

No. 35070-0-II

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

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

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STATE OF WASHINGTON
BY _____ DEPUTY
COURT OF APPEALS
DIVISION II

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF ARGUMENT.

The mother presents essentially no arguments against the merits of the father's appeal, electing instead to rely on a series of procedural maneuvers that she hopes will prevent this court from assisting the father in maintaining a relationship with his child. None of the mother's arguments has merit; they should be rejected and the cause remanded to the Superior Court for trial. Mother's request for attorney fees and costs should be denied.

B. ARGUMENT.

1. The Standard of Review Is *De Novo*.

This case does not, as the mother posits, concern the mere entry of an order staying the father's Washington marital dissolution action. Instead, it involves the entry of an order staying the Washington action *in favor of* another action pending in a competing foreign jurisdiction. The propriety of the Washington court's entry of a stay, so that Japan could hear the divorce case, hinges upon a complex interaction of US and Japanese law and international treaties governing jurisdiction over each of the parties, their child, their property, and the marriage. The issue is not, as the mother suggests, Resp. Br. 9–10, governed by notions of judicial economy that might

warrant a minimal level of scrutiny on appeal. Rather, the determinative issues relate to matters of jurisdiction and comity, all of which present legal questions reviewed as easily by this court as by the trial court. The standard of review for those questions is *de novo*. App. Br. 16–17.

2. Father Did Not Invite Error by Suggesting That a Stay Be Entered Until Japan Decided Whether It Had Jurisdiction.

The mother's suggestion that the father invited error by asking the Washington court to stay his case, Resp. Br. 10–12, distorts the father's true position below. The father suggested that the stay expire once Japan ruled upon whether it had jurisdiction over the mother's case, and without regard to what decision the Japanese court ultimately made. CP 61 & 139; 10 Sept. 2004 RP 8. If, as happened, Japan held that it had jurisdiction, the father intended to introduce oral testimony and other evidence here concerning the jurisdictional prerequisites of the American and Japanese courts, Japanese law, conflicts of law, the legal priority that should have been accorded to each case, and other related matters. CP 155-59; 5 May 2005 RP 11–14. Consistent with that position, the father in May 2005 filed a

motion to lift the stay to introduce such evidence and argument. 5 May 2005 RP; CP 159.

The father suggested below that a stay might be appropriate, but merely as an alternative to his principal request that the Washington court simply deny the mother's motion to dismiss the action here. CP 70 & 139. He agrees with the mother that he and his Japanese counsel both believed at the time that the Japanese court would not assume jurisdiction over the case, because the parties and their daughter were US citizens and a military family, and because it would be plainly illegal for the Japanese court to do so. CP 61-62, 70 & 148. The trial court here shared the father's belief that the mother might even be required to return to the United States because of her US citizenship. CP 50. Contrary to the mother's suggestion, at no time did the father agree that dismissal of the Washington action would be an appropriate response by our court to an assertion of jurisdiction by the Japanese court in violation of international law.

3. As Father's Was the First Case to be Filed, It Should Have Priority.

The mother, and the trial court, each correctly noted that the father's action was the first to be filed and therefore was the first

properly commenced under RCW 26.09. Resp. Br. 10 n. 14, 21 October 2005 RP 14–15. The mother observes in addition that the Washington court had no authority substantively to proceed with the father's case until 90 days after service, but then infers that the Washington case should not have priority over the Japanese one until the 90 day period lapsed, which would have been on or about September 7, 2004. Resp. Br. 10 n. 14. The mother presents no legal authority for the proposition that, as between competing cases, the first court having authority to grant affirmative relief should have priority. Whatever may be the merits of the mother's legal position, the factual underpinnings for it are completely absent. The mother presents no definitive evidence that the father was properly served with the Japanese action, or any evidence at all that the Japanese court could have granted affirmative relief before the Washington court could have done so.

Finally, whatever other conclusions might be drawn from mother's muddled presentation on this issue, one thing is clear: Under the express terms of the UCCJEA, the father's case had priority because he properly commenced by filing the Washington case before mother filed in Japan. App. Br. 18. At a minimum, the trial court

should have allowed the parenting issues to proceed in Washington based upon the clear terms of the UCCJEA.

4. The Trial Court Erred by Allowing the Japanese Action to Proceed to Judgment Without Taking Evidence and Argument Concerning the Japanese Action.

Contrary to the father's suggestion at the time, rather than allowing the father an opportunity to present relevant evidence and legal arguments in the event that Japan asserted jurisdiction over the case, the trial court ruled summarily that the Washington case would be dismissed upon entry of a Japanese divorce decree. Its rationale is not apparent in the September 5, 2005 Order, CP 149–50; in the Report of Proceedings underlying that order; or even in mother's responding brief before this court. The ruling is remarkable: despite the court's simultaneous holding that it had jurisdiction over the father and the marriage, it refused to determine whether it had jurisdiction over the mother, the parties' child, or their property.¹ 5 September

¹ The Court held it had jurisdiction, then concluded mysteriously that Japan's action should proceed:

I think I have jurisdiction. I think that's what I'm trying to say. So I think I need to say that. I also want the Japanese court to decide if they are going to assume jurisdiction. And 'assume' may not be a good word, but if they're going to retain, or, if they're going to exercise jurisdiction—if they exercise jurisdiction, I don't want anything more to do with this case. I don't say that because I'm not willing to decide it, but I think that's how it should be done.

2005 Order, CP 150. For a number of reasons, the court's decision was error.

- a. The Court Did Not Follow the Statutory UCCJEA Procedures, Which Required Washington to Take Jurisdiction over the Parties' Child.

Each of the jurisdictional issues confronting the court required unique statutory and factual analyses. One conceivable outcome in this case (albeit not one the father preferred or argued for) was that Washington would resolve certain aspects of the case, and Japan would resolve other aspects. The mother argued successfully below that the dissolution issues were inseparable, in the apparent hope that the trial court would "throw up its hands" and leave the entire case for the Japanese court to decide. That approach is inappropriate, particularly in respect to the unique issues surrounding child custody.

A child custody determination requires the court to undertake specific procedural steps and to make specific findings in order to defer the question to any foreign jurisdiction. Under the UCCJEA, once an issue arose as to custody and parenting time with Erika, the Washington court was required to confer with the Japanese court. RCW 26.27.251(2). If it appeared that Japan intended to take

jurisdiction over the child, the court next was required to take evidence concerning whether Japan was exercising its jurisdiction “substantially in accordance” with the UCCJEA. *Id.* And, if Japan was found to be acting in accordance with the UCCJEA, the court needed to determine whether Japan’s “child custody law . . . violate[d] fundamental principals of human rights.” RCW 26.27.051(3). Instead, our trial court simply refused to determine whether it had jurisdiction over Erika. CP 150 & 10 Sept. 2004 RP 27.

The court’s failure to apply the statutory UCCJEA procedures was error. Had the court allowed the father to present evidence regarding Japanese custody laws after Japan took jurisdiction, it would surely have concluded that Japan’s child custody laws indeed violated both the father’s and Erika’s fundamental human rights. As exemplified by the Japanese court’s judgment in this case, CP 232–33, the law of that country accords no parenting time rights to non-custodial parents. If there were any right of parenting time, the Japanese courts would provide no effective means to enforce it.²

² The only evidence in the record suggesting the father might be able to share parenting time with Erika was provided by the mother’s Japanese attorney. CP 319–22. However, her attorney simply states that a Japanese order can award parenting time; he completely fails to address the practical ability to enforce that parenting time if the custodial parent refuses to abide by the order. In the event, the

Consistent with its general disregard for the rights of fathers, and of foreign fathers in particular, Japan has failed to adopt the Hague Convention on the Civil Aspects of International Child Abduction. 5 May 2006 RP at 10–11.

Adding insult to injury, the mother asserts that the father “has not exercised visitation with his daughter since he and [mother] separated in 2003.” Resp. Br. 5 n. 8. Although the mother’s claim is unsupported by the record, in violation of RAP 10.3(a)(5),³ the father agrees that it is true—the father has not visited with Erika, because the mother will not permit it. The mother’s rude claim should focus the court’s attention on the father’s primary motivation for pursuing this litigation. Without this court’s assistance—and perhaps even with it—the father may well never see his daughter again. Because of the unfortunate synergy created by Japanese law and by the mother’s intransigence, the mother has every reason to continue withholding

Japanese judgment contained no order granting parenting time to the father.

³ The mother’s brief is filled with factual claims not supported by the record, and the court should approach it with caution lest the court be misled. For example, the mother claims that the father has failed to pay child support and the property award. Resp. Br. 5 n. 8 & 16. The mother must believe that these claims, supported or not, will poison the court against the father’s position on the issues actually presented by this case. Although the father would appreciate having the opportunity to demonstrate their misleading nature, he will restrain himself out of respect for the governing Rules of Appellate Procedure.

Erika from her father. The irony, once again, is that a Washington court would treat her fairly, whatever her fears to the contrary may be.

Whether the parties may have agreed that Japan had jurisdiction over Erika (as the mother claims in her brief, Resp. Br. 5) is immaterial. There can be no more cogent discussion of this point of law than the one that the mother herself provided to the court below:

“No Subject Matter Jurisdiction by Stipulation. It is fundamental to the concept of subject matter jurisdiction that a court cannot acquire it by the stipulations of the parties. The Appellate Court [*In re Marriage of Hamilton*, 120 Wash. App. 147, 84 P.3d 259 (Div. III, 2004)] cited another case, *In re Marriage of Murphy*, 90 Wash. App. 488, 952 P.2d 624 (Div. III, March 1998). The *Murphy* case made the important point that even under the previous law, [the] UCCJA, a court cannot acquire subject matter jurisdiction by stipulation of the parties:

Mr. Murphy’s primary argument is that Ohio acquired jurisdiction by virtue of the stipulation entered in the Ohio action. We disagree. Whether or not Ohio had jurisdiction over this custody matter is a question of *subject matter jurisdiction* determined by reference to the UCCJA as adopted in Ohio. This statute either confers or does not confer jurisdiction. The UCCJA does not confer jurisdiction based upon parental consent. Moreover, *subject matter jurisdiction is not acquired by agreement or stipulation. In re Marriage of Murphy*, 1998, *op. cit.*, citing as authority *Wampler v. Wampler*, 25 Wash. 2d 258, 267, 170 P.2d 316 (1946).

CP 25–26 (emphasis in original) (footnote omitted).

If the court had properly followed the statutory demands of the UCCJEA, the court would have taken jurisdiction over Erika and would have entered an appropriate parenting plan. The mother contends, incredibly, that the father has not preserved his argument that Washington should exercise child custody jurisdiction. Resp. Br. 14–15. To support her claim, she quotes a redacted portion of an oral argument below that simply reflects the father’s position, already discussed, on the order for a stay.

Contrary to the mother’s argument, the father specifically asked the court to make “a substantive, fully informed decision on whether or not in fact it has subject matter jurisdiction over this case” once Japan dismissed the mother’s action. 10 September 2004 RP 9. He made it clear that he sought revision of the August 24, 2005, dismissal order *in its entirety*, including both custody and parenting time issues. CP 128; 10 September 2004 RP 9–10. For the mother to suggest that the father abandoned his request for entry of a parenting plan is simply preposterous; the entry of an appropriate parenting plan for the father and Erika is the primary purpose of this case.

b. The Washington Trial Court Should Have Determined for Itself Whether Japan Had Subject Matter Jurisdiction over the Parties' Marriage, and Jurisdiction over the Father, the Child, and the Parties' Property.

The mother argues that these arguments represent a collateral attack on the Japanese divorce decree. Resp. Br. 15–16. The mother fails to recognize that the father's position here predates the Japanese decree and cannot be "collateral" to it: If the trial court had not erred by entering the stay in the first place, the father would have obtained a Washington judgment, or perhaps competing judgments would have been entered. The central question now is whether, given the facts and circumstances known the trial court when it entered the stay, it was appropriate for the Washington court to withhold any action, or even investigation, until Japan entered a divorce decree. It was not.

While our court considered whether to defer to the Japanese court, it had a duty to determine whether Japan had legal authority to act. The court would have been required to make that determination if the mother sought to enforce a Japanese decree in Washington; the same analysis should govern here. *In re Custody of R.*, 88 Wn. App. 746, 947 P.2d 745, 757 (1997).

An American court will enforce a foreign judgment in the United States only if convinced that the foreign court had jurisdiction to act. RESTATEMENT (SECOND) OF CONFLICT[S] OF LAW, § 98 cmt. c, § 92, § 104 (1971). A party may challenge enforcement of a foreign order by raising any defense to the validity of the order which would be cognizable in the foreign jurisdiction. *State ex rel. Eaglin v. Vestal*, 43 Wash. App. 663, 719 P.2d 163 (1986). See generally RCW 26.21.530; see also *Wampler v. Wampler*, 25 Wash. 2d 258, 170 P.2d 316 (1946); RESTATEMENT (SECOND) OF CONFLICT[S] OF LAW, § 112–15 (1971). Accordingly, when a court is called upon to enforce the judgment of a foreign court, the opposing party must be given an opportunity to show the foreign judgment would not be entitled to cognition in the foreign state itself. *Eaglin*, 43 Wash. App. at 663, 719 P.2d 163; see also *In re Estate of Wagner*, 50 Wash. App. 162, 748 P.2d 639 (1987).

Id.

Had the court allowed the father to introduce the evidence he sought to introduce, it would have concluded that the Japanese court did not have subject matter jurisdiction over the marriage, or personal jurisdiction over the father. Japanese jurisdiction over a marriage and the individual spouses in family law cases is predicated upon permanent residence in Japan. See Japanese decree at 12, CP 227. The SOFA Agreement provides that no member of the US military, or the member's dependants, establishes permanent residency in Japan

by virtue of their presence there in service to the US government. App. Br. 21–22.

The mother notes that the SOFA Agreement does not deprive Japan of jurisdiction over military personnel in civil cases. Resp. Br. 17 n. 16. Whatever the application of that principle might be in general civil cases, the applicable Japanese *dissolution* law requires the parties to be permanent residents in order for a divorce case to proceed. CP 227. The SOFA Agreement merely established that the father and his dependents were not permanent residents of Japan. App. Br. 21–22. The Japanese court stated that the SOFA Agreement “did not appropriately govern” this case for reasons that it did not explain and that cannot be explained. CP 227. The Japanese court simply ignored a governing international treaty.

Assuming that the Japanese court had jurisdiction over the subject matter and the parties—which it did not—a Washington court further would be required to recognize the Japanese divorce decree only to the extent that it did not contravene Washington public policy. *City of Yakima v. Aubrey*, 85 Wn. App. 199, 203, 931 P.2d 927 (1997). For the reasons already discussed in connection with the child custody jurisdiction issue, a Washington court of course would conclude that a

divorce decree allowing no parenting time for the non-custodial parent violates Washington's clear public policy. Washington "recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests." RCW 26.09.002.

c. Father Did Not Consent to Personal Jurisdiction in Japan.

The mother asserts that the father participated in the Japanese action, relying upon the father's participation in the mediation process as evidence that he participated in the divorce case. Resp. Br. 10. The father already addressed the rather repugnant policy issues presented by the mother's argument in his opening brief. App. Br. 24–26. It suffices here to point out that the mother presents no citation to, or evidence of, Japanese law holding that participation in mediation constitutes participation in litigation, as required under CR 9(k)(2). The evidence actually in the record is explicitly to the contrary. CP 307.

The mother also argues that the power of attorney the father executed in favor of his Japanese counsel constituted a personal

appearance in the Japanese action, Resp. Br. 4; CP 57–58, although we again have no indication from the record that such is actually the case. CR 9(k)(2). It is customary for parties in mediation in Japan to provide materials concerning their children and the marriage, CP 278, and we do know that the father executed a power of attorney in connection with the mediation. There is no evidence in the record that the father participated in anything other than the mediation and attempted reconciliation of the parties' marriage.⁴ And, of course, none of the mother's arguments about personal jurisdiction alters by one whit the trial court's obligations with regard to subject matter jurisdiction and child custody.

5. Father's right to appeal the order on revision is not affected by his failure to seek discretionary review of the order.

The mother notes that father did not appeal the order on revision or the October 22, 2005 order reaffirming the stay. Resp. Br. 12. She emphasizes the language in the order revision indicating that the father has the right to appeal the court's order. *Id.* To the

⁴ The father and his counsel noted below that their intention was to bring a motion to dismiss the mother's case in Japan. CP 60–61 & 70. There is no evidence in the record, however, that such a motion ultimately was filed with, or heard by, or ruled upon by the Japanese court.

extent that the mother is suggesting that the father had an obligation to seek discretionary appellate review of the revision order, she is incorrect. Rule of Appellate Procedure 2.3 allows a party, but does not require a party, to seek review of certain interlocutory orders. But discretionary review is not favored under Washington law, because it results in piecemeal litigation. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn. App. 813, 21 P.3d 1157, 1162 (2001). Moreover, the appellate court is empowered to hear all bases for appeal in an appeal of right, including those orders that might have been reviewed on a discretionary basis under RAP 2.3. *Id.*; *Kreidler v. Eikenberry*, 111 Wn.2d 828, 836, 766 P.2d 438 (1989). If a contrary rule was adopted, RAP 2.3 would be a “trap for the unwary”. *Id.*

If the mother’s argument is that the father failed to preserve his objection to the order on revision and the order denying the father’s request to dismiss the Washington case, then she is simply wrong. The preservation of error doctrine simply required that the father put the court on notice that he did not want these orders entered. *In re Audett*, 158 Wn.2d 712, 147 P.3d 982, 990 (2006). His opposition to the court’s order staying the case until Japan entered a decree has been discussed at length. Moreover, as the father filed the motion to

dismiss his Washington action, there is little doubt that he objected to entry of an order denying his request. A party is not obligated to assert repeatedly that the court's orders are objectionable in order to preserve error for appellate review. *Id.*

6. The Mother Is Not Entitled to Attorney Fees or Costs.

The mother posits that the father's predominant motivation is to force her to litigate this case in multiple courts and to search for a jurisdiction that would be legally favorable to him. The mother's argument attempts to distract the court from the reality of her own conduct and motivations. In truth, the mother selected Japan as her forum of choice in order to disenfranchise the father of a relationship with the parties' daughter. The mother removed the child from the US base in Japan and away from the family residence, and alleged that the father had been "violent," largely to prevent the father from having a relationship with Erika. The father correctly alleged that the mother was abusively using conflict to achieve her objectives in the case and sought custody of Erika.⁵ At no point does the mother deny (nor can

⁵ The mother, for example, argues that the father was "violent," but then admits that he engaged in no "physical violence" whatsoever. Resp. Br. 4 n. 5. In truth, the mother's allegations, even if true, only show that the parties argued during their marriage. It bears repeating, however, that the father has had no opportunity to present evidence rebutting these allegations.

she) that the Japanese decree fails to provide the father parenting time with Erika, or that Japan fails to enforce the parental rights of military fathers. As such, these facts must be taken as true. If the father's appeal is denied, the court should presume that he will never be able to share time with the parties' daughter.

The mother moreover oversimplifies matters when she claims that the father is "forum shopping". The litigation of international marital and custody cases is complicated by the overlay of international, federal, and state law, all of which become geometrically more intricate when military families are involved. Identification of the proper forum is exceptionally difficult. Parents, desperate to find some mechanism to retain (and, in this case, establish) a relationship with young children, are placed in the position of having to make time-sensitive decisions concerning the appropriate forum. Furthermore, the mother invited the father to file an action in Virginia when she argued in the Washington case that he lived in Virginia, not Washington. 10 Sept. 2004 RP 15. ("Washington has no jurisdiction because Mr. Toland doesn't live here. He lives in Virginia.") At the time he filed in Virginia, he had resided in that state for almost a year and a half. Far from maintaining inconsistent positions, the father

simply argued that he was a resident of Washington when he filed this action, and he became a Virginia resident after he had resided there during part of the two intervening years.

The mother argues that the father's bases for this appeal are frivolous pursuant to RAP 18.9 and RCW 4.84.185.

An appeal is frivolous if, considering the record as a whole and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Boyles v. Department of Retirement Sys.*, 105 Wash. 2d 499, 506–07, 716 P.2d 869 (1986).

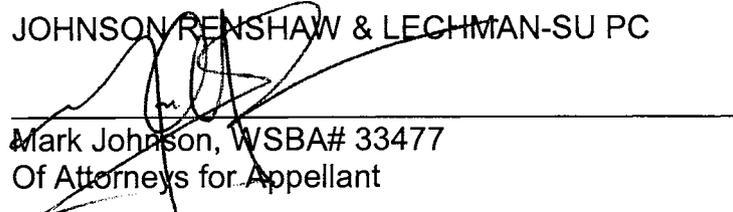
Stork v. International Bazaar, Inc., 54 Wn. App. 274, 289, 774 P.2d 22 (1989). Given the factual and legal complexities presented by the unusual facts and circumstances in this case, including application of international treaties, foreign law, and state and federal statutes and laws, the father's efforts were necessary to protect constitutionally protected rights that are strongly supported by Washington public policy. His efforts can be labeled as neither frivolous nor intransigent (as interpreted under RCW 26.09.140) and therefore cannot serve as a basis for an award of attorney fees.

C. CONCLUSION.

For the reasons argued here and in the opening brief, the father respectfully requests that the court reverse the order dismissing the father's marital dissolution action, and remand the matter for trial.

Respectfully submitted this 13 day of March, 2007.

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COURT OF APPEALS
DIVISION I

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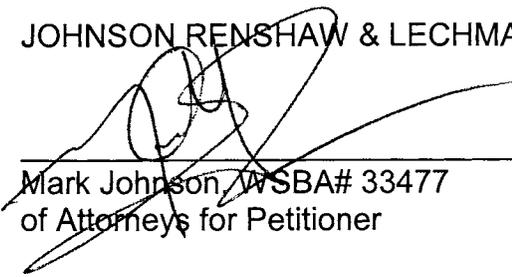
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set forth below.

DATED this 13 day of March, 2007.

JOHNSON RENSHAW & LECHMAN-SU PC



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