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## I. Argument

### 1. **Commander Toland's constitutional right to parent his daughter includes managing her finances, and is not limited to custody.**

As the only surviving parent of Erika Toland, Commander Toland has a fundamental liberty interest in the financial well-being of his daughter. Const. art. I, § 3; RCW 26.16.125; *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 49 (2000). Rather than addressing this proposition directly, the estate advances three arguments: (1) the father did not assign error to the rulings on any of his eleven requests for relief in his TEDRA petition, (2) that the right to parent only applies to custody, and (3) that the right to parent should be disregarded because the father is a debtor of the estate and therefore has unclean hands. For the reasons discussed below, these arguments are not supported by the record or the law and miss the point raised by the father.

The estate's argument that the father failed to assign error to the summary judgment decision, "related specifically to any of his eleven requests," is not accurate. Brief of Respondent, p. 9. Because this matter was decided on summary judgment, there are no findings of fact to assign error to. CR 56(h); *Washington Optometric Ass'n. v. County of Pierce*, 73 Wn.2d 445, 438 P.2d 861 (1968). However, the father did assign error to the entire order granting summary judgment. Brief of Appellant, p. 2 (Section II(A)(1)). Specifically, the father pointed out that paragraphs 8, 9, and 11 of the prayer for relief section of his TEDRA petition raised the issues that serve as the basis for this appeal.

Brief of Appellant, p. 9. The issues on appeal are clear, so the argument that the father did not adequately assign error to such issues should not affect the outcome of this matter. *City of Wenatchee v. Johnston*, 68 Wn. App. 697, 846 P.2d 547 (1993).

Next, the estate argues that the statutes and cases cited by the father apply to custody issues and those statutes and cases have nothing to do with Erika's finances. The estate then explores the custody issues at length. Although Commander Toland would like nothing more than to have his daughter returned to him, he realizes this court cannot rule on the custody of his minor child in the context of a probate case, and he is not asking the court to do so.

Contrary to the argument of the estate, a surviving parent has full legal control over a minor child's estate. RCW 26.16.125. Focusing on the heading of the statute rather than its plain language, the estate argues RCW 26.16.125 only applies to custody of the child. Brief of Respondent, pp. 12-13. But the plain language of the statute extends to a surviving parent's right to manage the finances of a minor child. The statute says, "in case of one parent's death, the other parent shall come into full and complete control of the children *and their estate*." RCW 26.16.125. On at least two occasions the Washington Supreme Court has made it clear a parent has control of a minor child's estate, to include income of that child. *Hines v. Cheshire*, 36 Wn.2d 467, 219 P.2d 100 (1950); *Magnuson v. O'Dea*, 75 Wn. 574, 135 P. 640 (1913) (right to income of child extends to stepparent with whom the child resides).

Next, the estate argues that the father has no right to participate in the selection of a custodian for his minor child's funds under RCW 11.114.060. Brief of Respondent, pp. 13-14. The estate argues this statute does not apply until *after* some sort of custodial property has been created by a transfer to the child. *Id.* at 14. Specifically, the estate argues, "[w]ithout any transfer of 'custodial property,' RCW 11.114.060(1) simply has no application." *Id.* Again, the estate overlooks the plain language of the statute. The statute states, "[a] member of the minor's family may request that the court establish a custodianship *if a custodianship has not already been established*, regardless of the value of the transfer." RCW 11.114.060(2) (emphasis added). A transfer of custodial property is not a pre-requisite to the application of this statute. In fact, the statute presumes there has not been a transfer. Because Commander Toland is Erika's father and only surviving parent, he is a member of her family. By dismissing his TEDRA petition, the trial court refused to consider his request to establish a custodianship under RCW 11.114.060(2). The trial court's decision on this issue should be reversed.

By recasting the issue before this court as whether Commander Toland has a right to participate in his deceased wife's estate, the estate argues that *Troxel* and the other cases discussing parents' sacred, fundamental rights to raise and parent their children do not apply to the circumstances before this court. Brief of Respondent, pp. 14-18. But Commander Toland is before this court in his capacity as the sole

surviving parent of his minor child, Erika, who everyone agrees is the sole heir of her mother's estate. Although Commander Toland raised serious concerns in his TEDRA petition regarding the validity of the Japanese court orders (which position has now been affirmed by a different trial court<sup>1</sup>), and the possibility that he may still be considered the surviving spouse of the decedent, those arguments are either not relevant to the issue now before the court, or were abandoned by the time of the summary judgment motion in this matter. RP 11-12. As a result, Commander Toland is not arguing that his right to participate in the probate arises from his relationship with his deceased wife. Rather, his right to participate in the probate arises from the fact that he is the only surviving parent of the only heir of the estate.

The estate argues that because *Troxel* and the related cases are custody cases, they are factually distinguishable from the present case. Brief of Respondent, p. 16. However, the father cites *Troxel* and related cases for the legal principles discussed by the courts in those cases; not to point out some factual similarity. Further, those cases must be read together with Washington's statutes. As discussed above, Washington's statutes already establish a parent's right to participate in matters that affect his or her child financially. RCW 11.114.060; RCW 26.16.125. *Troxel* and the related cases demonstrate that the reason we have laws giving parents sole authority over the estate of their minor children is

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<sup>1</sup> CP 647-656

because such control is a fundamental liberty interest of parents under both the state and federal constitutions. *Troxel v. Granville*, 530 U.S. at 65 (2000); *Moore v. Burdman*, 84 Wn.2d 408, 526 P.2d 893 (1974). The estate's argument that all of these cases focus on a parent's custody right overlooks the language in these cases that a parent's liberty interests include not only the custody of their children, but also the care and control of their minor children and their finances. *Id.*; *Hines v. Cheshire*, 36 Wn.2d 467, 219 P.2d 100 (1950); *Magnuson v. O'Dea*, 75 Wn. 574, 135 P. 640 (1913). Specifically, "... the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72-73.

The final argument by the estate on the issue of a parent's right to participate in, if not control, his minor child's finances, is that the maternal grandmother and aunt are not abductors of Erika, the father should pursue custody in Japan, and it is Commander Toland who comes before the court with unclean hands because he is allegedly a major debtor of the estate. Brief of Respondent, pp. 16-18.

The primary focus of this appeal is the financial well-being of Erika. If the Court feels it necessary, the father asks permission to file supplemental briefing on why he has not pursued custody in Japan, and why Erika is considered abducted. However, because this case was decided on summary judgment and because the estate submitted no evidence at the summary judgment motion, it is presumed for purposes

of this appeal that Erika is abducted. CR 56(e); *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 906 P.2d 336 (1995) (evidence should be viewed in the light most favorable to the non-moving party [the father in the present case]).

Further, the record shows that the maternal grandmother has retained custody of the child by secretly filing a guardianship in Japan while the aunt was negotiating a return of the child to the father. CP 224-225, 282-386, 647-656. This was done in violation of Commander Toland's due process rights as the only surviving parent of Erika. *Id.* The estate's assertion that Commander Toland has never paid child support or tried to see his daughter is also contradicted by the record. CP 280, 339, 350-363. When the estate made this argument at the trial court level in the companion case, the father again requested visits. CP 230. His request was initially met with a response that such visits must be supervised, and then counsel stated visits would not be permitted short of the father filing a custody action in Japan. CP 230-231.

The reason Commander Toland has not sought custody in Japan is because doing so would be a futile act. Japan is the only G-8 nation that has not adopted the 1980 Hague Convention on the Civil Aspects of International Child Abduction. H. Res. 1326 (Appendix A). Japanese divorce proceedings are much different than they are in the United States. Colin P.A. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan*, *Asian-Pacific Law and Policy Journal*; Vol. 8, Issue 2, pp. 197-

201; 211-228 (Spring 2007) (Appendix B and C); CP 208. Japanese courts do not regularly enforce custody orders, whether such orders were entered by Japanese courts or the courts of other nations. H. Res. 1326 (Appendix A); Jones, *In the Best Interests of the Court*, pp. 245-258 (Appendix D). Japan has not prosecuted cases of child abduction when the abduction is *to* Japan. H. Res. 1326 (Appendix A). Although the best interest of the children is a consideration in family law matters, Japan has no statutes setting forth factors to aid in determining what those best interests are. Jones, *In the Best Interests of the Court*, pp. 197-201, 218 (Appendix B and C). Further, in the present case, Commander Toland was not afforded due process when the grandmother obtained guardianship over Erika. CP 224-225. For these and other reasons, pursuing custody in Japan would be futile.

With regard to the Japanese judgments, the estate provides no citation to the record to support its claim that these judgments are legally enforceable, because they are not. RCW 6.40A.020(2)(c); CP 647-656. Prior to filing the Brief of Respondent, another trial court ruled that the Japanese judgments were unenforceable.<sup>2</sup> CP 647-656. The estate's argument that the father is a major debtor of the estate, and therefore comes before this court with unclean hands, is not only inaccurate, but is an issue that has been fully litigated and rejected by another trial court. The estate should be barred on these issues by the

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<sup>2</sup> The fact the Japanese judgments are unenforceable does not moot this case because there are other assets in the estate besides the judgments.

doctrine of collateral estoppel. *Chau v. City of Seattle*, 60 Wn. App. 115, 802 P.2d 822 (1991).

The only debt Commander Toland owes is the Court of Appeals judgment, which Commander Toland will happily pay to his daughter. RP 12-13; CP 512 (paragraph 3). His concern is that those funds reach his daughter, not her abductors. *Id.* His concern that the funds reach his daughter is justified in light of the fact that the estate continues to be unapologetic about taking steps to collect those funds on behalf of Yoko Futagi, not Erika Toland. Brief of Respondent, pp. 20-22.

Although RCW 26.16.125 is clear about who controls the estate of a minor, the father acknowledges that there is a chance the probate court may decide to appoint someone other than the father as custodian of daughter's funds. He is simply asking this court to reverse and remand the summary judgment order dismissing his petition so that he can at least have his request heard, and participate in that process as Erika's only surviving parent.

**2. Mediation of issues raised in Commander Toland's TEDRA petition should have been ordered absent a showing of good cause why mediation was inappropriate.**

If the trial court decision is reversed on the basis that parents have a statutory and constitutional right to participate in legal proceedings related to their child's finances, it was also error for the trial court to not enforce mediation in this case. RCW 11.96A.300. The estate argues that because Commander Toland's petition was dismissed,

it was not error to deny his request for mediation. But this argument is circular. The estate argues that because it was granted summary judgment, there was no need for mediation. However, if the order dismissing Commander Toland's claims is reversed, then mediation should be ordered.

Mediation is mandatory, if requested, absent a showing of good cause why there should not be mediation. RCW 11.96A.300(2)(d). Aside from arguing that the father has no legal right to participate in matters related to his daughter's financial well-being, the estate submitted no evidence or argument why there was good cause to deny mediation. Under the circumstances, Commander Toland requests that the matter be reversed and remanded with directions that the parties engage in mediation.

**3. Ms. Futagi's withdrawal of her creditor's claim is further evidence that the personal representative is representing the interests of the Futagi family.**

In response to the father's argument that the trial court erred in failing to consider his argument that there was a conflict of interest and breach of fiduciary duty inherent in the joint representation of the personal representative and the Futagi family, as evidenced by filing a creditor claim for Yoko Futagi, the estate withdrew the creditor claim. The withdrawal of the claim should serve as further evidence of the improper claim, conflict of interest, and breach of fiduciary duty.

The acknowledgment that the personal representative and a creditor of the estate were both represented by the same legal counsel, and the admission that the Futagi family continues to work in concert with the personal representative shows the continuing conflict of interest and breach of fiduciary duty. *See* CP 532 (“All of us are in agreement with how the Estate is proceeding... at no time are any of us discussing these matters with Mr. Toland....”). This conflict of interest continues to be of concern to Erika’s father and it was error for the trial court to not consider it. *Matter of Estate of Larson*, 103 Wn.2d 517, 520-521, 694 P.2d 1051 (1985).

4. **This case should be remanded to a new trial judge because the judge’s potential or actual bias against the father is evident from the court’s oral ruling, and such bias was not known until after the judge entered summary judgment dismissing the father’s case.**

Because the trial judge’s comments at summary judgment demonstrate actual or potential bias against the father in this case, it is proper for this court to remand the case to a different trial judge. *Application of Borchert*, 57 Wn.2d 719, 359 P.2d 789 (1961); *Santos v. Dean*, 96 Wn. App. 849, 982 P.2d 632 (1999). The estate argues this request should be denied because it was not raised before the trial court, the judge was not biased, and there are safeguards in place to protect from bias in a probate case. However, the judge’s bias was not known until after summary judgment was granted, the bias is clear from the

record, and the safeguards the estate claims exist have already been shown to be ineffective.

The estate first argues that the father's request for a new judge on remand should be denied because the request must first be brought before the trial court. However, the bias was not known until the court granted summary judgment. RP 17-20. Once the order on summary judgment was granted and this case was appealed, the trial court no longer had authority to enter such an order. RAP 7.2(a). Filing a motion and affidavit of prejudice against a judge after that judge has entered an order granting summary judgment is not a post judgment motion authorized by the civil rules, nor a motion to change or modify the decision. RAP 7.2(e). The motion could not have been brought before the motion for summary judgment because the bias did not become evident until the trial judge ruled. RP 17-20. It is not unusual to request a change of judge on remand if potential or actual bias has been shown. *See Santos v. Dean*, 96 Wn. App. 849, 982 P.2d 632 (1999); *State v. Aguilar-Rivera*, 83 Wn. App. 199, 920 P.2d 623 (1996).

Next, the estate argues that no bias has been shown because the trial judge was simply responding to the father's offer to pay the Court of Appeals judgment on the condition the funds reach his daughter. However, there has been no authority cited to show that it is either improper or illegal for a father to be concerned that funds properly due and owing his minor child actually reach his minor child. Such concerns certainly do not rise to the level of blackmail or extortion.

RCW 9A.56.110. Because this trial judge has made it clear she believes that Commander Toland's position is tantamount to blackmail, there has been a sufficient showing that if this matter is remanded, it should be remanded to a different trial judge.

Finally, the estate argues that there are safeguards in place to ensure that Erika receives the funds owing to her in the form of statutes, a court appointed personal representative, and a guardian ad litem. The problem is that none of these safeguards have been shown to work in this case. The estate itself, in a separate part of its brief, argues that the statutes regarding funds payable to minors does not yet apply. Brief of Respondent, pp. 12-14. The court-appointed personal representative is represented by the same attorney, and has been advancing the same legal positions, asserted by the minor child's abductors. Brief of Respondent, pp. 20-21. Further, the estate failed to notify the guardian ad litem of his appointment for approximately nine months. CP 74. 97. Without citation to the record, the estate claims it was not aware of the guardian ad litem's appointment. Yet the order appointing the guardian ad litem bears the signature of counsel for the personal representative and Futagi family. CP 74. When the father took steps to intervene in the case and raise his concerns about the handling of the estate and his desire to be a participant, his petition was summarily dismissed. CP 628-631. Also, there is no evidence in the record that anyone, including the personal representative or guardian ad litem, has ever made any proposal regarding distribution of estate assets to Erika, or who should

be appointed custodian of those funds. Only the father has done so. CP 83-127. In any event, the alleged safeguards are meaningless if the probate judge has indicated the legal positions of the father are potentially criminal. Finally, the safeguards listed by the estate do not satisfy the constitutional requirement that a parent be involved in the process. *Troxel*, 530 U.S. at 72-73.

5. **The estate's request for attorney fees should be denied and the entire order on summary judgment, including the statement that fees should be awarded, should be reversed.**

There has not yet been an award of attorney fees in this case.

There was language in the order on summary judgment that the estate should be awarded fees, but the amount would be determined at a later date. CP 631. However, that has never happened. The estate requests fees on the basis of RCW 11.96A.150, which permits fees for equitable reasons. RCW 11.96A.150(1) ("in such amount and in such manner as the court determines to be equitable").

If Commander Toland prevails on appeal it would be inequitable for him, as the prevailing party on these issues, to pay the estate's attorney fees both on appeal and at the trial court level. Courts applying this statute have declined to award fees where the claim of the party against whom fees were sought was not frivolous. *In re Estate of Wright*, 147 Wn. App. 674, 196 P.3d 1075, rev. denied 166 Wn.2d 1005 (2008). Further, courts have denied fees where the position advanced by the party seeking fees did not benefit the estate. *In re the Estate of Moi*, 136

Wn.App. 823, 151 P.3d 995, *rev. denied* 162 Wn.2d 1003 (2006). If Commander Toland prevails on appeal, then his position will necessarily have not been frivolous, and the position of the estate at summary judgment and on appeal will not have done anything to benefit the estate. Therefore, he asks that the court deny this request for fees, and reverse the entire order on summary judgment, including that part of the summary judgment order that attorney fees can be awarded the estate at a later time.

## II. Conclusion

This is a tragic case involving an eight year old girl whose mother committed suicide, who is now being kept from her father. To add insult to injury, the very people who are keeping Erika from her father without affording him basic due process, are now trying to take financial control of Erika, also by asking to have the father excluded from that legal process. This violates not only Washington statutes, but the state and federal constitutions. Under the circumstances, Commander Toland requests that the order granting summary judgment be reversed in its entirety, and that the case be remanded to a new judge for further proceedings in which the father will be permitted to take part.

Respectfully submitted this 5 day of June, 2011.

**BLADO KIGER BOLAN, P.S.**

  
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**Certificate of Delivery**

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

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COURT OF APPEALS  
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# Appendix A

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HRES 1326 EH

**H. Res. 1326**

***In the House of Representatives, U. S.,***

*September 29, 2010.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Resolved*, That--

(1) the House of Representatives--

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

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

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

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

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

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

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

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

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

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

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

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

Attest:

Clerk.

END

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# Appendix B

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decree until the appeal is resolved.<sup>122</sup> The high court's ruling in an interlocutory appeal can be appealed to the SCJ as a matter of right when matters of constitutional interpretation are involved (*tokubetsu kōkoku*, or special appeal to the Supreme Court), or with the permission of the high court, if important interpretations of law are involved (*kyōka kōkoku*, or appeal by permission).<sup>123</sup> Similar appellate procedures apply for the appeal of a final judgment in a litigated divorce.<sup>124</sup>

## V. SUBSTANTIVE FAMILY LAW

### A. *Children's Rights Legislation*

Japan has no substantive laws for the protection of children's rights in cases of parental separation. There are no statutes of guiding principles to determine the best interests of minor children when their parents divorce or cease cohabitating.<sup>125</sup> Unless, that is, one includes the U.N. Convention on the Rights of the Child (hereinafter Convention). Japan is a signatory of the Convention, together with virtually every other country on Earth

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<sup>122</sup> LADR, art. 13. Such appeals can take months. However, in the case of a provisional custody award, to the extent the custodial parent is already "in possession" of the child, the fact that the appeal has suspended the decree is largely meaningless.

<sup>123</sup> See generally SUPREME COURT OF JAPAN, OUTLINE OF CIVIL LITIGATION IN JAPAN 21 (2002).

<sup>124</sup> See *id.* at 17-20.

<sup>125</sup> Cf. CAL. FAM. CODE § 3020 (Deering 2006). In addition to numerous procedural requirements, the California Family Code includes the following statement of legislative purpose:

The legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy . . . .

*Id.*

(with the notable exception of the United States).<sup>126</sup> The Convention recognizes a number of rights relevant to a child whose parents are separated, including “the right to know and be cared for by his or her parents.”<sup>127</sup> Article 8 of the Convention obligates signatory states to provide assistance and protection when a child’s rights to “preserve his or her identity, including . . . family relations” are unlawfully interfered with.<sup>128</sup> Article 9 requires signatory states to “ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable laws and procedures, that such separation is necessary for the best interests of the child.”<sup>129</sup> Notwithstanding such separation, signatory states are further required to “respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”<sup>130</sup>

Although Japan’s Constitution specifies that “[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed,”<sup>131</sup> Japan appears to have done little to implement the provisions regarding preservation of the parent-child relationship. Indeed, in the academic writing and

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<sup>126</sup> Convention on the Rights of the Child, *opened for signature* Jan. 26, 1990, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention].

<sup>127</sup> Convention, art. 7(1). Article 14 requires states to “respect the rights and duties of the parents . . . to provide direction to the child in the exercise of his or her right . . . .” Article 18 requires states to use “best efforts” to “ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.”

<sup>128</sup> Convention, art. 8.

<sup>129</sup> Convention, art. 9(1).

<sup>130</sup> Convention, art. 9(3).

<sup>131</sup> KENPO, art. 98.

court opinions I reviewed, the Convention is rarely featured.<sup>132</sup> In addition, when Japan issued its second 5-year report on its implementation of the Convention in 2004, a coalition of foreign and Japanese NGOs issued a detailed critique of the inadequacies of Japan's legal system in protecting the rights of parents and children in parental separation cases, and further asserted that Japanese courts and other authorities engaged in routine and systematic discrimination based on nationality, gender, and legitimacy.<sup>133</sup> Such discrimination is also proscribed by the Convention.<sup>134</sup>

Japan does have a statute intended to prevent and facilitate the early detection of child abuse, although it was only enacted in 2000.<sup>135</sup> Among other things, this law imposes upon teachers,

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<sup>132</sup> *E.g.*, although it is considered the definitive exposition of the SCJ's view on visitation, the Sugihara Memorandum discussed below makes no mention of Japan's obligations under the Convention. *See e.g., infra* note 303. In fact, one Japanese children's rights lawyer notes that the official government translation of the Convention uses terms that appear to intentionally limit its scope and applicability. YUKIKO YAMADA, KODOMO NO JINKEN WO MAMORU CHISHIKI TO Q&A [PROTECTING THE RIGHTS OF CHILDREN: KNOWLEDGE AND Q&A] 8-10 (2004). For example, the official translation uses the term *jidō* for "child," rather than the most common translation of "child," *kodomo*. Since *jidō* would more commonly be translated as "infant" or "minor," its use establishes children as the subject of protection, rather than as persons benefiting from and able to exercise the rights recognized by the Convention. *Id.*

<sup>133</sup> Report from Children's Rights Council of Japan et al. to U.N. Committee on the Rights of the Child (Jan. 12, 2004), A Critique of Japan's Second Periodic Report on the Convention on the Rights of the Child By Japan, [http://www.crnjapan.com/treaties/uncrcreport/en/crc\\_critique.html](http://www.crnjapan.com/treaties/uncrcreport/en/crc_critique.html) [hereinafter Report from Children's Rights Council].

<sup>134</sup>

State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's . . . race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Convention, art. 2 (emphasis added).

<sup>135</sup> *Jidō gyakutai no bōshi ni kansuru hōritsu* [Law for the

lawyers, and other designated professions a special obligation to detect child abuse, though it does not provide any consequences for failing to do so. In any case, the statute's definition of "child abuse" is limited to actual violence against the child or other household members, or "emotionally damaging verbal conduct."<sup>136</sup> It does not include, for example, behavior which might foster parental alienation syndrome (PAS), which has only recently begun to receive attention in Japan,<sup>137</sup> and is regarded by at least some in the United States as a form of child abuse.<sup>138</sup>

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Prevention of the Abuse of Minors], Law No. 82 of 2000.

<sup>136</sup> *Id.* art. 2.

<sup>137</sup> My attempts to educate the family court regarding parental alienation were ignored. I have found only limited references to the subject in Japanese, including a web site operated by a pair of anonymous Japanese doctors who confirm that the subject has only recently started to receive attention in Japan. See PAS (Parental Alienation Syndrome) – Kataoya Hikihanashi Shōkōgun – Gozonji desuka? [Do You Know about PAS?], Sept. 6, 2005, <http://www.atomicweb.co.jp/~icuspringor> (on file with author). I have also talked with two Western-trained mental health professionals who practice in Japan, both of whom have confirmed that awareness of the syndrome is minimal in the country.

<sup>138</sup> See RICHARD GARDNER, THE PARENTAL ALIENATION SYNDROME xxi (2d. ed. 1992) ("The Parental Alienation Syndrome as a Form of Child Abuse"). Gardner's observation that "[w]ithout a thorough knowledge of the etiology, pathogenesis, and manifestations of this disorder, legal professionals are ill-equipped to assess such families judiciously," would imply that Japanese family court investigators as a group, who are unlikely to be sensitive to the realities of PAS, are inadequately equipped to make child custody recommendations. *Id.*

It should be noted, however, that Gardner's original conceptualization of PAS has been severely criticized, and, in the public, PAS has "generated both enthusiastic endorsement and strong negative response along gender lines." PAS has been severely criticized both in terms of its status as a diagnosable psychiatric disorder and as a useful tool for courts. Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, 31 J. AM. ACAD. PSYCHIATRY L. 158 (2003). See also Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 FAM. L.Q. 315 (2006); Robert E. Emery, *Parental Alienation Syndrome: Proponents Bear the Burden of Proof*, 43 FAM. CT. REV. 8 (2005); Alayne Katz, *Junk Science v. Novel Scientific Evidence: Parental Alienation Syndrome, Getting It Wrong in Custody Cases*, 24 PACE L. REV. 239 (2003). Without getting into whether PAS is a scientifically diagnosable disorder, I believe that the term serves as a useful shorthand for the generally accepted, and in some jurisdictions legislatively-mandated, notion that ongoing contact with both parents is usually

Similarly, custodial interference, interference with visitation rights, and parental alienation are similarly not subject to any specific sanctions under this law or any other statute.<sup>139</sup> Thus, despite the special duty imposed on lawyers to detect child abuse, there may be nothing to prevent them from encouraging parents to engage in behavior such as access denial, which in the U.S. might be considered detrimental to the best interests of the child (or even criminal).<sup>140</sup>

B. *The Civil Code (Minpō)*

The principle source of laws governing divorce and child custody is Japan's Civil Code. The Civil Code also provides the basic rules governing interpersonal legal relationships in society, such as contract, tort, inheritance, property, and other basic areas of law. However, a significant amount of family law is judicially created. For example, there are no clear statutory provisions for visitation in the Civil Code, and the SCJ has only recently ruled that visitation orders are within the scope of authority to make custody determinations granted by the Code.<sup>141</sup>

It should be noted at the outset that the Civil Code only really addresses the parent-child relationship within the framework of marriage and divorce. Therefore, if a child is born out of wedlock, the father effectively has no rights. And since many of the most difficult child custody and visitation issues arise while parents are estranged but still legally married, courts have dealt

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in the best interests of a child and therefore behavior by one parent to alienate a child from its other parent is presumptively not in the child's best interests.

<sup>139</sup> Cf. CAL. PEN. CODE §§ 277-280 (Deering 2007) (criminalizing interference with natural custody and court-ordered custody or visitation rights).

<sup>140</sup> For example, in her divorce guide for women, attorney Kurumi Nakamura writes that she "cannot really recommend visitation while a child's parents are separated but a divorce has not occurred." NAKAMURA, *supra* note 60, at 198.

<sup>141</sup> UCHIDA, *supra* note 99, at 135-136. An amendment to the Civil Code that would have codified existing family court practice by adding to Article 766 specific references to "visitation and interaction" as matters courts could decide in connection with custody determinations was proposed, but never adopted. *Id.*

# Appendix C

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F. Custody

1. No Joint Custody

There is no joint custody in Japan.<sup>184</sup> Neither statute nor judicial precedents provide for it, and it is impossible for parents to agree to it in any legally operative manner.<sup>185</sup> It is possible for a family court to designate one parent physical custodian and the other legal custodian, but this can only be done through the court system. It is impossible to provide for formal joint, shared, or split custody in a consensual divorce: there is no place in the divorce form for any such notation.<sup>186</sup>

Some Japanese scholars have dismissed the possibility of joint custody due to the “national sentiment” (*kokumin kanjō*).<sup>187</sup> As is common in cultural explanations of Japanese legal behavior, this assertion is presented as conclusive, yet it is completely unsupported. More significantly, the assertion may be coupled with references to implementation problems, suggesting the real issues may be enforcement and the need to modify the nationwide family registry system to accommodate a solution that might be in

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<sup>184</sup> Cf. CAL. FAM. CODE, §§ 3040, 3080 (Deering 2006) (creating a preference for joint custody when agreed to by the parents and otherwise granting courts discretion to order it in any case).

<sup>185</sup> One local government goes so far as to warn divorcing couples that it will reject any divorce filings that attempt to provide for joint custody. See Japan Children's Rights Network, Joint Custody is Illegal in Japan, <http://www.crnjapan.com/custody/en/jointcustodyillegal.html> (last visited Feb. 18, 2007) (citing Shiminka [Citizen Section], Okayama Shiyakusho [Okayama City Hall], Koseki no todoke [Notification of Family Register], <http://www.city.okayama.okayama.jp/shimin/shimin/koseki/rikon.htm> (last visited Feb. 18, 2007)). My own request for joint physical custody was ignored.

<sup>186</sup> It may be possible to accomplish quasi-formal split custody through a notarized legal document (*kōsei shōsho*), though it is unclear whether this will actually have any significance in subsequent proceedings involving custody disputes. See IZUMI SATO, ONNA NO RIKON GA WAKARU HON [A BOOK FOR UNDERSTANDING DIVORCE FOR WOMEN] 98 (2004).

<sup>187</sup> HIROSHI ENDO ET AL., MINPŌ (8) SHINZOKU [CIVIL CODE, V. 8 FAMILY RELATIONS] 126-127 (2000). Uchida also notes (without explanation) that “the view that [joint custody] would be unworkable under current conditions in Japan is persuasive.” UCHIDA, *supra* note 99, at 137.

the best interests of children (but would involve a great deal of bureaucratic effort).<sup>188</sup> In any case, other scholars have pointed to the need to move to a system of joint custody, showing that there is in fact no homogeneous “national sentiment” on the issue.<sup>189</sup> While this provides hope, currently Japan does not recognize or grant joint custody, even when applying foreign laws that allow for it. Thus, except in the rare cases described below, where physical and legal custody are split, judicial custody determinations are all-or-nothing affairs.

## 2. Parental Power (*Shinken*): Legal Custody and Full Custody

*Shinken* is sometimes translated as “parental power.”<sup>190</sup> During a marriage, it vests in both parents, who may exercise it jointly and severally.<sup>191</sup> *Shinken* includes all of the rights and responsibilities included in *kangoken* (physical custody, as described below). It also includes the right to engage in legal acts on behalf of a minor child (including applying for a passport and disposing of the child’s property) and the obligation of supporting the minor child.<sup>192</sup> *Shinken* continues until it terminates in connection with a divorce, the child reaches the age of majority (generally 20), or is terminated judicially, for reasons such as child abuse.<sup>193</sup>

When separated from *kangoken*, *shinken* is probably best understood as “legal custody” though in a narrower sense than commonly understood in the United States. When separated

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<sup>188</sup> UCHIDA, *supra* note 99, at 137.

<sup>189</sup> E.g., Takao Sato, *Oya no sekinin, jikaku wo: Minpō no “shinken” minaoshi hitsuyō* [Make Parents Aware of their Responsibilities: The Need to Amend “Parental Authority” Under the Civil Code], NIHON KEIZAI SHIMBUN, May 27, 1998.

<sup>190</sup> “Parental power” is the term used in the EHS Law Bulletin Series translation of the Civil Code referred to throughout this article.

<sup>191</sup> CIVIL CODE, art. 818-3

<sup>192</sup> UCHIDA, *supra* note 99, at 210-214.

<sup>193</sup> *Id.* at 240-245.

from *kangoken*, *shinken* does not include authority over education, the right to participate in deciding where a child will live, visitation rights, or even the right to know where the child is living or going to school.<sup>194</sup> Since *shinken* is recorded in the family register, it is readily provable, and has significance in relations with third parties. For example, a parent must have *shinken*, either jointly during marriage or solely after divorce, in order to apply for a Japanese passport for a child.<sup>195</sup> Since formal separation of *shinken* and *kangoken* is rare, however, the term *shinken* is frequently used to refer to full custody – legal and physical.

Three things should be noted about *shinken*. First, if a child is born out of wedlock, *shinken* vests automatically in the mother, and the only way the father can obtain any parental rights at all is with the mother's consent or through judicial proceedings similar to those specified for changes of custodian after divorce.<sup>196</sup> Second, since joint custody is impossible, divorces require the designation of one parent as sole custodian. Thus, while it is

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<sup>194</sup> Cf. Cal. Fam. Code § 3006 (Deering 2006) (“‘Sole legal custody’ means that one parent shall have the right and responsibility to make the decisions relating to the health, education and welfare of a child.”).

<sup>195</sup> Japanese passport regulations require that passport applications by a minor be signed by their legal custodian (*shinkensha*) or guardian. See, e.g., Embassy of Japan, Pasupōto no Tōnan, Funshitsu, Shōshitsu no Todokede/Kikoku no Tame no Tokōsho [Notification of Stolen, Lost, or Burned Passport/Travel Letter for Return to Japan], <http://www.us.emb-japan.go.jp/j/html/passport/tounan.htm> (last visited Mar. 2, 2007). Note that Japan does not appear to have any mechanism to block the issuance of a replacement passport when a parent fears that the other parent will abduct their child. Moreover, Japanese embassies have procedures for issuing emergency travel letters to Japanese nationals who urgently need to return to Japan and cannot wait for normal passport issuance procedures. *Id.*

<sup>196</sup> CIVIL CODE, arts. 818-4, 5. This seems to violate the Convention's requirement that children and their parents not be discriminated against based upon gender or legitimacy. Convention, art. 2. Thus, unmarried fathers who wish to have a relationship with their children may have no recourse but to abduct them, for which they may be arrested. See, e.g., Kennedy, *supra* note 2, at 14-15. When it comes to obligations of fathers of children born out of wedlock, however, the Civil Code is focused primarily on the issue of whether or not a child born shortly after a divorce is his. Civil Code arts. 772-777. The code also provides a mechanism for actions for acknowledgement of paternity, which can be brought by the child or its representative. Article 787.

possible to have a determination of sole physical custody prior to or without a divorce (in fact, in most cases, this decision will be determinative of final legal and physical custody), a designation of sole legal custody is generally impossible without a declaration of divorce. Legal custody is noted in the family registry, whereas physical custody is not. Third, once *shinken* has been determined, whether by the parties in a consensual divorce or by a court in a litigated divorce, it cannot be changed without further proceedings in family court that include mandatory mediation.<sup>197</sup>

Parents who lose both physical and legal custody in a divorce have virtually no rights with respect to their children.<sup>198</sup> They may not know where their children live, and custodial parents can change the children's names and have the children adopted by either a grandparent or a new spouse without the non-custodial parents' consent.<sup>199</sup>

### 3. Physical Custody (Kangoken)

As noted above, *shinken* consists of two elements: (1) the ability to conduct legal acts and manage property on behalf of a child, and (2) the rights and obligations associated with raising a

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<sup>197</sup> UCHIDA, *supra* note 99, at 237.

<sup>198</sup> Or, as one scholar put it, "the status of the non-custodial parent has not been of much interest to academics." SATO, *supra* note 156, at 22.

<sup>199</sup> While adoptions usually require the involvement of the family court, an exception is provided for cases where a child is adopted by one's parents or spouse. CIVIL CODE, art. 798. "Special Adoptions" involving children under the age of 6 (or 8, in certain cases) necessitate the involvement of the family court and require the consent of the natural parent, unless the natural parent is "unable to declare [his or her] intention or where there is cruel treatment, malicious desertion by the father and mother, or any other cause seriously harmful to the benefits of a person to be adopted." CIVIL CODE, arts. 817-5, 6 (emphasis added). Obviously, a non-custodial parent who does not even know the child's location will be unable to express her or her intent. I have talked to several Japanese and foreign non-custodial parents who have encountered the use of adoption by grandparents or a new spouse as a means of frustrating visitation or other attempts to exercise parental rights. Published accounts also report the use of name changes to frustrate contact with the non-custodial parent. See Wilkinson & Pau, *supra* note 1. See also Kennedy, *supra* note 2, at 15 (relating an account of a foreign father whose estranged wife and in-laws allegedly forged his signature on adoption papers to make his in-laws his son's legal parents).

child, including the right to decide his or her education and place of residence. When separated from the first element, the latter set of rights and obligations is referred to as *kangoken* and roughly correlates to the notion of physical custody in many U.S. jurisdictions.<sup>200</sup> During marital cohabitation, *kangoken* is a component of *shinken* and is exercised jointly by both parents. It is possible to separate *kangoken* from *shinken*, designating one parent (typically the father) as the legal custodian, and the other parent as the physical custodian (typically the mother). Such an arrangement can be ordered by a court under Article 766 of the Civil Code.<sup>201</sup> Designation as physical custodian is not recorded in a family registry.<sup>202</sup>

The system whereby *kangoken* could be separated from *shinken* is a remnant of the pre-war Civil Code, under which it was sometimes deemed desirable to formally allow mothers to continue acting as caregivers for younger children, even though fathers were usually awarded legal custody.<sup>203</sup> Thus, depending upon your point of view it is a development in Japanese family law intended either to make divorce less painful for women or to preserve fathers' paternal rights while sparing them the actual burdens of child-rearing.<sup>204</sup> Since women may now be legal custodians, the mechanism is no longer needed and is rarely

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<sup>200</sup> Cf. CAL. FAM. CODE § 3007 (Deering 2006) ("Sole physical custody' means that a child shall reside with and be under the supervision of one parent, *subject to the power of the court to order visitation.*" (emphasis added)).

<sup>201</sup> CIVIL CODE, art. 766-2.

<sup>202</sup> See, e.g., MATSUE, *supra* note 96, at 128, 130. Matsue also points out that unlike changes of *shinken* arrangements, *kangoken* arrangements can be modified by the parents without court involvement simply by changing the child's living arrangements. *Id.* Cf. Family Registration Law, arts. 78-79 (mandating registration of changes in legal custody due to divorce).

<sup>203</sup> UCHIDA, *supra* note 99, at 133.

<sup>204</sup> This compromise mechanism is now criticized as discriminatory in its implicit assumption that women are incapable of exercising legal custody. See NAKAMURA, *supra* note 60, at 195. Such criticism is ironic given that women are awarded full custody in most cases due in part to the assumption that men are incapable of exercising physical custody.

used.<sup>205</sup> While it may be a useful solution that parties occasionally agree to as a compromise in mediation, it is difficult to imagine a family court ordering such a solution on its own initiative over the objection of one of the parents.<sup>206</sup>

Designation of *kangoken* may actually have greater significance prior to divorce.<sup>207</sup> Although, literally, Article 766 of the Civil Code only provides for a determination of *kangoken* in the context of divorce, the courts have extended its application to cases involving separation.<sup>208</sup> As the award of *kangoken* pending divorce gives a parent the sole right to determine all aspects of the child's day-to-day life, education, and place of residence, and because *kangoken* is rarely separated from *shinken*, it can be safely assumed that the parent awarded *kangoken* prior to divorce will also be awarded *shinken* upon the divorce. Thus, when it comes to custody, *kangoken* proceedings (i.e., mediation sessions and subsequent judicial decrees that can be based solely on the written findings of mediators and court investigators, if assigned) may be more important than divorce litigation. Parents can expect courts to ratify the pre-divorce award of *kangoken* and to expand the custodial parent's rights to include legal custody.

An award of *kangoken* to one parent effectively empowers that parent to completely exclude the non-custodial parent from all aspects of their child's upbringing and day-to-day life. While the non-custodial parent may retain hypothetical rights as a joint legal

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<sup>205</sup> For example, in 2003, fathers were awarded *shinken* in only 2,716 of the 20,041 child custody cases brought before family courts. Of these 2,716 cases, 255 cases involved the mother being awarded *kangoken*. In contrast, in that same period, mothers were awarded *shinken* in 17,971 cases. Of those 17,971 cases, fathers were granted *kangoken* in only 18 instances. FAMILY CASE STATISTICS, *supra* note 33, at 39.

<sup>206</sup> See NAKAMURA, *supra* note 60, at 195.

<sup>207</sup> For example, of the 276 cases in 2003 involving mediation of physical custody determinations, 182 involved parents who were still married. FAMILY CASE STATISTICS, *supra* note 33, at 57.

<sup>208</sup> See, e.g., UCHIDA, *supra* note 99, at 138. It was not until 1995 that courts confirmed that Article 766 could be applied to order the payment of pre-divorce child-rearing expenses. *Id.*

custodian prior to divorce, in practice, such rights are largely meaningless.<sup>209</sup>

#### 4. Standards for Making Custody Determinations

There are no clear statutory guidelines that a family court must follow in making custody determinations, other than a generic “best interests of the child” standard. Without clear guidelines, custody determinations are almost entirely an administrative decision left to the discretion of family court judges, family court investigators, and mediators, whose only real guidance is apparently what they imagine to be the child’s best interests. There is, for example, no “good parent” rule whereby the parent more likely to allow visitation is preferred in custody determinations, nor are there any other legally-mandated criteria that a court is required to consider in making such decisions.<sup>210</sup>

Parents seeking a consensual divorce are free to bypass the legal system and agree to any arrangement they deem suitable, regardless of the best interests of the child. On the subject of *kangoken*, Article 766 of the Civil Code provides only that:

1. In cases [sic] father and mother effect a divorce by agreement, the person who is to take the [physical] custody of their children and other matters necessary for the [physical] custody shall be determined by their

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<sup>209</sup> Due to the suspension of the family court’s custody order pending appeal, there was a period during which I had, in theory, full legal and physical custody. Nonetheless, I was unable to see or know the whereabouts of my child for extended periods, and he was removed from Japan without my consent or knowledge. All of these actions were later ratified by the appeals court.

<sup>210</sup> Cf. e.g., CAL. FAM. CODE § 3040(a) (Deering 2006) (stating that “the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the custodial parent.”); § 3040(a) (prohibiting a court from considering the gender of the parent in making custody determinations); § 3011 (setting forth criteria to be considered in determining the best interests of the child); § 3046 (specifically prohibiting the court from considering absence from the family residence in most cases).

agreement, and if no agreement is reached or possible, such matters shall be determined by the Family Court.

2. The Family Court may, if it deems necessary for the benefit of the children, change the person to take the custody of them or order such other dispositions as may be appropriate for the custody.<sup>211</sup>

On the subject of *shinken*, the Civil Code provides only that “[i]n cases of judicial divorce the Court shall determine [sic] father or mother to have the parental power [legal custody].”<sup>212</sup>

Furthermore, there is no requirement that parties submit a parenting plan or even have the opportunity to demand one.<sup>213</sup> In fact, a custody evaluation may consist of nothing more than a family court investigator’s visit to the children’s home to observe their living environment. A custody determination may even be made without an evaluation of both parents.<sup>214</sup> Finally, there is no clearly articulated statement of public policy that frequent and continuous contact between a child and both parents is presumed to be in the best interests of the child, as is expressed (for example) in the California Family Code.<sup>215</sup>

There have been, however, a few attempts at providing guidance. For example, Article 54 of the LADR Regulations requires that a court hear the statements of any child of 15 or older

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<sup>211</sup> CIVIL CODE, arts. 766-1, 766-2(emphasis added).

<sup>212</sup> CIVIL CODE, art. 819-2.

<sup>213</sup> Cf. CAL. FAM. CODE, § 3040(a)(1) (Deering 2006) (“The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.”). I submitted a parenting plan *sua sponte*. It was (apparently) ignored.

<sup>214</sup> Cf. CAL. FAM. CODE §§ 3081, 3110 (Deering 2006).

<sup>215</sup> Cf. CAL. FAM. CODE, § 3020(b) (Deering 2006).

involved in custody proceedings.<sup>216</sup> Professional publications also reference various aspects of a child's environment that should be considered for custody determinations.<sup>217</sup> Nevertheless, many of these aspects, such as "mental intercourse with the child," tend to be highly subjective.

One striking exception to the absence of express criteria for awarding custody is the clear and long-standing preference for giving custody to mothers. Despite numerous constitutional and statutory imperatives requiring gender equality,<sup>218</sup> judicial precedent has created a "tender years" doctrine that results in women being awarded custody in the vast majority of cases,

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<sup>216</sup> LADR Regulations, art. 54. Some practitioners note that the opinions of children of 10 or above should also be taken into consideration when making determinations. CHILD ABDUCTION, *supra* note 108, at 14. In practice, however, it appears that the views of a child of any age are likely to be referenced only to the extent they support the court's conclusion. For example, in a 1996 Gifu case, a father was denied visitation with his 3 year old child because his child objected. 48 KASAI GEPPŌ 57 (Gifu F. Ct., Mar. 18, 1996). The court held that forcing a child so young to leave his mother to spend time with his father would cause the child "not insignificant emotional unease." Cases like this are frustrating because the mother is free to leave the child with anyone she pleases despite the ostensible justification for denial of visitation with the father.

<sup>217</sup> For example, CHILD ABDUCTION, *supra* note 108, at 14-15, lists a number of criteria that should be looked at when making custody determinations, including the parents' love towards the child, mental health, and financial condition.

<sup>218</sup> *E.g.*, KENPŌ, art. 24, para.2. ("With regard to . . . divorce, and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."); LADR, art. 1 ("This Law shall have for its purpose the maintenance of domestic peace and sound collective life of relatives on the basis of individual dignity and essential equality of the sexes."). There is also a statute aimed at creating a society where men and women can participate equally. The statute includes provisions that specifically call for (a) minimizing systems and customs that interfere with the equal participation of men and women in society, and (b) creating a society where both men and women can both take part in, among other things, child rearing while also engaging in activities outside the home. Danjo kyōdō sankaku shakai kihonhō [Basic Law for Equal Social Participation by Men and Women], Law No. 78 of 1999, arts. 1, 4, and 6. Child custody is not the only example where the notion of gender equality apparently falls by the wayside. For example Article 733 of the Civil Code prohibits women from remarrying within six months of a divorce or annulment, but imposes no such restriction on men. *See also* FUESS, *supra* note 162, at 164.

criteria should be used.<sup>226</sup>

Those tempted to justify a maternal preference as reflecting traditional Japanese cultural values should note that, until the mid-1960s, fathers took custody in the majority of divorces.<sup>227</sup> The “tender years” doctrine also runs counter to the hundreds of years where parents took custody of their children according to gender—daughters with mother, sons with fathers—or the tradition of children remaining in the household in which they had been raised before the divorce.<sup>228</sup> The maternal preference also ignores the long-standing custom of *atotori* (or *atotsugi*), where children (usually the eldest son) are expected to carry on the paternal household’s family name, business, and other traditions.<sup>229</sup>

In the publications I reviewed, there was also no mention

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<sup>226</sup> The favoritism for mothers is systematic in some cases. For example, Japan has a system of subsidies that by statute is only available to single-parent households headed by women. *Jidō fuyō teatehō* [Law for Child Support Subsidies], Law No. 238 of 1961 (Article 4 provides that among those qualified to receive the subsidy are children whose *fathers* have died, gone missing or are handicapped). See also KAJIMURA, *supra* note 52, at 51 (quoting criticism of this mothers-only subsidy).

<sup>227</sup> FUESS, *supra* note 162, at 157. During the pre-war period, the institutional preference for paternal custody appears to have been even stronger. *Id.* at 116. See also von Mehren, *supra* note 175, at 374 (stating that the post-war Civil Code meant that “[a] mother need no longer consider the loss of her children as the price of divorce.”). One possible though entirely speculative explanation for the maternal preference is that it developed from the personal experiences of the many people who had grown up in mother-only households due to the death or prolonged absence of their fathers during WWII and its antecedent conflicts. If this were the case, it would not be a coincidence that the maternal preference started to develop in the 1960s, around the time when such people would have been in their 30s and 40s and starting to take a central role in the courts and other areas of society. Fuess attributes the timing of this change to “the spread of second-wave feminism in Japan during the 1970s” and notes that it was “accompanied by the greatest inequality in post-divorce parenting arrangements visible in the statistical record.” FUESS, *supra* note 162, at 157.

<sup>228</sup> FUESS, *supra* note 162, at 91-92. As noted by Fuess, in pre-Meiji Japan there were significant regional variations in divorce and child custody practices. *Id.*

<sup>229</sup> FUESS, *supra* note 162, at 92-93 (discussing a variety of traditional regional practices regarding post-divorce custody arrangements, most of which revolve around maximizing the likelihood of a continuing family bloodline through male children).

of considering whether the child has been unilaterally removed from the marital home as a criterion for custody determinations. In other words, it does not appear to matter if a parent unilaterally removes the children from the marital home, changes their school (which in an international abduction case may change the very language they must use), or otherwise completely disrupts the environment in which the children have lived for years. This blind-spot presumably reflects the fact that a significant number of divorces are initiated by mothers taking their children and leaving the marital home, often returning to live with their parents.<sup>230</sup> In fact, it appears to be a practice recommended by at least some Japanese lawyers.<sup>231</sup> To consider the radical disruption of a

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<sup>230</sup> Although the number of marital actions brought in family courts in 2003 by wives (49,306) was far greater than the number brought by husbands (18,990), the absolute number of cases brought by husbands (2,036) where one of the complaints was about their spouse's refusal to cohabit was larger than number of wives (1,435) making the same complaint. *Id.* at 32-33. These statistics reflect not only divorce actions, but also cases where one party formally demands that the spouse return home. That domestic violence and/or child abuse may be a factor in some such cases is acknowledged, as is the fact that Japan has only recently started to deal with these problems. *See, e.g.,* Yoko Tatsuno, *Child Abuse: Present Situation and Countermeasures in Japan*, Jan. 26 2001, <http://wom-jp.org/e/JWOMEN/childabuse.html>; Yukiko Tsunoda, *Sexual Harassment and Domestic Violence in Japan*, 1997, <http://www.tuj.ac.jp/newsite/main/law/lawresources/TUJonline/SexualDiscrimination/tsunodasexualharrasment.html>. Of the 49,306 women bringing actions in family court in 2003, 14,588 complained of violence by their husbands. Of 18,990 husbands, 1,096 complained of violence by their wives. FAMILY CASE STATISTICS, *supra* note 33, at 32-33. Under Japan's new domestic violence law, it is possible to get a court-issued six-month restraining order based upon allegations of domestic violence, which will also prevent allegedly abusive spouses from contacting their children. Haigūsha kara no bōryoku no bōshi oyobi higaisha no hogo ni kansuru hōritsu [Domestic Violence Law], Law No. 31 of 2001, art. 10. Similarly, Japan's anti-stalking law may be used to prevent alleged stalkers from telephoning their victims or making other attempts at contact. Sutōkā kōi tō no kiseitō ni kansuru hōritsu [Law Regarding the Restriction of Stalking Behavior], Law No. 81 of 2000. More recently, there have been proposals to expand access to restraining orders in cases of verbal abuse. *Restraining Orders Eyed for Verbal Spouse Abuse*, ASAHI SHIMBUN, Apr. 7-8, 2007, at 21.

<sup>231</sup> *See, e.g.,* NAKAMURA, *supra* note 60, at 89-90 (advising wives contemplating a "time out" in their a marriage that: "Even if it is not certain that there will be a divorce, if you feel you would want to take the children if you do divorce, without a doubt you should take the children with you.") Attorney Yamaguchi characterizes the standard advice of a certain Japanese divorce lawyers along the lines of:

child's environment as a factor in custody determinations would doubtlessly hinder the continuing preference for mothers as custodians.

Whatever its basis may be, the maternal preference, combined with the dismal status of visitation discussed below, renders fathers an optional part of a child's life.<sup>232</sup> Professor Takao Sato finishes the section of his chapter by stating, "Under the current legal regime of sole custody, all that can be done is to make non-custodial parents aware of their position, and strongly convince them of their natural support obligations as parents."<sup>233</sup> Family courts may adhere to this "rule" even when fathers offer to take time off of work and dedicate themselves to raising their children.<sup>234</sup> In such situations, the courts may urge fathers to give money to their ex-wives to raise their children instead.<sup>235</sup>

There is also anecdotal evidence that race plays a role in custody determinations when one parent is not Japanese.<sup>236</sup> In

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You should take the children to your parents' house on such and such a date. You will need to take care of the transfer of their school, so be sure to make the necessary arrangements. Also be sure to change your address registration. If your husband calls you must not talk to him. You must not see him. . . . Under no circumstances allow him to see the children.

YAMAGUCHI, *supra* note 39, at 107. I have met a number of parents who were subjected to this treatment.

<sup>232</sup> This result lies in opposition to current government policy that seeks to encourage increased participation by fathers in child-rearing, as expressed in the Basic Law for Equal Social Participation by Men and Women and elsewhere.

<sup>233</sup> Sato, *supra* note 222, at 221. In fairness to Professor Sato, it should be noted that he is an advocate of joint custody, and notes that discrimination against the non-custodial parent is an irrational result of the existing sole custody regime. Sato, *supra* note 189.

<sup>234</sup> YAMAGUCHI, *supra* note 39, at 111-112.

<sup>235</sup> *Id.*

<sup>236</sup> The CRN Japan website lists a variety of forms of racial discrimination which foreigners may suffer in family-related disputes in Japan,

her fieldwork in the Japanese family courts in the 1980s and 1990s, Professor Bryant observed that in most such cases, custody was awarded to the Japanese parent, and even if it was not, there were elaborate protections in the divorce arrangements to protect the children's Japanese identities at the expense of the cultural heritage of their non-Japanese parent.<sup>237</sup> According to Bryant, "notions of blended families or bicultural identity did not factor into discussions of the post-divorce family conditions for the child(ren)."<sup>238</sup> Racial discrimination in custody determinations is also one of the criticisms that NGOs have leveled at Japan in connection with its implementation of the Convention.<sup>239</sup> Interestingly, while the SCJ maintains statistics on custody determinations by gender, and statistics by nationality for divorces involving non-Japanese parties, it does not publish figures for custody determinations by nationality.<sup>240</sup>

Finally, since custody determinations are effectively an administrative determination not based on substantive law, the court does not have to justify its decision other than by concluding that its decision is in the best interests of the child.<sup>241</sup> There is no

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including discrimination in custody awards, enforcement of foreign judgments, application of foreign law, failing to assist in locating children, and the award of restraining orders. It should be noted that some of these claims are speculative and still being developed. Japan Children's Rights Network, *Discrimination in Japan Concerning Children's Rights*, <http://cmjapan.com/discrimination/> (last visited Mar. 3, 2007).

<sup>237</sup> Bryant, *supra* note 45, at 18-19.

<sup>238</sup> *Id.* Bryant was writing of family courts in the 1980s and 1990s. My experience with family courts in Tokyo – the most metropolitan and international city in Japan, if not Asia – was that in 2003, the institution seemed unable to understand or was simply uninterested in the special issues affecting children growing up in multi-lingual/multi-cultural environments.

<sup>239</sup> Report from Children's Rights Council, *supra* note 133. Part of the problem may simply be the inability of family court mediators, investigators, and judges to imagine a child's well-being in a non-Japanese context, particularly in the absence of clear guidelines. Bryant, *supra* note 45, at 19.

<sup>240</sup> Almost one-half of the international divorce cases brought before family courts in 2003 involved Japanese men with Asian wives, primarily Filipina or Chinese. FAMILY CASE STATISTICS, *supra* note 33, at 46.

requirement that a judge explain why a particular result is in the best interests of the children, or provide any formal protections for the benefit of non-custodial parents.<sup>242</sup>

### G. Visitation

There are no visitation rights in Japan.<sup>243</sup> There is only a concept called visitation (*mensetsu kōshōken*), which is sometimes referred to as if it were a right.<sup>244</sup> Japanese family courts have used this concept in resolving marital disputes since as early as 1964.<sup>245</sup> As no statute specifically provides for visitation, it has

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<sup>241</sup> Cf. CAL. FAM. CODE § 3082 (Deering 2006) (specifically prohibiting judges from justifying a custody decision with nothing more than a statement that “joint custody is, or is not, in the best interest of the child” in cases where joint custody has been requested by a party). Doctor Gardner points out how meaningless the “best interests of the child” standard has become in the context of U.S. custody disputes and suggests that it should be replaced with a “best interests of the family” presumption. GARDNER, *supra* note 138, at 374.

<sup>242</sup> Cf. CAL. FAM. CODE § 3048 (Deering 2006) (detailing the matters which must be included in every custody or visitation order).

<sup>243</sup> In comparison, the California Family Code has an entire chapter devoted to visitation. CAL. FAM. CODE, Ch. 5 (Deering 2006). § 3100 of the code states that a court “shall” order visitation unless it would be detrimental. California precedent further holds that unless a custody order specifically denies the non-custodial parent visitation, he or she is “entitled to reasonable visitation as a matter of natural right.” *Feist v. Feist*, 46 Cal. Rptr. 93, 95 (App. 4 Dist. 1965).

<sup>244</sup> The terms *menkai kōryūken* and *menkai kōshōken* are also sometimes used. The term “*ken*,” used in all three terms, would normally be translated as “right.”

<sup>245</sup> A leading case on the subject stated in 1964 that:

Meetings and interaction with a minor child is a minimal request of the parent without legal or physical custody, and even if due to the unfortunate occurrence of the mother and father’s divorce it is in practice no longer possible for the mother and father to jointly exercise physical and legal custody, with one being named as physical and/or legal custodian, despite one parent raising and educating the child alone, the parent not having legal or physical custody has the right to meet and interact with the minor

# Appendix D

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visitation is a natural or inherent right of the parent would leave room for constitutional problems to arise if no visitation is permitted.”<sup>307</sup> Put more simply, Sugihara rejects characterizing visitation as a right because doing so would trigger constitutional due process requirements before visitation can be terminated. Again, this rationale has a certain logic, but only from the standpoint of judicial convenience, not from the standpoint of the welfare of a child.

The Sugihara Memorandum goes on to state that the most important thing about visitation should be the welfare of the child, rather than the wishes of the parent.<sup>308</sup> This conclusion preserves the judiciary’s authority and its ability to perpetuate “family values” of which it remains the sole arbitrator. As noted above, there are few mechanisms, either by statutory mandate, or the parties’ ability to procure outside evaluations, to separate the interests of the court from the welfare of the child. Thus, the 2000 Decision and Sugihara’s explanation of it have a particular logic. Visitation is not a right of the child or of the parent; it is a right of the judiciary, a prerogative of judges to confer a privilege on worthy and cooperative parents, parents who will agree to visitation without giving rise to the potentially embarrassing issue of enforcement. This is an issue with significant implications for the prestige of the judiciary and the way it is perceived by society.

## VI. ENFORCEMENT

The notion that visitation is a prerogative of judges rather than a right of parents or children makes sense once the limited enforcement powers of Japanese family courts are taken into account. The difficulty of enforcing civil judgments is the elephant in the room of much that is written about Japanese civil law. Drawing attention to the practicalities of enforcement can

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

significantly distract from whatever interesting theoretical areas are under discussion.

The issue of enforceability lurks at the highest levels of Japanese jurisprudence and may be one reason why the SCJ is reluctant to clearly hold that severing a parent-child relationship is unconstitutional. Professor John Haley has noted the general lack of mechanisms by which Japanese courts can enforce their orders in civil cases: the courts have no equitable or enforcement powers.<sup>309</sup> Courts have civil "enforcement officers" (*shikkōkan*), but they are in no way comparable to U.S. armed marshals. Furthermore, Japanese police do not get involved in civil disputes in general, and family disputes in particular.<sup>310</sup> In Yamaguchi and Soejima's exposé-style book on trials in Japan, their enforcement of civil judgments chapter is entitled "Finally You Got a Judgment, but the Only Thing it is Good for is Paper to Wipe Your Bottom."<sup>311</sup> They also identify reforming the enforcement system as one of the most pressing issues in the Japanese legal system today.<sup>312</sup> Concern over the effectiveness of the civil execution (i.e., enforcement) system has also been raised by the Justice System Reform Council (JSRC), a working group of thirteen prominent lawyers, academics, and business

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<sup>309</sup> HALEY, *supra* note 6, at 118.

<sup>310</sup> According to some accounts, the Japanese police will get involved when violence or foreigners are involved. Wilkinson & Pau, *supra* note 1.

In cases that involve violence, the Japanese police can be both quick and brutal. In cases where there is no violence, but the child is a Japanese national or dual national, the police will act quickly and violently against the non-Japanese abducting party as long as they have sufficient warning. Since there is no specific law in Japan making this a crime, they will use other means, by finding some irregularity with a passport or visa.

<sup>311</sup> YAMAGUCHI & SOEJIMA, *supra* note 29, at 45-74.

<sup>312</sup> *Id.* at 253.

executives established by the Cabinet to propose sweeping legal reforms.<sup>313</sup>

This situation is even more pronounced for family courts, whose orders are widely recognized as unenforceable.<sup>314</sup> One family court insider notes that “family courts have no enforcement powers to realize the best interests of children.”<sup>315</sup> Another, a family court mediator, writes that there are effectively no legal remedies available in cases where the custodial parent stubbornly refuses visitation.<sup>316</sup> Foreign commentators have expressed similar views regarding enforcement of visitation rights in Japan.<sup>317</sup> While non-custodial parents alleging interference with visitation are occasionally successful in tort litigation, the legal victories do not necessarily result in visitation, and are often

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<sup>313</sup> See Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?* 2 ASIAN-PAC. L. & POL’Y. J. 89, 107 (2001); JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL (June 12, 2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

<sup>314</sup> See, e.g., EIKO ISHIDA ET AL., KEKKON, RIKON, OYAKO NO HÖRITSU SÖDAN [LEGAL ADVICE ON MARRIAGE, DIVORCE AND PARENT-CHILD MATTERS] 27 (Nobuo Takaoka ed., 2004) (stating that because payment of child support is voluntary, one should not expect a family court “compliance advisory” issued to a delinquent parent to be effective); Struck & Sakamaki, *supra* note 2.

<sup>315</sup> Ken’ichi Hayashi, *Ko no Ubaiai wo Meguru Funsō Jiken ni Okeru Katei Saibansho Chōsakan no Yakuwari* [The Role of Family Court Investigators in Disputes Involving the Abduction and Counter-Abduction of Children], 1100 HANREI TAIMUZU 185 (Nov. 10, 2002).

<sup>316</sup> Fujiko Endo, *Mensetsu Kōshō no Jiki, Hōhō, Rikō Kakuho* [Visitation: Scheduling, Methods and Ensuring Compliance], 1100 HANREI TAIMUZU 191 (Nov. 10, 2002). This perhaps explains her remarkable conclusion that visitation is not a legal problem at all, but a “personal relationship” problem. *Id.* As noted above, family courts seem comfortable regarding visitation as a legal right for purposes of terminating it.

<sup>317</sup> See, e.g., Wilkinson & Pau, *supra* note 1 (“All matters of custody and parental rights are handled in powerless ‘family courts’ which can only use persuasion to achieve results.”); U.S. Dept. of State, International Parental Child Abduction: Japan, [http://travel.state.gov/family/abduction/country/country\\_501.html](http://travel.state.gov/family/abduction/country/country_501.html) (last visited Mar. 3, 2007) (stating that “compliance with [Japanese] Family Court rulings is essentially voluntary, which renders any ruling unenforceable unless both parents agree.”).

meaningless if the custodial parent is judgment-proof.<sup>318</sup> Enforcement of visitation is in any case a matter of minor interest, and some commentators regard it as completely unenforceable.<sup>319</sup> The enforcement of orders to hand over parentally abducted children receives more attention, but enforceability issues remain.<sup>320</sup>

If a party fails to comply with a family court mandated obligation, the family court may issue a non-binding "compliance advisory" (*rikō kankoku*) or a "compliance order" (*rikō meirei*) if the advisory is ineffective.<sup>321</sup> In 2003, family courts received a total of 16,106 requests for compliance advisories.<sup>322</sup> The vast majority of these advisories involved monetary or "other" obligations.<sup>323</sup> Only 883 were requested in connection with "personal relationship" (*ningen kankei*) matters.<sup>324</sup> Of these, less

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<sup>318</sup> See, e.g., ISHIDA, *supra* note 314, at 90. Based on my discussions with Japanese parents, it appears that other than receiving a money judgment, the only benefit of obtaining a judgment against a custodial parent for interference with visitation, is that it can induce a promise to allow visitation in exchange for dropping the suit. Once the suit is dropped, however, the custodial parent can, and sometimes does, resume the denial of visitation, requiring the non-custodial parent to bring an entirely new action.

<sup>319</sup> CHILD ABDUCTION, *supra* note 108, at 34; Endo, *supra* note 316, at 191; ISHIDA, *supra* note 314, at 90. These commentators suggest that one remedy for interference with visitation would be for the courts to order a change in custody, but none cite recent cases where this has been implemented.

<sup>320</sup> A total of 554 matters involving the hand-over of a child were brought in family courts in Japan in 2003. FAMILY CASE STATISTICS, *supra* note 33, at 10-11. Unfortunately, these statistics do not indicate the gender of the parent seeking relief, though it seems likely that the majority are women seeking the return of a child abducted by an estranged husband.

<sup>321</sup> LADR, arts. 15-5, 15-6. On the practicalities and limitations of compliance advisories in abduction cases, see Ken'ichi Hayashi, *Rikkō Kankoku no Jitsujō to Mondaiten* [The Realities and Problems of Compliance Advisories], 18 KAZOKU (SHAKAI TO HO) 55-60 (2002). Hayashi notes that in abduction cases compliance advisories rarely result in the return of a child. *Id.* at 56.

<sup>322</sup> FAMILY CASE STATISTICS, *supra* note 33, at 67.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

than half resulted in full or even partial compliance.<sup>325</sup>

Despite the poor track record of compliance advisories, in the same period, the entire family court system received only eighty-four requests for compliance orders.<sup>326</sup> Although this low number might imply that compliance orders are rarely needed, the fact that in response to these eighty-four requests, compliance orders were only issued twenty-nine times suggests that judges rarely feel inclined to issue them.<sup>327</sup> One reason for this judicial disinclination may be that compliance orders are just as difficult to enforce as compliance advisories. Under the LADR, a court may impose a fine of up to ¥100,000 (less than U.S. \$1,000 at current exchange rates) on a party who fails to obey a compliance order or otherwise disobeys “measures ordered by the Mediation Committee or the Family Court . . . *without justifiable cause*” (emphasis added).<sup>328</sup> One explanation for the paucity of compliance orders, as well as the small number of divorce decrees, is that courts are reluctant to provide remedies that will be proved paper tigers. Almost any parent would rather pay the ¥100,000 fine than obey an order to transfer possession of his or her child. The same is doubtless true of parents seeking to deny visitation. The “without justifiable cause” exception also gives non-complying parties a way to avoid incurring this minimal penalty and frees family courts from the obligation to issue them.

Indirect enforcement (*kansetsu kyōsei*) is another means of enforcement provided under Article 414 of the Civil Code and Article 172 of the Civil Enforcement Law.<sup>329</sup> Together, these

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<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 69.

<sup>327</sup> *Id.*

<sup>328</sup> LADR, art. 28. Although there is at least one court case citing failure to allow visitation as a factor in determining whether the custodial parent’s custodial rights should be altered or terminated, nothing in the literature suggests that this is a practical and frequently used option. CHILD ABDUCTION, *supra* note 108, at 34.

<sup>329</sup> CIVIL CODE, art. 414; Minji shikkōhō [Civil Enforcement Law], Law No. 4 of 1979, art. 172. See also Naoko Nakayama, *Kodomo no Ubaiai Jiken no Toriatsukai* [Dealing with Cases of Parental Abduction and

provisions give courts discretion to levy fines on an ongoing basis against non-complying parties. This remedy, however, merely imposes a financial obligation, which may be unenforceable if the non-complying party has no identified and attachable assets or wages subject to garnishment, as may often be the case with custodial stay-at-home mothers.<sup>330</sup> Furthermore, because the welfare of the child is one of the goals of the family court, some courts may be reluctant to order remedies that impoverish the child's household. In any case, as noted in one guide on child-abduction, this method of enforcement is unlikely to result in the hand-over of the child and thus "cannot be expected to have any real effect."<sup>331</sup> As with penal fines, in most cases, enforcement mechanisms that involve the choice between paying a fine and having contact with one's children can be expected to have limited impact.

Direct enforcement is also limited. Even if a child is abducted in violation of a custody order, the police are unlikely to intervene. There also does not appear to be a formal mechanism whereby courts can order police involvement.<sup>332</sup> There is some

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*Counter-Abduction*], in *MEDIATION MANUAL*, *supra* note 81, at 226-227 (stating that there are difficulties associated with the methods of enforcing an order to return a child).

<sup>330</sup> See, e.g., 3 Hours, *supra* note 94. Lui writes that:

the court rendered a judgment, penalizing my ex-wife 30,000 yen a day for not returning my son to me. Yet, this penalty was difficult to enforce, as my ex-wife did not work and therefore had no wages to be garnished. Moreover, her bank account information was unknown. According to my lawyers, all she needed to do was to file for bankruptcy to escape from paying at all.

*Id.* Yamaguchi and Soejima also note the limited ability of victorious plaintiffs to obtain financial information about defendants for enforcement purposes. *YAMAGUCHI & SOEJIMA*, *supra* note 30, at 253.

<sup>331</sup> *CHILD ABDUCTION*, *supra* note 108, at 9.

<sup>332</sup> As noted by one Japanese writer on the subject of visitation, "Suppose that the separately-residing parent does not have custody [shinken]. Even if he kidnaps his children, the police will only say 'It's the children's

academic debate over whether a child can be treated as analogous to a piece of movable property for purposes of applying Article 169 of the Civil Enforcement Law, which deals with the specific enforcement of the transfer of such property.<sup>333</sup> While in theory it is possible for a court enforcement officer to overcome the resistance of a parent and take possession of a child, in practice, courts have been reluctant to endorse such remedies.<sup>334</sup> As noted by one family court insider, in cases where the parent refuses to physically hand over a small child, enforcement is impossible.<sup>335</sup> Furthermore, if the child refuses to cooperate, enforcement may again be regarded as impractical.<sup>336</sup> One woman I interviewed went to her child's kindergarten, accompanied by a court enforcement officer, to take custody of her abducted child over whom she had full legal custody. This effort was defeated by the

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father – it's not like he is going to kill them or anything, so there is not much for us to do.” Hiromi Ikeuchi, *Nihon ni Okeru Rikon Go no Mensetsu ga Konnan na Jidaiteki Haikai* [The Historic Background for the Difficulty of Post-Divorce Visitation], in SHINKAWA, *supra* note 172, at 96-97. Cf. CAL. FAM. CODE § 3048(b)(2)(K) (Deering 2006), which empowers a court to involve law enforcement authorities if necessary.

<sup>333</sup> See, e.g., CHILD ABDUCTION, *supra* note 108, at 9. This debate also comes up in the context of interlocutory preservative orders (*shimpan mae no hozen shobun*), which are also sometimes issued in abduction cases prior to the family court issuing a formal decree. While direct enforcement of such orders is theoretically possible, such enforcement is limited by the “best interests of the child” standard, and it seems unlikely that theory is often converted into practice. On the enforcement of preservative orders, see, e.g., Naoko Nakayama, *Kodomo no Ubaiai to Katei Saibansho no Shihōteki Kinō* [Parental Abduction and the Judicial Function of Family Courts], 18 KAZOKU (SHAKAI TO HŌ) 43, 50-52 (2002)

<sup>334</sup> CHILD ABDUCTION, *supra* note 108, at 9. Another factor that may limit direct enforcement is that, although enforcement officers are court employees, they derive their compensation from fees paid by the parties seeking enforcement and may have limited incentive to assist in cases not involving money or property. See Supreme Court of Japan, Shikkōkan [Court Enforcement Officers], <http://courtdomino2.courts.go.jp> (last visited Mar. 4, 2007); Shikkōkanhō [Enforcement Officer Law], arts. 7-12.

<sup>335</sup> Wataru Yamazaki, *Kodomo no Hikiwatashi no Kyōsei Shikkō* [Enforcing the Hand-over of Children], 1110 HANREI TAIMUZU 189 (Nov. 10, 2002).

<sup>336</sup> *Id.* This is another instance where the Japanese system both seemingly encourages and rewards parental alienation.

teacher simply refusing to hand the child over.<sup>337</sup>

There seems to be a general awareness within the legal community of the inability of the legal system to prevent or remedy parental abduction and counter-abduction, as illustrated by the following statement in a manual written by lawyers specializing in child abduction cases:

Even if the return [of the child] is successful, it is difficult to imagine that the dispute will end there. Unless the obligor [i.e., abducting parent subject to the return order] develops the psychological foundation for accepting the legal decision, the danger that the same sort of dispute will continue forever cannot be ruled out. Accordingly, it is desirable to avoid such enforcement methods.<sup>338</sup>

This language confirms that compliance with family court orders is optional, and that a stubborn parent who never becomes “psychologically prepared to accept the legal decision” will often win.<sup>339</sup>

The greatest hurdle to enforcement, however, may be the discretion granted to family courts in exercising what limited

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<sup>337</sup> Yamaguchi states that fathers will not be arrested for abducting their own children and resisting efforts to enforce their return. YAMAGUCHI, *supra* note 39, at 121. It is worth noting that a recently-published 600 page practice manual for court enforcement officers does not deal with enforcement of child custody or visitation. SHIKKOKAN JITSUMU NO TEBIKI [PRACTICAL MANUAL FOR ENFORCEMENT OFFICERS] (Shikkōkan jitsumu kenkyūkai ed., 2005).

<sup>338</sup> CHILD ABDUCTION, *supra* note 108, at 9.

<sup>339</sup> In such cases, there is a possibility that those who ignore the law actually end up being given preferential treatment. Ryōko Yamaguchi, *Yōji Hikiwatashi Seikyū no Seishitsu* [The Essence of Requests to Hand-over Young Children], 162 BESSATSU JURISUTO 75 (May 2002).

powers they do have. I talked to one woman whose efforts to enforce visitation with her children ended when her husband hung up on the family court investigator who had telephoned to convince him to obey a compliance order. The investigator told her, "There is nothing more I can do."<sup>340</sup> The family court is apparently free to give up on cases such as these. And the more difficult the case, the more incentive there may be for the family court to do so, both in terms of institutional resources and prestige, as well as the individual interest of docket-clearing. In such cases, some courts reportedly convince applicants to withdraw motions, or will simply reject them.<sup>341</sup>

One other enforcement remedy sometimes available is Japan's habeas corpus statute (*jinsin hogohō*).<sup>342</sup> If a child is unlawfully detained, the court may issue a writ of habeas corpus (*jinsin hogo meirei*), which requires the person detaining the child to bring him or her to court and explain the reasons for detention.<sup>343</sup> Habeas corpus proceedings are the only proceedings involving child custody where the child may be separately represented by government-appointed counsel.<sup>344</sup> Hearings are usually conducted within two weeks and, because they are brought in district or high courts, represent the only way for parents to avoid the time-consuming, mediation-focused family court system.<sup>345</sup> Theoretically, parties are penalized for failing to comply with an order.<sup>346</sup> Nevertheless, some commentators generally regard habeas corpus judgments as

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<sup>340</sup> Interview with anonymous source.

<sup>341</sup> Yamazaki, *supra* note 335, at 187.

<sup>342</sup> *Jinsin hogohō* [Habeas Corpus Law], Law No. 199 of 1948. That a statute originally intended to protect citizens from the unlawful use of state power has become a tool in child custody disputes illustrates the paucity of available remedies.

<sup>343</sup> Habeas Corpus Law, art. 11.

<sup>344</sup> Habeas Corpus Law, art. 14.

<sup>345</sup> Habeas Corpus Law, arts. 4, 6.

<sup>346</sup> Habeas Corpus Law, art. 26.

unenforceable.<sup>347</sup>

Whether or not habeas corpus judgments are enforceable, the SCJ has severely limited access to the only remedy that provides prompt access to an alternate forum, independent representation of the child through appointed counsel, and the remote possibility of criminal sanctions, including imprisonment, for non-compliance. In a 1993 decision, the SCJ held that, where the disputants were the child's parents, habeas corpus orders should only be available where the exercise of custody by one of the parents was a "gross violation" (*kencho na ihōsei ga aru*).<sup>348</sup>

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<sup>347</sup> CHILD ABDUCTION, *supra* note 108, at 50. A 2002 case illustrates the judiciary's awareness of these limitations. The case was a suit for damages by a father who had abducted his children to Texas after losing custody and being ordered to stop seeing them, contacting them, and even to stop seeking visitation. His ex-wife received a habeas corpus order and the father brought the children back to Japan for proceedings at the Himeji branch of the Kobe District Court. The children were entrusted to court personnel while the hearing took place. At the end of the proceedings, court personnel blocked the courtroom doors, physically preventing the man and his father from leaving. The children were then handed over to the mother, and later that day the court issued an opinion ordering the transfer of physical custody even though it had already taken place. The man thus sued the presiding justice of the Himeji branch on the grounds that the court's actions were *ultra vires*. Although he lost, it is still interesting to note that the court used the hearing to accomplish the transfer of physical custody before actually ordering it. GYŌSEI REISHŪ (Kōbe Dist. Ct., Apr. 15, 2002).

Judge Hiroshi Segi argues that habeas corpus orders issued by family courts need to be fully enforced, but also notes the limited enforceability of this remedy under some theories. For example, under some theories, whether such orders are directly enforceable depends upon the child's age and mental capacity. And, if direct enforcement is not possible, indirect enforcement (monetary sanctions) is the only remaining option. Hiroshi Segi, *Kasai no Saiban no Shikkō to Jinshin Hogo Seikyū* [*Habeas Corpus and the Enforcement of Family Court Judgments*], KAZOKU (SHAKAI TO HO) 61-91 (2002). Noting that monetary sanctions are unlikely to be effective on parties with limited financial resources, he confirms that "as a legal system, in terms of the ability to ensure enforcement, current habeas corpus proceedings are, to be honest, seriously deficient." *Id.* at 67, 76. Segi is also somewhat critical of the court's role in cases like the Kobe habeas corpus case cited above, since the party bringing the child to the court feels ambushed and that the proceedings were not even a trial. *Id.* at 73. He also notes that another issue in enforcing habeas corpus cases can be the difficulty of getting prosecutors interested. *Id.* at 72.

<sup>348</sup> 47 MINSHŪ 5099 (Sup. Ct., Nov. 19, 1993), available at <http://courtdomino2.courts.go.jp/promjudg.nsf/766e4f1d46701bec49256b8700435d2e/a3f856ed9deed3ee492570ff00377a15?OpenDocument>; CHILD

Thus, the SCJ has limited the remedies available to parents most likely to need them.<sup>349</sup>

Because enforcement is so difficult, a parent who refuses to accept the authority of a court with respect to child custody or visitation by the other parent may be subject to only minimal sanctions. Given the ability of a custodial parent to deny the non-custodial parent all contact with their child, it is unsurprising that some parents, usually fathers, choose to abduct their children; there may appear to be few legal risks in doing so, and it may be the only way to retain a relationship with their children. One lawyer even explains how this works. In his book on divorce, Hiroshi Yamaguchi has a section entitled "How Fathers Can Obtain Full Custody through Self-help Remedies."<sup>350</sup> According to Yamaguchi, if a father abducts his children while the divorce is still proceeding, the court will order the child returned, but this order can be safely ignored, as can other orders from the family, district, or high courts.<sup>351</sup> At some point, the court will recognize the new status quo and award custody to the father.<sup>352</sup>

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ABDUCTION, *supra* note 108, at 48-49; Yamazaki, *supra* note 335, at 186.

<sup>349</sup> The restrictions on habeas corpus judgments helps explain the case of Stephen Lui, who was denied his request for habeas corpus even though the SCJ confirmed his California custody order only a month earlier. 3 Hours, *supra* note 94. One possible explanation for this paradox is that, because the U.S. embassy had become involved, the SCJ was paying lip-service to international comity by recognizing the judgment of a U.S. court, but did not see anything wrong with the child being raised by his Japanese mother in violation of that order.

<sup>350</sup> YAMAGUCHI, *supra* note 39, at 120-123. In closing, Yamaguchi makes clear that he could not continue to represent a client contemplating such a course of action, and that it should only be considered if the other parent is abusing the child or in other such circumstances that the court has failed to notice exist. *Id.* There is also evidence that police may be taking a more active role in combating this type of behavior using current law. *See infra* note 359. The fact that I have cited this section of Yamaguchi's book should in no way be taken as an endorsement of parental abduction of any sort.

<sup>351</sup> *See id.*

<sup>352</sup> *Id.* A Japanese lawyer from whom I sought a second opinion suggested that I consider grabbing my son on his way home from school.

With little or no enforcement mechanisms, the family court fails to protect children and their parents, usually at the time parents' expectations of court assistance are greatest. The most tragic example I encountered of such failure is that of a Japanese mother I interviewed in 2005.<sup>353</sup> She and her husband obtained a consensual divorce when their child was about 1 year old. The divorce filing named her as the child's legal and physical custodian, but her ex-husband refused to hand the child over. Despite mediation and decrees by family and appellate courts that confirmed her status as sole custodian, enforcement failed. Nor did his threatening her in front of the entire mediation panel make any difference. Desperate to see her child, she agreed to her husband's offer to allow visitation in exchange for her giving up custody and paying child support. An agreement was drawn up and the necessary procedures were commenced at the family court to transfer custody. After completion of these proceedings, she was able to see her child briefly a few times until her husband again refused to allow visitation and demanded increased child support. When I met with her, her hope was that she could at least have her child remember her face. It is doubtful that the courts will be able to turn even this small wish into reality.

A. *A Note on International Cases*

This being an article primarily for U.S. practitioners, it would be remiss not to mention the status of U.S. family court judgments in Japan. While there are principles and applicable law on the recognition of foreign judgments by Japanese courts,<sup>354</sup>

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<sup>353</sup> *Kodomo ni Aenai Okāsan [A Mother Who Can't See Her Children]*, in SHINKAWA, *supra* note 172, at 82; Interview with anonymous source.

<sup>354</sup> See, e.g., Takao Sawaki, *Recognition and Enforcement of Foreign Judgments in Japan*, 23 INT'L LAW 29 (1989). As a matter of black letter civil procedural law, the final judgment of foreign courts will be given effect if all of the following conditions are satisfied: (1) the foreign court has jurisdiction under a statute or treaty; (2) the losing defendant was given necessary notice or served with process or answered notwithstanding the absence thereof; (3) the contents of the judgment and the procedures by which it was arrived at do not conflict with Japanese public order or good morals; and (4) there is comity. *Minji soshō hō* [Code of Civil Procedure], Law No. 109 of

recognition of a foreign judgment is largely irrelevant to the issue of enforcement. Japanese courts may choose to recognize a foreign custody order, as they did in the case of Samuel Lui, or ignore it, as in the case of Murray Wood, whose children were abducted from Canada by their non-custodial Japanese mother during visitation in Japan.<sup>355</sup> But whether or not the foreign judgment is recognized, virtually no Japanese court has ever ordered a child returned to the United States.<sup>356</sup> In fact, one of the absurdities of the current situation is that a Japanese court order may be more enforceable abroad than at home because a parent who brings a child to the U.S. in violation of a Japanese court order could face criminal sanctions under American law.

Virtually any Japanese lawyer or legal scholar will probably explain that the cases involving children abducted to Japan are difficult in part because they must be dealt with through the family court system. The police generally do not get involved, and it is best to leave such matters up to the specialists in the family courts: this was, after all, one of the rationales behind the SCJ limiting access to habeas corpus in parental abduction cases.<sup>357</sup>

Nevertheless, this de facto immunity does not seem to apply to a foreign parent trying to leave Japan with a child. Recently, a Dutch father was arrested for trying to leave the country with his child who had been living with his estranged wife.<sup>358</sup> He was prosecuted for violating a pre-war section of the

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1996, art. 118.

<sup>355</sup> Daphne Bramham, *Torn Between Their Parents: Murray Wood Believed the Best Care for His Two Children Would Be to Share Their Custody with His Ex-wife. He Hasn't Seen Them Since November*, VANCOUVER SUN, Mar. 15, 2005, at B2. In Murray Wood's case, both the Saitama Family Court and the Tokyo High Court recognized that the Japanese mother had abducted their two children from Canada in violation of a Canadian custody order, and that doing so was criminal under Canadian law. Nonetheless, the court justified making a new custody award in her favor on the grounds that the welfare of the children outweighed these factors. *Id.*

<sup>356</sup> Perez, *supra* note 2.

<sup>357</sup> 47 MINSHO 5099 (Sup. Ct., Nov. 19, 1993).

Penal Code originally enacted to prevent the trafficking of minors to China for prostitution.<sup>359</sup> The SCJ confirmed his conviction in 2003.<sup>360</sup> The child's parents were still married and, therefore, the father still had full custody. The hand-over of the child was apparently accomplished summarily, without the procedural niceties debated by legal practitioners and academics. It would be easy to attribute this result to racial discrimination – in child abduction cases, perhaps Japan has one set of rules for foreigners and another for Japanese people. More likely, however, it was simply a case where another bureaucracy – the immigration service – decided to get involved and, unlike the judiciary, had the ability to enforce the hand-over of the child independent of the considerations described by the judiciary as being critical in custody determinations.

## VII. SYNTHESIS

As far as child custody and visitation is concerned, there is no substantive law in Japan. There is procedure but no substance. Decisions about a child's welfare are administrative dispositions based on the internally generated rules, procedures, and values of a judicial bureaucracy. Even where there are clear laws, such as the provisions requiring fundamental gender equality in the Constitution and the LADR, or the rights espoused in the Convention, they may not be applied if they conflict with the goal of preserving judicial authority, or the judiciary's own family values.<sup>361</sup> Custody and visitation rights can be bypassed at the

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<sup>358</sup> 57 KEISHŪ 187 (Sup. Ct., Mar. 18, 2003).

<sup>359</sup> The crime in question was abduction or enticement for purposes of removing from Japan (*kokugai isō mokuteki ryakushu oyobi yūkai*). KEIHO [PENAL CODE], art. 226. This provision of the Penal Code was amended in 2005 so that it covers kidnapping and abduction from any country, not just Japan. For a detailed discussion of this case and its implications for parental abduction, see Colin P.A. Jones, *No More Excuses: How Recent Amendments to Japan's Criminal Code Should (but Probably Won't) Stop Parental Child Abduction*, 6 WHITTIER J. OF CHILD & FAM. ADVOC. 289 (2007).

<sup>360</sup> 57 KEISHŪ 187 (Sup. Ct., Mar. 18, 2003).

<sup>361</sup> My belief that Japanese courts will go so far as to bypass substantive law when necessary to preserve their institutional authority is based