETITION FOR REVIEW

FILED

OCT 30 2012

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STATE OF WASHINGTON

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I. IDENTITY OF PETITIONER

Bryce Dille is the Personal Representative of the Estate of Etsuko Toland. On the Estate's behalf, Bryce Dille filed an action in Pierce County Superior Court to enforce money judgments awarded in favor of Etsuko Toland and against the Respondent, her ex-husband, in her Japanese divorce decree.

II. COURT OF APPEALS DECISION

The petitioner seeks review of the decision of the Court of Appeals pertaining to recognition of a Japanese divorce decree through the doctrine of comity (Case No. 42187-9-II in the appellate court). A copy of the decision is in the Appendix at pages A-1 through A-14.

III. ISSUES PRESENTED FOR REVIEW

1. Is the Court of Appeals' refusal to allow enforcement of money judgments in a Japanese Divorce Decree through the equitable doctrine of comity in conflict with established Washington and federal law when the Court of Appeals found that the person against whom the Judgments are entered submitted to the jurisdiction of the Court, was represented by Counsel, and that the proceedings allowed for a full and fair trial?
2. In denying comity, is the Court of Appeals' reliance on a Japanese guardianship that occurred approximately two years after entry of the Japanese Divorce Decree in conflict with established Washington

and federal law where that foreign proceeding had nothing to do with issues pending in Washington, did not establish custody, and did not deprive the Respondent of any fundamental constitutional rights in either the United States or Japan?

IV. STATEMENT OF THE CASE

A. Factual Summary

Etsuko Futagi Toland, Decedent, and Peter Paul Toland, Jr., the Respondent, were married on March 22, 1995 in Japan.¹ CP 175. During the marriage, Etsuko and Paul lived for a short time in Kent, Washington, where the Navy had stationed Paul, but they lived in Japan for the majority of their marriage. CP 184.

Etsuko and Paul's daughter, Erika, was born in Japan on October 17, 2002. CP 185. Erika has lived in Japan all of her life, has never resided outside that country, and speaks only Japanese. CP 328.

Etsuko suffered verbal and emotional abuse from Paul during their marriage. CP 16-18. On July 13, 2003, when Erika was still an infant, Etsuko separated from Paul. CP 18. The family was then living on a Navy base near Tokyo. CP 18, 327. When she left, Etsuko took Erika with her and left a note for Paul informing him she was going to live near the base. CP 327. Later, Etsuko moved with Erika and her mother (Erika's

¹For brevity and ease of reference, the parties hereafter will be referred to by their first names (Peter Paul Toland referred to as "Paul"), no disrespect intended.

grandmother), to live in Tokyo. Etsuko again gave Paul notice, including providing him with her address and telephone number. CP 327.

In November of 2003, Estusko started a mediation procedure which is preliminary to divorce in Japan. CP 5 and 328. During the mediation procedure, there were two trial visitations afforded Paul and he exercised those visits, in Japan. CP 6. The parties agreed upon a visitation schedule for Erika in July 2004, but Paul returned to the United States and did not exercise those agreed visitation rights. CP 18, 169-171. Attempts at reconciliation were unsuccessful, and Etsuko moved forward with the divorce proceeding. CP 3-24.

As set out in the Japanese Final Decree of Divorce, Paul was represented by four attorneys throughout the entire divorce (CP 14), but they were discharged on the final day of the divorce and did not appear at the Final Hearing. RP, 8/6/2010, p. 4, lines 19-24, CP 329. The divorce was unofficially entered in September, 2005 and after further proceedings through the Japanese court system, an official Japanese Final Decree was entered in March, 2006. CP 3-24.

Paul filed two complaints for divorce in the United States, one in Pierce County, Washington in September, 2003 (where Etsuko and Paul had lived in 1999) and another in Virginia (where Paul had also been stationed by the Navy). CP 15, 16. Both cases were dismissed. CP 7-8.

Paul appealed dismissal of the Washington divorce, and this Court of Appeals affirmed the dismissal in mid-October, 2007. CP 118-133. A Mandate of this Court issued awarding Etsuko reimbursement of attorney's fees (which she had paid during the case with funds borrowed from her sister to defend the action, CP 329). Id. On October 31, 2007, approximately fifteen days after the Court of Appeals decision, Etsuko committed suicide. CP 327.

Since her mother's death, Erika has continued to reside in Japan with her maternal Grandmother in the same home where she was living with her mother prior to the suicide. CP 327. Although Paul has alleged there was an "abduction," Erika's residence is the same as when Paul twice exercised visitation during the Japanese divorce mediation. CP 17-18.

Etsuko's surviving sister and Erika's aunt, Dr. Yoko Futagi, has responded to the false reports of abduction. CP 328, 331-332. Yoko and her mother had been willing to allow Paul to see Erika in a supervised visitation setting in Tokyo (CP 331-332), but Paul has failed and refused to file for custody of Erika in Japan and has remained adamant that he will not do so ("I have no intention of engaging the Japanese legal system or recognizing their authority over my family affairs regarding Erika," CP 325).

After Etsuko's death, Yoko did have discussions with Paul concerning Paul's desire to visit with Erika in Japan. CP 317-325. The discussions ended without any arrangement having been made. CP 330-335.

In January of 2008, Etsuko's mother hired an attorney to file for guardianship of Erika in Japan. CP 376. The guardianship was necessary to enroll Erika in school, take care of her medical needs and the like. Id. Paul was not notified of the guardianship proceeding because that is not required under Japanese law. Id. Erika's grandmother was not granted full, permanent custody of Erika, and the guardianship does not stop or interfere with Paul's right to pursue custody of Erika in Japan. CP 168 and CP 376-377.

B. Procedural Summary

Etsuko's Will provides that Erika is her sole heir. CP 167. Subsequent to Etsuko's death, Paul refused to pay the divorce decree judgments or the attorney's fees awarded in the Appeals case²; therefore, Yoko Futagi filed a Petition for Probate in Washington to collect on the judgments for the benefit of her niece, Erika. CP 332-334. As Yoko was unable to post the bond required to serve as Personal Representative, attorney Bryce Dille was appointed to serve as Personal Representative of

² The appeals judgment has been paid to the Estate after a Court order requiring payment entered in Etsuko's probate in August, 2011.

the Estate. CP 1-2. The court also appointed a guardian ad litem for Erika, attorney Michael Smith, although Mr. Smith has not taken an active role in the instant case or in the probate of Etsuko's Estate.

After his appointment, Bryce Dille sought to register the Japanese divorce decree judgments for enforcement in Washington for the benefit of the Estate's minor heir. CP 1-24, 25-26. Paul was personally served with the registration documentation on April 2, 2010. CP 35-36. On April 19, 2010, he filed an Answer denying the judgments were enforceable in Washington (CP 28-30), along with a motion to dismiss the case or for an order denying recognition of all, or part of, the Japanese decree. CP 32.

On December 7, 2010, the trial court entered its Order denying the Motion to Dismiss, which included a finding that:

The court cannot find anything facially wrong with the Japanese divorce decree as it addressed all of the issues, including support, property division, and other matters, the judgments of which are of valid amounts under Japanese law. The property and support aspects of the Japanese Divorce Decree need not be re-litigated.

CP 292, lines 9-13.

The trial judge concluded that the Estate could bring the matter before the court again if it could establish the Japanese Decree should be recognized under the doctrine of comity. CP 293, lines 4-6. The trial judge further concluded that the Estate would need to establish "at a

minimum” that Paul had received actual notice of Erika’s grandmother’s guardianship action in Japan before the grandmother was appointed guardian, or otherwise that the Estate would have to establish that “fundamental due process and fairness was available to Father in any Japanese guardianship proceeding.” CP 293, lines 6-10.

In response to the December 7, 2010 order, the Estate retained Yorimichi Ishikawa, a Japanese lawyer with expertise in family law matters, to testify concerning the grandmother’s Japanese guardianship proceeding. CP 374-379. Mr. Ishikawa’s undisputed testimony is that Paul did not receive notice of the Japanese guardianship because Japanese law did not require the attorney who represented the Grandmother to notify Paul of the proceedings. CP 376. Mr. Ishikawa’s undisputed testimony is also that the guardianship does not stop or interfere with Paul’s right and ability to pursue custody of Erika in Japan. CP 376.

Mr. Ishikawa’s written expert testimony, dated February 9, 2011, was also needed to defend a Maryland custody case filed by Paul against the Grandmother. CP 375, 377. After disclosure of Ishikawa’s testimony in the Maryland case, Paul promptly filed a Motion for Summary Judgment to dismiss the Estate’s action seeking recognition of the Japanese divorce decree judgments in Washington. CP 297-301. Citing Mr. Ishikawa’s affidavit, Paul claimed that the case must be dismissed, as

a matter of law, because he did not receive notice of the Japanese guardianship until after the grandmother was appointed guardian of Erika. CP 303-304.

The Estate's response to the summary motion highlighted several disputed facts with respect to Paul's testimony. CP 305-313. Although the Estate could not dispute that Paul did not receive notice of the Japanese guardianship, the Estate argued that the valid divorce judgments should not be denied comity due to actions taken nearly two years after the divorce decree was entered and after the ex-wife had died. Id. Furthermore, even Paul's expert witness in the Maryland custody proceeding agreed that the Japanese guardianship did not impair Paul's right to seek custody of his daughter in Japan; therefore, his lack of notice of the guardianship was harmless, and did not affect any fundamental right with respect to the judgments rendered in the Japanese divorce decree nearly two years earlier. CP 310-312. The Maryland custody proceeding was dismissed by the trial court, and that decision upheld by Maryland's highest court. App. B. Paul's petition for certiorari to the U.S. Supreme Court was denied. See App. C.

The trial court rejected the Estate's arguments and granted Paul's summary motion, denying enforcement of the Japanese divorce decree judgments as a matter of law. CP 543-544. On reconsideration, the trial

judge again denied enforcement of the Japanese divorce decree judgments and, in his oral ruling, made clear his basis was the guardianship, which had nothing to do with the divorce proceeding:

[Paul] was not given notice of [the Japanese guardianship]. . . Now, whether that was intentional on Grandmother's part or just her attorney's advice in Japan, I don't know, but it kind of offends, at least, what I think are the substantial due process rights he would have in the U.S. Any state in the United States he would have at least the right to notice, to know what's happening with his daughter. That was denied him by the Japanese courts. . . Since the Japanese courts deny what I think are fundamental due process rights of a father, I don't see any imperative to grant comity to this particular decree, so I'm going to deny the motion to reconsider.

RP, 3/25/2011, lines 11-24.

The Estate filed its timely appeal of the summary judgment and Ruling on reconsideration. The Court of Appeals upheld the trial court's ruling and the Estate now petitions for review of that decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Washington State Court of Appeals found that the correct question to consider when dealing with the issue of comity is whether

there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries. App. at p. A-9.

The Court of Appeals answered the question in the affirmative; it found that, "In fact, the [Japanese] divorce [herein] satisfies the standards required to enter a foreign judgment under comity. The Japanese divorce proceedings allowed for a full and fair trial resulting in a Japanese divorce decree, which meets the elements of a valid foreign judgment" Id., at p. 10. The Estate argues that the duty of the trial court and the Court of Appeals stopped there. Based on this finding alone, the trial court and the Court of Appeals should have allowed registration of the Judgments in Washington under the principles of comity and RCW 6.40A.090, so that the Estate can proceed to collect that which it is due for the benefit of Etsuko's minor child and sole heir to the Estate. The balance on the divorce judgments is in excess of \$100,000.00. App. E.

1. The Court of Appeals' decision conflicts with basic Washington and federal law on the equitable doctrine of comity.

Various courts around the country, both state and federal, have repeatedly determined that where the basic principles of comity identified by the Court of Appeals are met, the Court should recognize and enforce the foreign judgment in the U.S. The U.S. District of Delaware found in the case of Mata v. American Life Insurance Company, 771 F. Supp. 1375, 1380, 1991 U.S. Dist. LEXIS 11274 (1991), that

[A] foreign judgment must first be recognized and reduced to a judgment in the enforcing United States court. Recognition occurs when a United States court finds that a matter has been decided by a foreign court in the judgment and does not need to be further litigated in a United States court...

The Third Circuit Court of Appeals has described the doctrine of comity as follows:

Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.” *Id.*, citing Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017, 31 L.Ed.2d 479, 92 S.Ct. 1294 (1972).

The Court in Mata also cited the case of Pilkington Brothers P.L.C. v. AFG Industries, Inc., 581 F. Supp. 1039, 1043 (D.Del. 1984) (citations omitted) in support of its ruling as to when comity should be used to recognize and enforce foreign judgments:

This court has had occasion to elaborate upon this principle as well: An American court will under the principles of international comity recognize a judgment of a foreign nation if it is convinced that the parties in the foreign court received fair treatment by a court of competent jurisdiction 'under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries. . .'

As did the Court of Appeals here, the Mata Court also considered the case of Hilton v. Guyot, 159 U.S. 113, 40 L.Ed. 95, 16 S.Ct. 139 (1895). The Mata Court noted how the Hilton case articulated the requisite

criteria to grant comity to recognize and enforce a foreign judgment, summarizing that criteria. Mata at 1381. As applied to this case, the Court of Appeals admits the criteria have been met. App. at p. A-10.

While the Mata Court does note that the criteria in Hilton did not end the analysis for the recognition of a foreign judgment and that Delaware's courts have reluctantly required a demonstration of "reciprocity," consistent with Hilton, as a condition precedent to enforcement of a foreign judgment, Washington does not require reciprocity. App. at p. A-9, footnote 9.

Further, in Bank of Montreal v. Kough, 612 F.2d 467, 471-72c (9th Cir.1980), the Ninth Circuit Court of Appeals noted that the drafters of the Uniform Foreign Money Judgment Recognition Act "consciously rejected reciprocity as a factor to be considered in recognition of foreign money judgments, apparently on the ground that due process concepts embodied in the Act were an adequate safeguard for the rights of citizens sued on judgments obtained abroad." Mata, at 1382.

Petitioner has located no authority to deny comity where each of the required criteria have been met with respect to the foreign judgment in

question. In the fifteen (15) reported Washington cases which address the doctrine of comity, all applied the simple test of validity.³

2. The Court of Appeals' reliance on subsequent foreign legal proceedings to deny comity is in conflict with Washington and federal law.

The Court of Appeals' reliance on an unrelated Japanese guardianship proceeding that occurred two years after Etsuko's death to deprive her minor child, and only heir, of the right to collect money judgments from Etsuko's divorce is in conflict with the established doctrine of comity under Washington and federal law for several reasons.

a. The parent-child relationship has not been "nullified."

First, the Court of Appeals erroneously found that ". . . the guardianship proceeding . . . and the Japanese law concerning parental rights, nullify the parent-child relationship that our law explicitly recognizes," stating it was thus "compelled to conclude, as the trial court did, that we should not recognize and enforce the related divorce decree."

3 Kammerer v. W.Gear Corp., 96 Wn.2d 416, 635 P.2d 708 (1981); Escrow Serv. Co. v. Cressler, 59 Wn.2d 38, 365 P.2d 760 (1961); Mosher v. Mosher, 25 Wn.2d 778, 172 P.2d 259 (1946); Shibley v. Shibley, 181 Wash. 166, 42 P.2d 446 (1935); Harju v. Anderson, 133 Wash. 506, 234 P. 15 (1925); Sheppard v. Coeur D'Alene Lumber Co., 62 Wash. 12, 112 P. 932 (1911); Douglas v. Teller, 53 Wash. 695, 102 P. 761 (1909); Childs v. Blethen, 40 Wash. 340; 82 P. 405 (1905); MacKenzie v. Barthol, 142 Wn.App. 235, 173 P.3d 980 (2007); Olivine Corp. v. United Capitol Ins. Co., 122 Wn.App. 374, 92 P.3d 273 (2004); Rains v. DSHS et al, 98 Wn.App. 127, 989 P.2d 558 (1999); In re the Matter of Custody of R., 88 Wn.App. 746, 947 P.2d 745 (1997); State v. Medlock, 86 Wn.App. 89, 935 P.2d 693 (1997); Mayekawa Mfg. Co. v. Sasaki, 76 Wn.App. 791, 888 P.2d 183 (1995); State v. Meyer, 26 Wn.App. 119, 613 P.2d 132 (1980).

This finding and conclusion are contrary to the evidence of the Japanese attorneys submitted by both the Estate and the Respondent Father of the minor child.

The evidence of the experts as set out in the record before the trial court and recognized by the Court of Appeals (App. at A-5), is that the Japanese court's granting of guardianship powers to the grandmother **did not bar the father from seeking permanent custody of the child in the Japanese courts.** The Court of Appeals should not have found that the parent-child relationship has been "nullified" by the existence of a stop-gap guardianship in Japan which simply facilitated the grandmother's ability to enroll the child in school, obtain medical care for the child as needed, and otherwise provide interim care for the child pending further proceedings, such as a custody proceeding brought by the father in Japan.

The Estate's position with respect to the guardianship is further supported by the facts that (i) the minor child's custody is not now and never will be before the Washington courts; (ii) Father has said he will not seek custody or proceed with any other litigation in the Japanese courts (CP 325); therefore, any harm caused to the parent-child relationship is by Father's own doing, not as a result of the actions of anyone else or any other court; (iii) Father has fully litigated the question of his obtaining custody in Maryland and jurisdiction regarding that issue has been declined by the

Maryland trial court. The Maryland Supreme Court has affirmed that decision (App. B), and Father's Petition for Writ of Certiorari to the U.S. Supreme Court on the matter has been denied (App. C).

b. RCW 26.09.002 had no application.

Second, the Court of Appeals' further explanations relating to the parent-child relationship and preservation thereof, which it finds has been "nullified" by the Japanese Guardianship, are without merit because they cite to the Washington statute which begins with the words, "**In any proceeding between parents under this chapter . . .**" RCW 26.09.002, App. A-11. The case involving this Estate is not a proceeding "between parents." Indeed, there are no proceedings anywhere between the parents: not in Washington, not in Maryland, and not in Japan. The Mother of the child is deceased, and has been since 2007. The only proceedings relating to the parent-child relationship that can ever be, will be between the maternal grandmother and the Father, in Japan.

c. Father refuses to bring a Japanese custody action, and his chances of success in obtaining custody in Japan are purely speculative.

Finally, the Court of Appeals statement that the father's chances of prevailing in a custody action in Japan are "slim to none" is unsupported in the record. App. at A-12. That is not what the Japanese attorney experts said; that is what the father's Attorney argued to the Court of

Appeals. There is no evidence that a father would not prevail over a grandmother in a Japanese custody proceeding where the child's mother is deceased. There is no authority on that fact pattern as presented to a Japanese court in the record at all. There is no reason for the Court to deny comity relating to the Japanese divorce decree based on unsupported speculation.

The Estate is concerned that the Court of Appeals would opine that ". . . even if Paul obtained a custody order from Japan, **undisputed evidence** (emphasis added) shows that the Japanese Court would likely not enforce it." The Court bases that opinion on a congressional House Resolution of the 111th Congress, 2d Session (App. at p. A-11). Such a Resolution is not "evidence", and there is no proof anywhere in these proceedings to date in Washington, or even in Maryland, that supports such a conclusion.

This decision of the Court of Appeals to deny comity comes down to its finding that the guardianship proceeding ". . . has effectively deprived Paul of any parenting role in Erika's life since Etuko's death." App. at p. A-12. This finding is wholly inaccurate. The facts are that the father has never commenced a proceeding in Japan to gain custody, and he testified in the Maryland trial court on cross-examination that he has never

requested of the grandmother to see or visit with the child in all the years that have passed since Etsuko's death in 2007. App. B.

Neither has the father supported his child, the minor heir. In this regard, the Court of Appeals erroneously gave consideration to the issue of *current* child support payments due from the father where the Estate has only ever sought to collect support owed up until the date of Etsuko's death. The Court of Appeals found that, "Here, evidence shows that Akiko [grandmother] may not be able to enforce the child support order in Japan." App. at p. A-13. In support of this position, the Court cites to a U.S. State Department Travel Warning as "undisputed evidence before the trial court" that "Japanese family courts may award child support but they lack the authority to actually enforce those awards." *Id.* There is no evidence of any kind that was ever brought to the trial court that the deceased Mother attempted to collect on the child support judgment rendered in the Divorce Decree, or that the Grandmother (Akiko) attempted to collect on the past due child support since the death of the Mother. Neither is there any evidence as to whether there is a subsequent Japanese child support order entered in Japan, for current support after the death of the Mother. This is speculative commentary by the Court of Appeals and should not be considered as a factor in denying comity.

Furthermore, the defendant bears the burden of proof in establishing that the judgment is not entitled to enforcement. McCord v. Jet Spray International Corp., 874 F. Supp. 436, 1994 U.S. Dist. Lexis 19355. at page 4, paragraph 11. "The mere existence of specific defenses to the enforcement of a foreign judgment is not an indication of non-recognition." Id. at page 4, paragraph 12. "The fact that Massachusetts and Belgium law differ with respect to employment contracts does not make Belgium's law contrary to Massachusetts' public policy". Id., at page 3. The Estate believes and argues that specific sections of Japanese law dealing with enforcement of foreign judgment in Japan would have to be reviewed and considered to support the Court of Appeals far-reaching finding. In McCord, the Court noted that it examined the relevant portions of the Belgian Judicial Code and found that Belgian courts would recognize a Massachusetts judgment. Id., p. 3.

No examination of Japanese statutes was accomplished by either the Washington trial court or the Court of Appeals, thus further supporting the Estate's argument as to the speculative nature of the opinion of the Court of Appeals in this matter.

Though the Estate has devoted much time and effort to analysis of the guardianship proceeding, it does not concur with the Court of Appeals reliance on that proceeding as a basis to deny comity. The guardianship is

truly unrelated to the divorce judgments. The divorce judgments are separate and distinct, from an entirely different proceeding, with entirely different parties, than the guardianship.

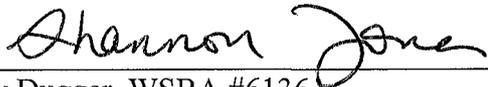
VI. CONCLUSION

Review of this case is required to establish that the foreign guardianship proceeding has nothing to do with the issues pending in this State as to comity, and that the guardianship established two years after entry of the Decree of Divorce and the judgments contained therein does not deprive the father of any fundamental rights in the United States, or in Japan, such that comity should not be afforded the decree.

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The Estate asks that this Court accept review of the issues raised in this Petition to resolve Washington's position as to usage of the statutory savings clause found at RCW 6.40A.090 with regard to granting comity relating to foreign decrees and judgments. In this day and age of worldwide ease of communication and proceedings between countries, their citizens and U.S. citizens, this case raises an issue of substantial public interest where it comes to enforcement of foreign divorce decrees where all of the basic criteria to grant comity are met.

Respectfully submitted this 25 day of October, 2012.



Judy Dugger, WSBA #6136
Shannon R. Jones, WSBA #28300
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Appendices

- A. Court of Appeals Decision
- B. Decision from Maryland Court of Appeals
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- E. Balance of Toland Judgments from Divorce Decree – October 1, 2012

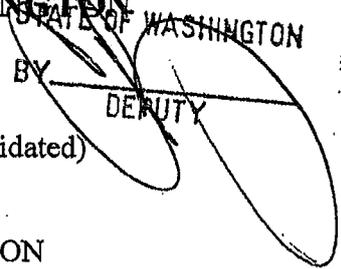
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Court of Appeals Decision

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

STATE OF WASHINGTON
BY 
DEPUTY

ESTATE OF ETSUKO TOLAND,
Respondent,

No. 41388-4-II (Consolidated)

v.

PUBLISHED OPINION

PETER PAUL TOLAND JR.,
Appellant.

BRYCE H. DILLE, as Personal Representative
of the Estate of Etsuko Futagi Toland,
Appellant,

No. 42187-9-II.

v.

PETER PAUL TOLAND JR.,
Respondent.

ARMSTRONG, J. — Commander Paul Toland appeals the trial court’s summary judgment dismissing his petition to intervene in the estate of his former wife, Etsuko Toland, under the Trust and Estates Dispute Resolution Act (TEDRA), chapter 11.96A RCW.¹ Etsuko divorced Paul in Japan where she and the parties’ young daughter, Erika, lived until Etsuko’s death. Paul argues that as Erika’s only remaining parent, Etsuko’s sole heir, he is an interested party under TEDRA. We agree.

In addition, the Estate of Etsuko Toland (Estate) appeals the trial court’s summary judgment denying registration of the Tolands’ Japanese divorce decree. The Estate filed the registration action to collect money judgments the Japanese court awarded Etsuko against Paul in

¹ We refer to the Tolands by their first names for the sake of clarity.

the Japanese divorce decree. The Estate argues the trial court erred by refusing to recognize the Japanese decree under comity principles. We affirm the trial court's summary judgment denying registration of the Japanese divorce decree because recognizing the judgment would violate public policies and fundamental rights, including Paul's parental rights as recognized under federal and state law. We reverse the trial court's order denying Paul's TEDRA petition to participate in the Estate action, and remand to the trial court for further proceedings consistent with this opinion.

FACTS

BACKGROUND

Paul and Etsuko married in Japan in 1995. In 1996, the Navy reassigned Paul to duty in Texas and Washington, and then it reassigned him to Japan in July 1999. On October 17, 2002, Paul and Etsuko's daughter, Erika, was born in Japan. In July 2003, Etsuko and Erika moved out of the marital home on the Navy base and into a home with Etsuko's mother in Tokyo.

In November 2003, Paul and Etsuko entered into mediation, which Japanese law requires before instituting divorce proceedings.² When the mediation failed, Etsuko filed for divorce in Japan. Paul was represented by Japanese lawyers during at least part of the divorce proceedings. The Japanese court orally entered a divorce order on September 29, 2005, and finalized the divorce in March 2006. The decree divided the parties' property, awarded Etsuko custody of

² In September 2003, Paul filed for divorce in Pierce County Superior Court, but he did not serve Etsuko. The action was stayed because of the parallel proceeding in Japan. After the Japanese court entered the final divorce decree, the Pierce County Superior Court dismissed the divorce action. We affirmed the dismissal. *Toland v. Toland*, noted at 140 Wn. App. 1015 (2007).

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Erika, ordered Paul to pay child support, and awarded damages to Etsuko for Paul's fault in the divorce.

On October 31, 2007, Etsuko committed suicide. Etsuko's sister, Yoko Futagi, informed Paul in December 2007 of Etsuko's death.³ Yoko and Paul started corresponding by e-mail and telephone, apparently discussing how to bring Erika to the United States. At the same time, Akiko, Etsuko's mother, applied for and was granted guardianship of Erika in Japan without giving Paul notice of the guardianship proceedings.

PROCEDURE FOR TEDRA CASE

Yoko petitioned to probate Etsuko's Estate in Pierce County, Washington. The assets listed in the Estate's inventory included the judgments from the Japanese divorce decree. The trial court appointed attorney Bryce Dille as the Estate's personal representative. The trial court appointed attorney Michael Smith as Erika's guardian ad litem because Erika is the sole heir to the Estate.

Paul filed a TEDRA petition to intervene in the proceedings. Paul asked for special notice of the proceedings and to be appointed the custodian of Erika's inheritance. The Estate moved for summary judgment on Paul's TEDRA petition. Apparently concerned about Paul's conflict of interest from owing the Estate money, the trial court granted the Estate summary judgment, which effectively excluded Paul from the case.

PROCEDURE FOR COMITY CASE

In a separate action intended to collect the judgments from the Japanese divorce decree,

³ Yoko declared that she did not believe she told Paul about the death, claiming instead that Paul called her in December and told her he knew of Etsuko's death.

the Estate applied to register the Japanese divorce decree under the Uniform Enforcement of Foreign Judgments Act, chapter 6.36 RCW, and the Uniform Foreign-Country Money Judgments Recognition Act, chapter 6.40 RCW. Paul answered and moved to dismiss, denying that the judgments were enforceable in Washington under the statutes pleaded.⁴ The Estate abandoned its claim under chapter 6.36 RCW and relied on the savings clause in chapter 6.40A RCW to assert comity principles for registration of the decree.⁵ The trial court allowed argument based on comity principles.

Following that argument, the trial court found that the Japanese divorce decree appeared facially valid because Paul had legal representation and because the decree addressed property division, support, and other matters commonly litigated in Washington divorce proceedings. But the trial court was concerned that because Paul was not given notice or the opportunity to be heard in the subsequent guardianship proceeding, his right to due process and his constitutional rights as a parent were violated. Thus, the trial court allowed another hearing for the Estate to show that Paul either received notice of the guardianship proceeding or that “fundamental due process and fairness was available to [Paul] in any Japanese guardianship proceeding.” Clerk’s Papers (CP) at 293.

⁴ The legislature has amended this statute. The amendments do not change the substance of our discussion, thus we cite to the current version.

⁵ The Uniform Foreign-Country Money Judgments Recognition Act in chapter 6.40A RCW does not apply to “[a] judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.” RCW 6.40A.020(2)(c). The savings clause states, however, that “[t]his chapter does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this chapter.” RCW 6.40A.090.

In a custody proceeding Paul had started in Maryland, the Estate admitted that Paul had not received notice of the guardianship proceeding in Japan; it noted that notice was not required under Japanese law. Based on this admission, Paul moved for summary judgment in the Washington case. The Estate responded with an affidavit from a Japanese attorney, Yorimichi Ishikawa. Ishikawa conceded that Paul was not provided notice, but she asserted that under Japanese law, Paul was not entitled to notice of the guardianship proceeding. Further, both Ishikawa's and Paul's expert stated that the Japanese court's granting of guardianship powers to Akiko did not bar Paul from seeking permanent custody of Erika in Japanese courts.

The trial court granted Paul summary judgment and dismissed the Estate's registration action, reasoning that Paul was denied basic fairness and due process in the Japanese guardianship proceedings. The trial court also concluded from the expert witnesses' testimony that Paul's chances of prevailing in Japan in a custody action are "slim to none" because of the "fait accompli" set up by the guardianship proceeding. Report of Proceedings (RP) (Mar. 25, 2011) at 2-3. Thus, because Japan's proceedings failed to afford Paul the fundamental rights recognized in Washington and the United States, the trial court refused to grant comity to the Japanese divorce decree. The Estate appeals that summary judgment ruling.

ANALYSIS

I. STANDARD OF REVIEW

We review a summary judgment de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). We will affirm an order granting summary judgment if, viewing the evidence in the light most favorable to the nonmoving party, we find no issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger*, 164

Wn.2d at 552. A court may grant summary judgment only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). The moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If the moving party meets its burden, the nonmoving party cannot rely on the pleadings but must present evidence through affidavits, depositions, or otherwise to oppose the motion. CR 56(e); *Atherton*, 115 Wn.2d at 516.

II. TEDRA

Paul argues that the trial court erred in dismissing his motion to intervene in the probate proceeding under TEDRA because he is the only surviving parent of Erika, the sole heir to the Estate. He asserts that his fundamental liberty interest as a parent provides a right to petition under TEDRA. We agree.

TEDRA is “intended to provide nonjudicial methods for the resolution of matters” involving trusts and estates. RCW 11.96A.010. In passing TEDRA, the legislature found that prompt resolution of such matters was preferable and encouraged use of dispute resolution mechanisms other than litigation. RCW 11.96A.260. A “matter” includes “[t]he determination of any question arising in the administration of an estate” RCW 11.96A.030(2)(c). And, “any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter” RCW 11.96A.080(1) (emphasis added). A party includes “[a]ny other person who has an interest in the subject of the particular proceeding.” RCW

11.96A.030(5)(i).⁶

When interpreting a statute, we seek to follow the legislature's intent. *Bostain v. Food Express Inc.*, 159 Wn.2d 700, 708; 153 P.3d 846 (2007). Thus, we "adopt the interpretation which best advances the legislative purpose." *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990). The legislature defined the TEDRA statutes broadly as "generally applicable statutory provisions for the resolution of disputes and other matters involving . . . estates." RCW 11.96A.010. "Matter" under the statute is also broadly defined. Thus, a broad reading of "any other interested person" is appropriate and would include Paul in his role as Erika's parent. Certainly, he has an interest in ensuring that the Estate is efficiently administered and that the funds it collects go to Erika. See *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (parents have a "liberty interest . . . in the care, custody, and control of their children"). Although Paul does not currently have custody of Erika and may be considered an estate debtor, these facts do not preclude him from being an "interested party" under the statute.

Moreover, a possible conflict of interest does not preclude Paul from participating in the Estate because allowing him to participate does not grant him authority to control the Estate assets or hinder the Estate's attempts to collect those assets.⁷ Furthermore, TEDRA is intended

⁶ The statutory definition is, in part:

(5) "Party" or "parties" means each of the following persons who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner:

(i) Any other person who has an interest in the subject of the particular proceeding;

RCW 11.96A.030(5)

⁷ We are aware that because we are affirming the trial court's decision not to enforce the Japanese decree, the Estate lacks the power to collect the judgments through legal means.

to provide a vehicle to resolve disputes, and Paul's conflict of interest should not frustrate that statutory goal. Paul and the Estate have a dispute as to whether Paul should be paying judgments that would benefit Erika. Giving Paul a voice in resolving that dispute is more likely to resolve the issues than is denying him any participation.⁸

Because TEDRA was intended to be broadly applied, and because Paul is the father of the sole minor heir to the Estate, we hold that Paul is an "interested party" under the statute. We reverse and remand for the trial court to allow Paul to participate in the probate proceedings under TEDRA.

III. COMITY

The Estate argues that the trial court erred when it granted Paul summary judgment and denied registration of the Japanese divorce decree under comity principles. We disagree.

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 40 L. Ed. 95 (1895). But under the doctrine of comity, courts have discretion to "give effect to the laws [and resulting judicial orders] of another jurisdiction out of deference and respect, considering the

Nothing in our opinion, however, prevents Paul from voluntarily paying some or all of what he owes for child support and other judgments in the Japanese decree.

⁸ The parties are long overdue in transferring this dispute from the antagonistic atmosphere of the courtroom to the settlement table. Paul has the right to meaningfully participate in Erika's life; she has a corresponding right to have him be a part of her life. Paul has an obligation to financially support Erika, and Akiko has the right to Paul's help in supporting Erika as long as Akiko has actual custody.

interests of each [jurisdiction].”⁹ *MacKenzie v. Barthol*, 142 Wn. App. 235, 240, 173 P.3d 980 (2007) (alterations in original) (quoting *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 160-61, 744 P.2d 1032 (1987)). This doctrine is not a rule of law but is rather a matter of “practice, convenience and expediency.” *Haberman*, 109 Wn.2d at 160.

When considering a comity issue, we ask whether:

there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries.

Hilton, 159 U.S. at 202; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1971). That fair proceeding should result in a valid judgment, which “will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971). A valid judgment exists where (1) the court rendering judgment had jurisdiction; (2) notice and an opportunity to be heard were afforded to the parties affected; (3) the court is competent to render judgment; and (4) the party asking for enforcement complies with the rules of the state of enforcement to enter the judgment. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1971).

Comity does not require us to enforce a valid foreign judgment where it is “so contrary to the laws” of Washington that enforcing the foreign judgment would seriously interfere with our own policy or laws. *Mirgon v. Sherk*, 196 Wash. 690, 693, 84 P.2d 362 (1938) (considering whether to enforce a usury contract); see also *Hilton*, 159 U.S. at 165 (comity “is the voluntary

⁹ *Hilton* sets forth requirements for recognizing a foreign judgment and in doing so, it imposed a reciprocity requirement. This reciprocity holding is no longer good law in most states, including Washington. See *Tonga Air Servs. Ltd. v. Fowler*, 118 Wn.2d 718, 726, 826 P.2d 204 (1992).

act of the nation by which it is offered, and is inadmissible when contrary to its policy” (quoting *Bank of Augusta v. Earle*, 38 U.S. 519, 589, 13 Pet. 519, 10 L. Ed. 274 (1839)). Where doubt exists as to entry of a foreign judgment, we favor our own laws over the foreign laws: *Hilton*, 159 U.S. at 165. A mere difference in law is insufficient to deny enforcing the foreign judgment under comity principles. *Untersteiner v. Untersteiner*, 32 Wn. App. 859, 863 n.3, 650 P.2d 256 (1982).

The trial court refused to recognize the Japanese divorce decree, not because the underlying judgment was invalid, but because subsequent legal actions in Japan did not meet our fundamental principles concerning due process and parental rights. In fact, the divorce satisfies the standards required to enter a foreign judgment under comity. The Japanese divorce proceedings allowed for a full and fair trial resulting in a Japanese divorce decree, which meets the elements of a valid foreign judgment. Because of this, the Estate argues that the trial court should have limited its inquiry to the validity of the divorce decree.

Limiting our review to the divorce decree, however, would require us to ignore the practical and constitutionally harmful consequences of the guardianship proceeding. In effect, the guardianship proceeding, including the role Akiko assumed under it, and the Japanese law concerning parental rights, nullify the parent-child relationship that our law explicitly recognizes; thus, we are compelled to conclude, as the trial court did, that we should not recognize and enforce the related divorce decree. Three basic concerns guide this conclusion.

First, under our due process principles, Paul had the right to notice of and opportunity to participate in the guardianship proceeding. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (citing *Mullane v. Cent. Hanover Bank & Trust*

Co., 339 U.S. 306, 313, 70 S. Ct. 652, 94 L.Ed. 865 (1950)). The evidence is undisputed that he received no notice of the guardianship proceedings, and he did not know the result until the Estate filed the instant case in March 2010.

Second, under Washington law, when Etsuko died, Paul would have been entitled to “full and complete control” of Erika absent a justifiable reason to withhold custody. RCW 26.16.125.¹⁰ As RCW 26.09.002 explains, Washington’s public policy favors fostering the parent-child relationship:

In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties’ parental responsibilities. The 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.

Yet, because Erika was living with Akiko when Etsuko died, Akiko assumed full parental control through the guardianship proceeding. The Japanese law experts explained that the guardianship action does not hinder Paul’s right to bring a custody action in the Japanese courts. But the Japanese courts afford no presumption in a custody action that the biological parent should have custody, although they consider it to be a relevant fact. And, even if Paul obtained a custody order from Japan, undisputed evidence shows that the Japanese court would likely not enforce it. H.R. 1326, 111th Cong., 2d Sess. (Wash. 2010) (stating that Japan has no existing process to enforce custody or visitation orders without the voluntary cooperation of the other spouse).

¹⁰ RCW 26.16.125 reads in pertinent part: “[T]he rights and responsibilities of the parents in the absence of misconduct shall be equal . . . and in case of one parent’s death, the other parent shall come into full and complete control of the children and their estate.” The legislature amended this statute after Etsuko died. Because the amendments do not change the substance of the statute, we cite to the current version.

Third, Paul's substantive due process right as a parent will be abridged if we recognize the Japanese decree. Federal law recognizes a parent's fundamental substantive due process right to parent his child. *Troxel*, 530 U.S. at 65; *see also Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 534-35; *Yoder*, 406 U.S. at 232-33. "[T]he 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." *Troxel*, 530 U.S. at 65.

Although Japanese courts use a "welfare of the child" standard in custody proceedings, which appears to meet our "best interests of the child" standard, they apparently do not recognize the same substantive due process right of a parent found in our federal law. CP at 444. In determining the "welfare of the child," Japanese courts consider: (1) the parent's relationship with the child; (2) past support provided by the parent; (3) future ability to support the child; (4) living arrangements if the child resides with the parent; (5) the child's interests in schooling and friends; and (6) the parent's ability to communicate with the child. But here the guardianship proceeding has effectively deprived Paul of any parenting role in Erika's life since Etsuko's death. And, under the guardianship, Akiko has chosen what school Erika will attend and who her friends will be. Thus, under these factors, as the trial court noted, Paul's chances in the Japanese courts of actually gaining custody of Erika are "slim to none." RP (Mar. 25, 2011) at 2-3. Thus, Japanese law does not protect Paul's substantive due process rights as a parent.

Additionally, we hesitate to enforce a judgment that would be unenforceable in the country that rendered the judgment. *See generally* RCW 6.40A.020(1)(b) (Courts will apply the Uniform Foreign-Country Money Judgments Recognition Act if the foreign judgment is "final,

conclusive, and enforceable.”).¹¹ Here, evidence shows that Akiko may not be able to enforce the child support order in Japan. Proof of Japanese law is a question of fact for our courts. *See Bogitch v. Potlatch Lumber Co.*, 93 Wash. 585, 589, 161 P. 487 (1916). Undisputed evidence before the trial court demonstrates that Japanese family courts may award child support but they lack the authority to actually enforce those awards. U.S. STATE DEP’T TRAVEL WARNING (“[C]ompliance with [Japanese] Family Court rulings is essentially voluntary, which renders any ruling unenforceable unless both parties agree.”); 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 166, 247 (Spring 2007) (Japanese family court orders are widely recognized as unenforceable), 247 n.314 (paying child support is voluntary, thus compliance is not expected) (citations omitted); RESOLUTION OF DISPUTES OVER PARENTAL RIGHTS AND DUTIES IN A MARITAL DISSOLUTION CASE IN JAPAN: A NONLITIGIOUS APPROACH IN CHOTEL, 39 Fam. L.Q. 489, 503 (Summer 2005) (approximately 66 percent of parents never make a child support payment).

We are satisfied that enforcing the Japanese divorce decree would violate Paul’s procedural due process right to notice and the opportunity to be heard, Washington’s policy protecting the parent-child relationship, and Paul’s substantive due process right as a parent.

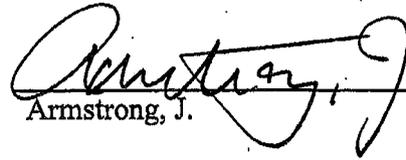
¹¹ We adopt the same policy set forth in statutory schemes addressing recognition of foreign country judgments. Although the question before us is not statutory, but one of comity, we agree with the policy that we should not recognize or enforce a foreign judgment where it would not be enforceable in the foreign jurisdiction that issued the judgment.

Under these circumstances, we hold that the trial court did not err in declining to grant comity to the Japanese divorce decree.¹²

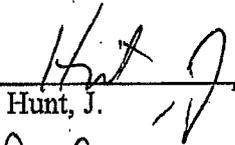
IV. ATTORNEY FEES

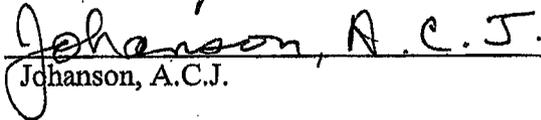
In the TEDRA case, the Estate requested attorney fees under RAP 18.1. Because the Estate has not prevailed, we deny an award of fees to the Estate.

We reverse the trial court's order denying Paul's TEDRA petition to participate in the Estate. We affirm the trial court's summary judgment denying registration of the Japanese divorce decree.


Armstrong, J.

We concur:


Hunt, J.


Johanson, A.C.J.

¹² The Estate does not argue that we should consider separately the judgments for child support and those for property division and Etsuko's tort judgment.

(B)

Decision from Maryland Court of Appeals

IN THE COURT OF APPEALS OF
MARYLAND

No. 83

September Term, 2011

PETER PAUL TOLAND, JR.

v.

AKIKO FUTAGI

Bell, C.J.
Harrell
Battaglia
Greene
Adkins
Barbera
McDonald,

JJ.

Opinion by Battaglia, J.

Filed: March 28, 2012

This case involves the interpretation of the Uniform Child Custody Jurisdiction and Enforcement Act, Sections 9.5-101 to 9.5-318 of the Family Law Article, Maryland Code (1984, 2006 Repl. Vol.).¹ Peter Paul Toland, Jr.,² Appellant, challenges the Circuit Court for Montgomery County's determination that a Japanese decree providing guardianship of his minor child to the child's grandmother, Akiko Futagi, Appellee, without notice to him, did not constitute a violation of his due process rights. He also argues that the Circuit Court's dismissal of his Complaint to Establish Custody, pursuant to Uniform Child Custody Jurisdiction and Enforcement Act, was error. On our own motion and prior to any proceedings in the Court of Special Appeals, we granted certiorari to consider the following questions:

1. Whether the lower court erred and violated Mr. Toland's due process rights and fundamental liberty interest in the care, custody and control of his daughter in violation of the United States Constitution^[3] and the Maryland Declaration of Rights.^[4]

¹ All statutory references to the Family Law Article are to the Maryland Code (1984, 2006 Repl. Vol.), unless stated otherwise.

² The Appellant is a member of the Navy, although he has been referred to in the parties' briefs as "Mr. Toland;" we shall continue with that appellation.

³ The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

⁴ Article 24 of the Maryland Declaration of Rights states:

Article 24. Due Process. "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privilege, or

(continued...)

2. Whether the lower court erred and misapplied the UCCJEA when it granted the Appellee's Motion to Dismiss.

We shall hold that the Circuit Court's dismissal of Mr. Toland's complaint did not violate his due process rights under the United States Constitution and the Maryland Declaration of Rights, as they were not implicated by the Japanese decree. We also shall hold that the Circuit Court properly applied the Uniform Child Custody Jurisdiction and Enforcement Act to conclude that it should not exercise jurisdiction over Mr. Toland's Complaint to Establish Custody of his daughter, because the child had no connection with Maryland, and Japan, where she was born and has lived her entire life, had not declined custody jurisdiction. In so holding, we shall affirm the Circuit Court's dismissal of Mr. Toland's Complaint to Establish Custody.

Introduction

Whenever a child custody dispute in Maryland involves another state or another country, the Maryland Uniform Child Custody Jurisdiction and Enforcement Act is implicated. *In re Kaela C.*, 394 Md. 432, 454, 906 A.2d 915, 928 (2006). The Maryland Uniform Child Custody Jurisdiction and Enforcement Act, which is currently codified as Sections 9.5-101 through 9.5-318 of the Family Law Article, was enacted in 2004 to replace its predecessor, the Maryland Uniform Child Custody Jurisdiction Act, which was initially

⁴(...continued)

outlawed, or exiled, or in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”

enacted in 1975 and codified as Sections 184 to 207 of Article 16, Maryland Code (1957, 1966 Repl. Vol., 1977 Supp.) and was later repealed and recodified⁵ as Sections 9-201 to 9-403 of the Family Law Article, Maryland Code (1984, 1985 Supp.).

By way of background, in 1968, the National Conference of Commissioners on Uniform State Laws⁶ drafted the Uniform Child Custody Jurisdiction Act to address the problem of conflicting custody decrees among states and foreign countries and a “growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states.” Unif. Child Custody Jurisdiction Act, Prefatory Note, 9 U.L.A. Part IA, at 262 (1999); *see also In re Kaela C.*, 394 Md. at 454, 906 A.2d at 928 (The Uniform Child Custody Jurisdiction Act was designed to “address both the increased mobility of individuals and the negative results of that mobility, namely the rampant kidnaping of children by parents looking to relitigate custody determinations in a more favorable forum, a tactic known as ‘seize and run.’”). The concern was that movement of a child from state to state, by parents or family members seeking a more favorable custody

⁵ The 1984 recodification of the Maryland Uniform Child Custody Jurisdiction Act, as part of the Family Law Article, reflected only stylistic changes from the original version in the 1957 Maryland Annotated Code. *Olson v. Olson*, 64 Md. App. 154, 159 n.1, 494 A.2d 737, 740 n.1 (1985).

⁶ The National Conference of Commissioners on Uniform State Laws is composed of judges, practitioners and scholars from every state in the country, as well as the District of Columbia. Generally, four Commissioners represent each state and are appointed by the governor or the legislature. Promulgation of a Uniform Act, through a vote of states, constitutes the National Conference’s recommendation for adoption in all states. Preface, 9 U.L.A. Part IA, at III-IV (1999).

decree in another jurisdiction, created an instability that inhibited the child's ability to develop personal attachments or a sense of belonging in a community. Courts, including the Supreme Court of the United States, had yet to clarify whether the Full Faith and Credit Clause of the United States Constitution applied to custody determinations, which often led to "a custody decree made in one state one year [that] is often overturned in another jurisdiction the next year or some years later and the child is handed over to another family, to be repeated as long as the feud continues." 9 U.L.A. Part IA, at 263-64.

In order to determine which state had jurisdiction, the Uniform Child Custody Jurisdiction Act limited interstate custody jurisdiction to the child's "home state," where the child had lived for at least six months prior to the proceeding, or the state that had strong contacts with the child and family. Unif. Child Custody Jurisdiction Act, Section 3(a), 9 U.L.A. Part IA, at 307. Where a state was not the home state or of significant connection to the child, then only in instances of emergency, such as when the child was abandoned in the state, or when no other state had jurisdiction, would a state assume jurisdiction over an interstate child custody determination. *Id.* To further discourage competition among states, the Uniform Child Custody Jurisdiction Act also required that a court decline jurisdiction upon learning of an ongoing proceeding in another state, and permitted a court to decline jurisdiction upon determining that the petitioner had wrongfully taken the child from another state, or that the court was an inconvenient forum because, for example, another state had a closer connection with the child. *See* Unif. Child Custody Jurisdiction Act, Sections 6, 7, 8, 9 U.L.A. Part IA, at 474, 497-98, 526. The Act also required a court to maintain a registry

of out of state custody decrees and to recognize and enforce decrees from other states and foreign countries. Unif. Child Custody Jurisdiction Act, Section 16, 9 U.L.A. Part IA, at 625-26. In effect, the Uniform Child Custody Jurisdiction Act required a court, upon learning of an interstate dimension of a child custody proceeding brought before it, to engage in a two-step inquiry: determine whether it had jurisdiction and, if so, whether it should exercise jurisdiction.

In 1997, the Commissioners revised the Uniform Child Custody Jurisdiction Act “in light of federal enactments and almost thirty years of inconsistent case law.” Unif. Child Custody Jurisdiction & Enforcement Act, Prefatory Note, 9 U.L.A. Part IA, at 650. One of the federal enactments referred to was the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A,⁷

⁷—The Parental Kidnapping Prevention Act, Section 1738A of Title 28, United States Code provides in pertinent part:

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

* * *

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and
(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from

(continued...)

which expressly provided that full faith and credit must be given to child custody determinations. The Parental Kidnapping Prevention Act conflicted with the Uniform Child Custody Jurisdiction Act in part because the latter provided that both the home state of the child and the state having significant connections with the child and family could exercise

⁷(...continued)

such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

jurisdiction, whereas the Parental Kidnapping Prevention Act gave exclusive jurisdiction to the home state, so as to avoid concurrent jurisdiction with another state. *See* Section 1738A(c)(2)(A) of Title 28, United States Code.

The Maryland Uniform Child Custody Jurisdiction Act was enacted in 1975, in order to

help eliminate jurisdictional competition and conflict with courts of other States, discourage continuing controversies over child custody, avoid re-litigation of custody decisions of other States, and promote and expand the exchange of information and other forms of mutual assistance between the courts of this State and those of other States concerned with the same child.

Legislative Council of Maryland, Report to the General Assembly of 1975: Proposed Bills 174-75 (1975). The Maryland Child Custody Jurisdiction and Enforcement Act was enacted in 2004 and repealed the Maryland Uniform Child Custody Jurisdiction Act at the same time; the purpose of the new Act remained the elimination of competition among states in determining interstate child custody disputes. *See Garg v. Garg*, 393 Md. 225, 239, 900 A.2d 739, 747 (2006) (“Jurisdiction or its exercise under both the UCCJA and UCCJEA is a threshold legal issue that the law requires be resolved expeditiously.”); *see also* Unif. Child Custody Jurisdiction & Enforcement Act, Section 101 cmt., 9 U.L.A. Part IA, at 657.

The Maryland Uniform Child Custody Jurisdiction and Enforcement Act, codified in Section 9.5-201(a) of the Family Law Article, prescribes that a Circuit Court in this State has jurisdiction to entertain a child custody complaint if Maryland is the home state of the child:

(a) *Grounds for jurisdiction.* – Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State has jurisdiction to make an initial child custody determination only if:

- (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
- (2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:
 - (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
 - (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
- (3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or
- (4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.

Section 9.5-201(a) of the Family Law Article. The Act also provides that a Circuit Court may decline to exercise jurisdiction if it determines that it is an inconvenient forum, pursuant to Section 9.5-207 of the Family Law Article, or that "a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct," under Section 9.5-208 of the Family Law Article. It also contains a catch-all "vacuum jurisdiction" provision, Section 9.5-201(a)(4) of the Family Law Article, which allows a court in this State to exercise jurisdiction where no other state, including a foreign country, can.⁸

⁸

"Vacuum jurisdiction" is the phrase coined to refer to that section of the

(continued...)

In the present case, Maryland is not the home state of Mr. Toland's child, while Japan is. At issue is the international application of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act, which is discussed in Section 9.5-104 of the Family Law Article:

- (a) *Foreign country treated as state.* – A court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Subtitles 1 and 2 of this title.
- (b) *Recognition and enforcement of child custody determination made by foreign country.* – Except as otherwise provided in subsection (c) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this title must be recognized and enforced under Subtitle 3 of this title.
- (c) *Applicability of title.* – A court of this State need not apply this title if the child custody law of a foreign country violates fundamental principles of human rights.

Section 9-104 of the Family Law Article. Subsection (c) contains the language upon which ~~Mr. Toland relies to assert that a Maryland circuit court can exercise jurisdiction over his~~ child in Japan. That section provides that a Maryland court need not apply the Maryland Uniform Child Custody Jurisdiction and Enforcement Act in a situation in which the child custody laws of a foreign country “violate[] fundamental principles of human rights.” Section 9.5-104(c) of the Family Law Article. Although the term “fundamental principles

⁸(...continued)
original Uniform Child Custody Jurisdiction Act and later the Uniform Child Custody Jurisdiction and Enforcement Act that enables jurisdiction as a matter of last resort because no other state exercises jurisdiction as the child's home state, as the “more appropriate forum” based on significant connections to the child and family, or had declined to exercise jurisdiction. Unif. Child Custody Jurisdiction Act, Section 3 note 102, 9 U.L.A. Part IA, at 422 (1999).

of human rights” was left undefined in the Act proposed by the Commissioners, as well as in the Maryland statute, the drafters alluded to a similar provision in the Hague Convention on the Civil Aspects of Child Abduction, which permits a country to refuse to return a child if the return would violate “the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms,” which has been interpreted by the United States Department of State as “utterly shock[ing] the conscience or offend[ing] all notions of due process.” Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (1986); *see also* Unif. Child Custody Jurisdiction & Enforcement Act, Section 105 cmt., 9 U.L.A. Part IA, at 662.

Factual and Procedural Background

Mr. Toland filed a Complaint To Establish Custody in the Circuit Court for Montgomery County, alleging that he was entitled under Section 5-203(a) of the Family Law Article, Maryland Code (1984, 2006 Repl. Vol.),⁹ as the sole surviving parent, to custody of his nine-year-old daughter, Erika,¹⁰ who presently lives with her maternal grandmother, Akiko Futagi in Japan, after having lived in Japan since her birth. Etsuko, Mr. Toland’s ex-wife and the mother of the child, had previously been awarded custody by a Japanese Court. Etsuko died in 2007, and a Japanese decree issued thereafter, and without notice to Mr.

⁹ Section 5-203(a)(2)(i) of the Family Law Article, Maryland Code (1984, 2006 Repl. Vol.) provides that “A parent is the sole natural guardian of the minor child if the other parent . . . dies.”

¹⁰ References to Erika’s name are alternatively spelled as “Erika” or “Erica” throughout the record. We shall use “Erika” for purposes of consistency.

Toland, appointed Ms. Futagi, the grandmother, as the guardian of Erika. Upon learning of the guardianship decree, Mr. Toland amended his complaint and alleged that Maryland was the appropriate forum to determine custody because he resided in this State, and under the Uniform Child Custody Jurisdiction and Enforcement Act,

Japan cannot be considered the minor child's home state because the minor child is only physically present in Japan as a result of the maternal grandmother's unjustifiable conduct and because Japan's family court system does not comply with the standards of due process, fundamental fairness and the norms of international comity required by this State.

Ms. Futagi responded to Mr. Toland's complaint and filed a "Motion to Dismiss Custody Proceeding for Lack of Personal Jurisdiction and Pursuant to the Uniform Child Custody Jurisdiction Act of Maryland and For An Award of Counsel Fees under Maryland Statute Section 9.5-208."¹¹ She attached to a subsequent Memorandum of Law in Support

¹¹ Section 9.5-208 of the Family Law Article provides:

(a) *In general.* – Except as otherwise provided in § 9.5-204 of this subtitle or by other law of this State, if a court of this State has jurisdiction under this title because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) a court of the state otherwise having jurisdiction under §§ 9.5-201 through 9.5-203 of this subtitle determines that this State is a more appropriate forum under § 9.5-207 of this subtitle; or

(3) no court of any other state would have jurisdiction under the criteria specified in §§ 9.5-201 through 9.5-203 of this subtitle.

* * *

(continued...)

of the Motion to Dismiss an affidavit of her Japanese family law expert, Yorimichi Ishikawa,¹² who attested that under Japanese law, Ms. Futagi was awarded guardianship,

¹¹(...continued)

(c) *Assessment of expenses and fees.* – (1) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under subsection (a) of this section, the court shall assess against the party seeking to invoke the court’s jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney’s fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. (2) The court may not assess fees, costs, or expenses against this State unless authorized by law other than this title.

Section 9.5-208 of the Family Law Article.

¹² In his affidavit, Mr. Ishikawa summarized his understanding of the facts underlying this case and then explained that Mr. Toland remained able to seek custody of his daughter in Japan, as the guardianship proceeding did not award Ms. Futagi custody of the child:

There is nothing preventing the Father from filing a custody or a guardianship proceeding [in] Japan. The Guardianship that is and has been in place since January, 2008 has no bearing on his ability or right to file a proceeding and seek the custody or guardianship of his minor daughter, Erika Toland.

* * *

There is nothing in Japanese law that requires that [Ms. Futagi] or her Attorney give Mr. Toland Notice of the Guardianship. I believe that Mrs. Futagi was at all times represented by a Japanese lawyer that followed Japanese law. Neither of them did anything in violation of Japanese law in obtaining the Guardianship over the child. After the death of the Mother, it is clear that the maternal Grandmother needed legal authority to deal with the child’s issues on a day-to-day basis in Japan: to enroll her in school, to obtain necessary medical care for the child as the need may have developed, and the like. The Guardianship did not grant Mrs. Futagi full, permanent custody

(continued...)

which neither equates to custody nor prevents Mr. Toland from pursuing custody in Japan, and that notice of the guardianship proceeding to the biological parent was not required. A hearing on the Motion to Dismiss occurred, during which Mr. Toland and his expert on Japanese family law, Mikiko Otani, testified. Ms. Otani confirmed that Japanese law did not require notice of the guardianship proceeding to Mr. Toland and that the guardianship decree did not prevent Mr. Toland from pursuing custody of his daughter in a Japanese court.

Judge Steven G. Salant of the Circuit Court for Montgomery County, the presiding judge, thereafter issued a Memorandum Opinion, which included findings of fact and conclusions of law. The findings of fact are not in dispute before us.¹³

Judge Salant found that in 1995, Mr. Toland married Etsuko Futagi in Japan and they later had one child, Erika, who was born in Japan and has not left that country. In 2003, Etsuko took Erika, ostensibly without Mr. Toland's consent, to live with her mother Akiko Futagi and later obtained a Japanese divorce decree that awarded the wife custody of Erika.

Judge Salant stated:

¹²(...continued)

of the child, and there is nothing in Japanese law related to the Guardianship that would stop or interfere with Mr. Toland's right and ability to pursue custody of the child in the Japanese Courts because of the existence of the Guardianship either when it was formed or now.

¹³ In this case, the parties, their experts and the Circuit Court all appear to agree that the proceeding in Japan at issue awarded Ms. Futagi guardianship of the child, rather than custody. At oral argument, however, there was some discussion which drew some confusion, as Mr. Toland, through his counsel, asserted that the Japanese court awarded Ms. Futagi custody.

Plaintiff Peter Paul Toland, Jr. ("Plaintiff") and Etsuko Futagi Toland ("Mother") were married in Japan on March 22, 1995. After the marriage, the Mother and Father continued to live in Japan as a result of the Father's military service. In June 1996, the Father was transferred to Seattle, Washington, where the couple resided for the next three years, until July 1999 when the couple returned to Japan after the Plaintiff was transferred there.

The minor child, Erica Toland ("child"), was born on October 17, 2002 in Japan. Plaintiff contends the child is a United States citizen, whereas Defendant contends the child has dual citizenship in Japan and the United States. The Mother became a United States citizen on April 18, 2003. On July 13, 2003, the Plaintiff returned from work to discover the Mother had left the family home with the child. The Mother filed for divorce and, over the Plaintiff's jurisdictional objection, on September 29, 2005, the Tokyo Family Court issued a decree of divorce awarding the Mother custody of the minor child.

(internal footnotes omitted).

Judge Salant then found that after the wife's death in 2007, Erika remained in Japan

with her grandmother, Ms. Futagi, who was awarded guardianship of the child by a Japanese court:

The Mother died on October 31, 2007. Since that time, the child has lived with her maternal grandmother, Akiko Futagi ("Defendant") in Japan. The Plaintiff alleges that he has seen the child only twice since July 13, 2003, and the Defendant has continued to deny him all access to the minor child. Defendant posits that Plaintiff last sought to visit the child in September or October 2007, before the Mother's death, and has not requested visitation since that time.

The Plaintiff filed a Complaint to Establish Custody in the Circuit Court for Montgomery County, Maryland on October 2, 2009 (D.E. #1). After learning that the Defendant had been appointed the legal guardian of the child by the Japanese Court, Plaintiff filed an Amended Complaint to Establish Custody on

September 1, 2010 (D.E. #22) (“Complaint”) to incorporate said facts.

(internal footnotes omitted). Judge Salant, in a footnote, observed that Mr. Toland was not notified of the proceeding awarding guardianship to Ms. Futagi:

Plaintiff had no notice of any guardianship proceeding in Japan and therefore did not participate in the guardianship proceeding.

In his conclusions of law, Judge Salant determined that Japan was the home state of Erika under Maryland’s version of the Uniform Child Custody Jurisdiction and Enforcement Act, Section 9.5-201(a)(1) of the Family Law Article, because Erika “has lived exclusively in Japan for her entire life”:

A court has jurisdiction to make a child custody determination if that State is the home state of the child on the date of the commencement of the proceeding. § 9.5-201(a)(1). “Home state” is defined as the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of a child custody proceeding. § 9.5-101(g). The child at issue has lived exclusively in Japan for her entire life. It is uncontested that at no time has the child lived in the State of Maryland. Accordingly, Japan is considered the home state of the child and Japan has jurisdiction to enter a child custody decree pursuant to §§ 9.5-201(a)(1) and 9.5-104(a). At this time, Japan has not declined to exercise jurisdiction on the ground that Maryland (or any other jurisdiction) is the more appropriate forum, therefore no State other than Japan can claim jurisdiction under § 9.5-201(a)(2)–(a)(3).

Judge Salant then addressed Mr. Toland’s argument that Maryland could exercise “vacuum jurisdiction” under Section 9.5-201(a)(4) of the Family Law Article, because Japan should

have declined jurisdiction under Section 9.5-208, as Erika's presence in that jurisdiction was allegedly caused by the wife and grandmother's "unjustifiable conduct," when the wife took Erika from their family home in 2003. Without addressing whether their conduct was unjustifiable, Judge Salant concluded that the Circuit Court could not exercise "vacuum jurisdiction" until after Japan declined jurisdiction, which Japan had not done:

Plaintiff argues that despite the above analysis, this Court has jurisdiction pursuant to § 9.5-201(a)(4), often termed the "vacuum jurisdiction" provision, to make an initial custody determination. Plaintiff contends that Japan, even were it to be considered a State for UCCJEA purposes, could not claim home state jurisdiction because such jurisdiction exists solely due to the Mother's, and later the Defendant's, unjustifiable conduct. Plaintiff contends that Japan would be required to decline jurisdiction under § 9.5-208(a) because Japan could only have obtained jurisdiction due to the Mother's and the Defendant's unjustifiable conduct, namely their "surreptitiously removing the minor child" and refusing to allow the Plaintiff contact with the child. Thus, Plaintiff contends that vacuum jurisdiction must apply as there is no other state that would have home state, significant connection, or more appropriate forum jurisdiction.

This Court cannot exercise jurisdiction pursuant to § 9.5-201(a)(4). While Plaintiff's argument that Japan would be required to decline jurisdiction due to the Mother's and the Defendant's unjustifiable conduct may in fact be correct, **this** Court cannot assume jurisdiction on that supposition alone. The issue of whether Japan would be required to decline jurisdiction under § 9.5-208(a) is for the Japanese courts to determine. This Court cannot speculate as to a decision that may be made by the Japanese court. Before this Court could exercise jurisdiction pursuant to § 9.5-201(a)(4) Japan would have to decline jurisdiction; as Japan has not done so, this Court cannot exercise subject matter jurisdiction pursuant to § 9.5-201(a)(4).

(emphasis in original).

Judge Salant addressed Mr. Toland's second argument related to the exception to the application of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act, under Section 9.5-104(c) of the Family Law Article, because, allegedly, Japan's child custody laws violate the "fundamental principles of human rights":

Plaintiff's final argument is that this Court is not required to apply the UCCJEA jurisdictional requirements to this case because Japan's custody laws violate fundamental principles of human rights. *See* § 9.5-104(c). Plaintiff's Opposition listed a number of ways in which his, and the child's, rights have allegedly been violated by the Mother, by the Defendant, and by Japanese law. It should first be noted that this Court is **not** determining whether the Plaintiff's or the child's rights have been or would be violated pursuant to Japanese law. Nor is the issue before the Court to determine whether comity would or should be accorded to a child custody determination made in Japan, or whether Japan would accord comity to or enforce a custody determination made pursuant to Maryland law. The sole issue before the Court is whether Japan's child custody law so violates fundamental principles of human rights as to justify employing § 9.5-104(c) and assuming jurisdiction for this custody proceeding.

(emphasis in original). Judge Salant observed that the term "fundamental principles of human rights" was left undefined by the Uniform Child Custody Jurisdiction and Enforcement Act, but that the Comment of the National Conference of Commissioners on Uniform State Laws suggested that fundamental fairness could be included within the term's meaning:

Neither the Comments to the UCCJEA nor Maryland statute or case law define the term "fundamental principles of human rights." While the Comments do note that a court may refuse to apply the UCCJEA when the child custody law of the

other country violates “basic principles relating to the protection of human rights and fundamental freedoms,” the drafters of the UCCJEA took no position on what laws relating to child custody might violate such “fundamental freedoms.” See Comments, Section 105: International Application of Act at 14.

Fundamental freedoms, Judge Salant determined, encompassed due process under the United States Constitution, including the fundamental liberty interest of a parent to the care, custody and control of the child:

Fundamental freedoms and liberties frequently arise under a given political system and structure. In the United States, these interests are recognized or established under our constitutional system of government. Under our system of government it has been established that the interest of parents in the care, custody, and control of their children is “perhaps the oldest of the fundamental liberty interests” recognized by the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054 (2000). See *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258 (1997) (“...[T]he ‘liberty’ specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one’s children.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526 (1972) (“Th[e] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625 (1923) (holding the Due Process Clause of the United States Constitution protects the rights of parents to “establish a home and bring up children” and “to control the education of their own”). See also *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571 (1925). After examining the extensive precedent as cited above, the *Troxel* Court declared it “beyond doubt” that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. 530 U.S. at 66. The same right has

also been recognized by the Court of Appeals of Maryland which has held that “[a] parent’s interest in raising a child is, no doubt, a fundamental right, recognized by the United States Supreme Court and this Court.” *In re Samone H.*, 385 Md. 282, 300, 869 A.2d 370 (2005).

The fundamental liberty interest of a parent in a child, however, is not absolute, according to Judge Salant:

However, such a right is not an absolute right, and may be curtailed by the State where it is in the best interest of the child or necessary for the protection of the child from abuse or neglect. *See In re Adoption/Guardianship No. 3598*, 109 Md. App. 475, 675 A.2d 170 (1996). The Court may award custody to a third party as against a biological parent if the Court finds that the biological parent is unfit or that exceptional circumstances exist to justify such a determination, and that it is in the best interest of the child to do so. *See Ross v. Hoffman*, 280 Md. 172, 372 A.2d 582 (1977) (discussing exceptional circumstances); *Pastore v. Sharp*, 81 Md. App. 314, 567 A.2d 509 (1990) (discussing fitness).

The right to “family life” has also been recognized by several international treaties, conventions, and covenants. The Universal Declaration of Human Rights (“Declaration”) provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour [sic] and reputation.” Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), at art. 12.

Based upon the foregoing discussion, and the determination that the procedures and considerations for awarding custody in Japan were akin to the best interests of the child standard in Maryland, Judge Salant held that, because the Japanese custody laws did not violate fundamental fairness, the exception to the international application of the Uniform Child Custody Jurisdiction and Enforcement Act did not apply, and the Circuit Court should

not exercise jurisdiction over the present interstate custody dispute:

Based on the above analysis, the Court does not find that the child custody law of Japan violates the fundamental principles of human rights such as to justify an exercise of § 9.5-104(c).

Judge Salant dismissed Mr. Toland's Complaint to Establish Custody¹⁴ and Mr. Toland timely appealed.

Discussion

We initially address whether the Circuit Court, in dismissing Mr. Toland's complaint, violated his due process rights under the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights, as Mr. Toland initially argues in his first question. While we have often stated that the due process clauses of the Fourteenth Amendment and Article 24 may differ in application, *see, e.g., Frey v. Comptroller of the Treasury*, 422 Md. 111, 176-77, 29 A.3d 475, 513 (2011), both clauses are synchronistic in that "[t]he first prerequisite to raising a due process argument is that the action complained of must constitute 'state' action." *Pitsenberger v. Pitsenberger*, 287 Md. 20, 27, 410 A.2d 1052, 1056 (1980), citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974). Such state action may include a court's recognition and enforcement of a foreign decree. *See Rentals Unlimited, Inc. v. Motor*

¹⁴ Judge Salant additionally denied Ms. Futagi's request for attorneys' fees under Section 9.5-208(c)(1) because she did not demonstrate that Mr. Toland acted unjustifiably in bringing his claim.

Vehicle Administration, 286 Md. 104, 111, 405 A.2d 744, 749 (1979) (observing that “the due process clause . . . forbids the recognition and enforcement of a foreign judgment rendered by a court which lacks jurisdiction”).

In the present case, however, it is clear that these proceedings do not involve Ms. Futagi seeking to register or enforce the guardianship decree in Maryland, and Judge Salant reviewed the decree at the behest of Mr. Toland only to determine whether Japanese child custody law violated the “fundamental principles of human rights” for purposes of Section 9.5-104(c) of the Family Law Article. Without judicial enforcement of the foreign decree in Maryland, Mr. Toland’s due process rights were not implicated by the Circuit Court’s consideration of the Japanese decree in the limited context of determining whether the exception under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act applied.

As to Mr. Toland’s challenge to the Circuit Court’s application of the Uniform Child Custody Jurisdiction and Enforcement Act, we first address whether the Circuit Court properly applied Section 9.5-201(a) of the Family Law Article to conclude that it should not exercise jurisdiction. Under the framework of Section 9.5-201(a), the home state of the child ordinarily has exclusive jurisdiction and it is undisputed that Maryland is not the home state of Erika, because she has never lived in or visited this State.

Mr. Toland argues, however, that the Circuit Court should have exercised “vacuum jurisdiction,” under Section 9.5-201(a)(4), because Erika’s continuous presence in Japan is the result of the unjustifiable conduct of Ms. Futagi and Mr. Toland’s ex-wife and therefore

requires Japan to decline jurisdiction. He argues that Japan, where Erika has lived for her entire life, is precluded from being considered her home state because “the mother and maternal grandmother, Ms. Futagi, engaged in the unjustifiable conduct of surreptitiously removing the minor child from the Father without his knowledge or consent.” This argument has not been proffered to a Japanese court in a custody dispute. The Maryland Uniform Child Custody Jurisdiction and Enforcement Act does not authorize a Maryland circuit court to decline jurisdiction on Japan’s behalf. Therefore, Judge Salant’s refusal to exercise vacuum jurisdiction under Section 9.5-201(a)(4) and conclusion that the Uniform Child Custody Jurisdiction and Enforcement Act applied was appropriate.

Alternatively, Mr. Toland asserts that the exception to the application of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act, Section 9.5-104(c), is implicated in this case, by arguing that his fundamental rights as a parent were violated by various aspects of Japanese family law. Initially, he argues that the appointment of Ms. Futagi as guardian of his daughter was an infringement on his fundamental right as a parent to the care, custody and control of his child; thus, the failure to notify him of the proceeding constituted a violation of the “fundamental principles of human rights” and permits the Circuit Court to disregard the ordinary jurisdiction limitations of the Uniform Child Custody Jurisdiction and Enforcement Act.

Ms. Futagi responds, in support of the Circuit Court’s dismissal, that Japanese child custody laws are not implicated because the Japanese guardianship decree does not inhibit Mr. Toland’s ability to pursue custody of his daughter in Japan.

Custody of a child, which is undoubtedly a parental right protected under both the United States Constitution, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), as well as the Maryland Declaration of Rights, *In re Samone*, 385 Md. 282, 300-01, 869 A.2d 370, 380-81 (2005), encompasses the “care, control, and maintenance of a child.” Black’s Law Dictionary 441 (9th ed. 2009). Custody generally follows biology, and a biological parent is deemed the natural custodian of a child, *DeGrange v. Kline*, 254 Md. 240, 242, 254 A.2d 353, 354 (1969), and, in custody cases between a parent and a third party, we adhere to the presumption that based on this natural connection, a child’s best interests are served by permitting the parent to retain custody of the child. *Koshko v. Haining*, 398 Md. 404, 423, 921 A.2d 171, 182 (2007) (“This presumption is premised on the notion that ‘the affection of a parent for a child is as strong and potent as any that springs from human relations and leads to desire and efforts to care properly for and raise the child, which are greater than another would be likely to display.’”).

A guardianship, in contrast, generally is an outgrowth of a court decree. As we noted in *Kicherer v. Kicherer*, 285 Md. 114, 400 A.2d 1097 (1979), a guardian’s role in relation to the child or ward, including the temporality, purpose, and authority of the appointment, is defined by the court:

Lest sight be lost of the fact, we remind all concerned that a court of equity assumes jurisdiction in guardianship matters to protect those who, because of illness or other disability, are unable to care for themselves. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility. . . . [A]ll the parties should be reminded that appointment to that

position rests solely in the discretion of the equity court and the administering of that office as it pertains to both the person and property of the ward is subject to judicial control.

285 Md. at 118-19, 400 A.2d 1100-01 (internal citations omitted). In the *Kicherer* case, a husband and son of a mentally-disabled adult woman were appointed co-guardians of her person and property. Although we dismissed as moot each of the co-guardians' appeals, each seeking the termination of the guardianship appointment of the other, we instructed that the lower court, pursuant to its equitable authority, require the co-guardians to file reports and accountings documenting the woman's care regularly, to ensure they carried out their duties properly.

A court, therefore, has equitable jurisdiction to appoint a "guardian of the person of a minor simply for the purpose of making a particular type of decision for that minor" or for a number of purposes. *In re Adoption/Guardianship No. 10935*, 342 Md. 615, 628, 679 A.2d 530, 536 (1996); see Black's Law Dictionary 774 (9th ed. 2009) (A guardian "may be appointed either for all purposes or for a specific purpose."). In *Wentzel v. Montgomery General Hospital, Inc.*, 293 Md. 685, 447 A.2d 1244 (1982), we ratified the notion that a grandmother and an aunt of a minor child could petition to be appointed as co-guardians for the purpose of consenting to a proposed surgical procedure for the child.

The role of a guardian is, therefore, separate and distinct from that of a custodian of a child. In *In re Adoption/Guardianship No. 10935*, 342 Md. 615, 679 A.2d 530 (1996), a case involving the resignation of a co-guardian, we reiterated that a parent may name a

guardian for his or her child, without termination of a parent's right to custody. *See also* Monrad G. Paulsen and Judah Best, *Appointment of a Guardian in the Conflict of Laws*, 45 *Iowa L. Rev.* 212, 213 (1960) ("Legal custody can be given to one person or agency while another remains the guardian.").

In this case, the Japanese decree established a guardianship, as found by the Circuit Court. Ms. Otani, Mr. Toland's expert, and Ms. Ishikawa, Ms. Futagi's expert, confirmed that the guardianship decree was not equivalent to custody and that Mr. Toland remained able to seek custody of Erika. The guardianship, therefore, has not severed Mr. Toland's custodial rights to his daughter and did not implicate "fundamental principles of human rights."

Mr. Toland, however, asks us, as he did the Circuit Court, to review all Japanese child custody law, including the methodology and criteria for awarding custody, even though there was no custodial determination in the present case. Any question regarding Erika's custody, which is not ripe, would require us to render an advisory opinion based upon "a matter in the future, contingent and uncertain," which is "a long forbidden practice in this State." *Hickory Point Partnership v. Anne Arundel County*, 316 Md. 118, 129, 557 A.2d 626, 631 (1989), quoting *Boyds Civic Association v. Montgomery County Council*, 309 Md. 683, 690, 526 A.2d 598, 601 (1987) and *Hatt v. Anderson*, 297 Md. 42, 46, 464 A.2d 1076, 1078 (1983).

When we have addressed whether the law of a foreign state is fundamentally unfair in the family law context, we have done so in cases in which the issue was ripe for consideration. In *Aleem v. Aleem*, 404 Md. 404, 947 A.2d 489 (2008), for example, we

considered whether to apply comity and recognize the effect of a husband's performance of *talaq*, which is the recitation of "I divorce thee . . ." three times with the effect under Pakistani law of unilaterally terminating a marriage, during the pendency of a divorce proceeding in the Circuit Court for Montgomery County. The lack and deprivation of basic rights to the wife, as exemplified by the facts of the *Aleem* case, we determined, was contrary to the public policy of this State; we therefore concluded that the *talaq* law was not entitled to comity in this State. 404 Md. at 425-26, 947 A.2d at 502.

We conclude, therefore, that the appointment of Ms. Futagi as Erika's guardian, without severing Mr. Toland's right to custody, did not violate his fundamental rights and that the Section 9.5-104(c) exception to the application of the Uniform Child Custody Jurisdiction and Enforcement Act, allowing for a Circuit Court to exercise jurisdiction despite not being permitted to do so under Section 9.5-201(a), is not applicable. The Circuit Court properly applied the Uniform Child Custody Jurisdiction and Enforcement Act to the present case to dismiss Mr. Toland's complaint; we, therefore, affirm.

**JUDGMENT OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**

(C)

**US Supreme Court denial of Petition for Writ of
Certiorari**

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 478-3011

October 1, 2012

Mr. Dale John Roberts
7263 Maple Place, Suite 205
Annandale, VA 22003

Re: Peter Paul Toland, Jr.
v. Akiko Futagi
No. 11-1549

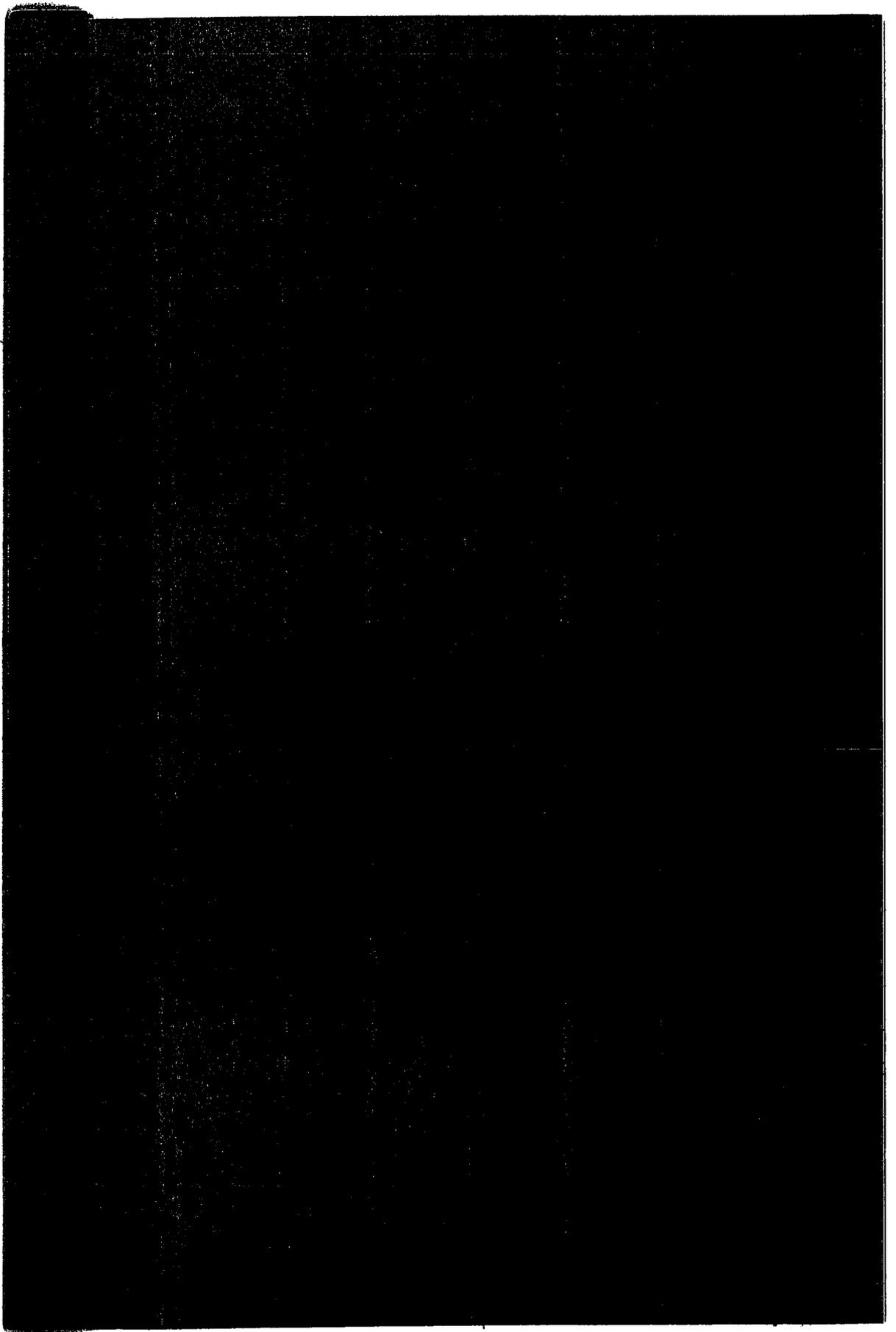
Dear Mr. Roberts:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,


William K. Suter, Clerk



(D)

Affidavit of Japanese Attorney Yorimichi Ishikawa

AFFIDAVIT OF JAPANESE ATTORNEY
YORIMICLI ISHIKAWA

Exhibit E

~~XXXXXXXXXX~~

AFFIDAVIT OF YORIMICHI ISHIKAWA

YORIMICHI ISHIKAWA, having been first duly sworn, upon oath deposes and states:

I am a practicing attorney in Tokyo, Japan and have been contacted on behalf of Akiko Furugi regarding a pending Maryland custody case and on behalf of the Estate of Etsuko F. Toland in a pending case in the State of Washington to serve as an expert with regard to issues that have been raised in both matters.

My contact information is the Office of Ishikawa and Tenosumi Law and Accounting Office, Sanabi-Kaikan, 1-9-4 Yuraku-cho, Chiyoda-Ku, Tokyo 100, Japan, telephone (03) 3214-0871, facsimile at 03-3214-8641, and e-mail yo0rini@nccs.tcn.na.jp.

I was admitted to practice in 1983 and engage in litigation, family law, corporate law, and various international transactions. I am a graduate of Keio University with a Bachelor's Degree in Law. I am a Committee Member of the Legal Training and Training Institute and my specialties are in Litigation, Family Law, Corporate Law, and Intellectual Property/In/Out-Bound Investments/International Transactions. I was admitted to the Bar in Japan in 1983. I speak and read both English and Japanese.

Because my practice is involved in Family Law areas of litigation and issues arising within them, I am familiar with the relevant Japanese law that addresses them and have recently reviewed them with respect to current matters pending before the Courts of Maryland and Washington State.

These cases involve the Father, Peter Paul Toland, Jr., and his minor child Erika Toland, age 8, that lives near Tokyo with her maternal Grandmother, Akiko Furugi. The Mother of the child, Etsuko Furugi Toland, died in October, 2007 and her Estate is being handled in the State of Washington. The Father has filed a custody proceeding in Maryland to obtain the custody of Erika.

AFFIDAVIT OF ISHIKAWA - 1

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I find that there are three main overlapping issues regarding both the Maryland and Washington State litigation on which I have been asked to render an opinion based on a reasonable degree of legal certainty:

Whether the Father is prevented, by virtue of the existence of the Japanese Guardianship or otherwise, from filing a custody proceeding in Japan to acquire full care, custody, and control of Erika;

Whether the Father was provided Notice of the Guardianship proceedings when they were undertaken in January, 2008 by the maternal Grandmother, Akiko Futagi;

Whether the Father has any effective legal remedy in Japan to seek the return of the minor child to the United States without a custody order from the Maryland Court.

My responses to these items are as follows, based on relevant Japanese law.

JAPANESE CHILD CUSTODY PROCEEDING:

There is nothing preventing the Father from filing a custody or a guardianship proceeding in Japan. The Guardianship that is and has been in place since January, 2008 has no bearing on his ability or right to file a proceeding and seek the custody or guardianship of his minor daughter, Erika Roland. It is my view and experience that the Court will take into account the Father's relationship with the child, how or whether he has supported her in the past, his financial wherewithal to support her in the future, his living arrangements where the child would reside while in his custody, her schooling and friends, her ability to communicate with him, and the like.

AFFIDAVIT OF ISHIKAWA - 2

27-9

It is my experience and thus my view based on that fact that the Japanese Court may well impose further conditions for re-uniting with the child or at least enforce the provisions it set out in the Final Decree to transition the child into Mr. Toland's custody and away from the care and day-to-day living circumstances she has had with her maternal Grandmother, especially since her Mother's death.
JAPANESE GUARDIANSHIP:

The maternal Grandmother, Akiko Fuzugi, pursued the Japanese Guardianship wherein she was appointed Guardian in January, 2008 without Notice to Ms. Toland. There is nothing in Japanese law that requires that she or her Attorney give Mr. Toland Notice of the Guardianship. I believe that Mrs. Fuzugi was in all times represented by a Japanese lawyer that followed Japanese law. Neither of them did anything in violation of Japanese law in obtaining the Guardianship over the child. After the death of the Mother, it is clear that the maternal Grandmother needed legal authority to deal with the child's issues on a day-to-day basis in Japan: to enroll her in school, to obtain necessary medical care for the child as the child may have developed, and the like. The Guardianship did not grant Mrs. Fuzugi full, permanent custody of the child, and there is nothing in Japanese law related to the Guardianship that would stop or interfere with Ms. Toland's right and ability to pursue custody of the child in the Japanese Courts because of the existence of the Guardianship either when it was formed or now.

CUSTODY ORDER FROM THE UNITED STATES:

It is my view based on my experience in Japanese family law that there is nothing in Japanese law that would require a Japanese Court to decide the custody of the child in this matter based on a custody order rendered by a state in the United States. I see a U.S. Custody Order as

APPENDIX OF ISHIKAWA . 3

never go bearing whatever on the considerations a Japanese Court would give to custody proceedings in this case or any other case. I have outlined above on page three of this Affidavit some of the items that I believe the Japanese Court would consider in deciding the custody and placement of the child. It is my view that it is bestially in the interest of the child in the United States would determine with regard to the propriety of returning custody of this child to Mr. Toland. Testimony and evidence needs to be presented in the Japanese proceeding and from that the Court would reach the decision.

In short, because the child has lived all of her life in Japan, has attended schools in Japan, speaks Japanese fluently, has established an entire way of life in Japan, I believe that the Court would find and require a smooth transition to a new life with Mr. Toland in the United States. Erika has easily suffered the trauma of leaving her Mother. The Japanese Court would want to do what is possible and necessary to protect her from any further emotional upset. However, this is said in the light that I believe the Court would favor re-uniting the child with her Father, especially since he is her only surviving parent. I believe that this is a goal the Court would seek to achieve because it is in keeping with the Court's deep set belief that it would be in Erika's best interest to do so.

DATED this 2 day of February, 2011 at Tokyo, Japan.

Yorinobu Ishikawa
 Yorinobu Ishikawa
 Attorney at Law

ON THIS DAY Yorinobu Ishikawa, Attorney at Law, personally appeared before me, identified himself to me, and read the above Affidavit to me in English. He then swore under oath that the statements he is making in this Affidavit are true and correct and that he signed the foregoing Affidavit as his free and voluntary act in my presence.

My Commission expires: _____

Notary Public

AFFIDAVIT OF ISHIKAWA - 4

(E)

**Balance of Toland Judgments from Divorce Decree
October 1, 2012**

**BALANCE OF TOLAND JUDGMENTS
FROM JAPANESE DIVORCE DECREE**

**USING EXCHANGE RATE (AVERAGED BASED ON UPWARD CURVE FROM
START TO END OF MONTH) AS OF MARCH 17, 2006**

115.8 YEN PER \$1 U.S.

1. JPY50,000 end of each month until Erika reaches adulthood (child support):

Principal balance owed from April 1, 2006 through mother's date of death (10/31/2007): (exclusive of interest)	\$8,204.01
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2. JPY8,000,000 for property distribution

Principal balance owed as of April 1, 2006:	\$69,084.62
Plus interest at 5% per annum, per decree, from April 1, 2006 through October 1, 2012:	\$20,827.50

3. JPY1,000,000 for "solatium"

Principal balance owed as of April 1, 2006:	\$8,635.58
Plus interest at 5% per annum, per decree, from April 1, 2006 through October 1, 2012:	\$2,812.44

TOTAL OWED AS OF October 1, 2012	<u>\$109,564.15**</u>
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***Note: If the judgments are allowed WA registration, and to carry interest at 12% per annum from the date the registration case was filed (3/17/2010), then the total balance of all judgments would be increased to \$121,102.46.**

****Note: Does not include 70% of legal costs which were to be borne by Respondent (Peter Paul Toland, Jr.)**