A legal note from Marshal Willick about how 8 = 6, if the Nevada Supreme Court says it does (and a reminder invite to our open house on January 6)

In *Ogawa v. Ogawa*, 125 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 51, Nov. 12, 2009), the district court had entered findings that Nevada was the "habitual residence" of the subject minor children for purposes of the Hague Convention on the Civil Aspects of International Child Abduction. Obviously irritated with the father, who appeared only through counsel and ignored all orders to return the children from Japan, or provide discovery, the district court also entered a default judgment against the father, and awarded the mother all of the community property and child and spousal support in amounts not supported by the evidence, sole legal and physical custody of the children, and attorney's fees and costs, all without considering the merits of the case. The father appealed.

Having been served up this mess, the Nevada Supreme Court asked the State Bar Family Law Section to file an Amicus brief, which it did through the working group of Robert Cerceo, Katherine L. Provost, and Marshal S. Willick (the Brief can be reviewed in its entirety on the Appeals page of our web site, at http://www.willicklawgroup.com/appeals).

The recited facts show that the parties and children made several moves back and forth between the U.S. and Japan, finally living in Japan with the children. In 2003, the mother, the three children, and the father's parents traveled to the U.S. All sides agree that the mutual consent of the parties was that the mother and children would return to Japan at some future date.

But the mother changed her mind, and decided in May, 2003, to remain in the United States. She enrolled the children in school in Henderson. The children did return to Japan a year later, in June, 2004, but the mother later testified that she thought at the time they were only going for a three-month vacation, although in fact they never returned from Japan. The mother first filed an action seeking custody of the children eight months later.

Even though, at the time, the father had not even been served with paperwork, the district court decided that it had full jurisdiction, and issued custody orders in 2005. It took until 2006 to obtain proof of service of any documents on the father, who then protested the district court's orders, through counsel; ignoring those protests, the district court rendered the orders set out above.

On appeal, the Nevada Supreme Court correctly noted that "Home state" is defined as the state in which a child lived with a parent for at least six consecutive months, including any temporary absence from the state, immediately before the child custody proceeding commenced, under NRS 125A.085. The Court also correctly found that a "a period of temporary absence during the six-month time frame necessary to establish home-state residency" did not interrupt that period.

But from this, the Court decided that the entire three-month period that the mother testified she thought the children were on "vacation" constituted a "temporary absence" that "didn't count" in computing the six-month look-back period for figuring home state jurisdiction, and therefore concluded that the mother's custody action – filed eight months after the children left Nevada for the last time – was filed within six months of the time Nevada had been the children's home state.

The Supreme Court correctly found that the Hague Convention was not applicable in this case, since Japan is not a signatory, and it properly reversed the "default" divorce decree, because the father had filed responsive pleadings and appeared through his attorney, and properly remanded for the district court to "hold a hearing on the merits and render its decision based on the evidence, taking into account statutory guidelines concerning custody, support, property distribution, and attorney fees and costs awards."

But the Supreme Court's order finding that Nevada had subject matter jurisdiction as the children's home state under the UCCJEA is likely to cause future grief and confusion.

What the Court ***should*** have found on the facts disclosed was that Japan was the children's home state on the day that the custody action was filed – since that is where they had been for more than six months before the first custody action was filed – and that custody litigation should have proceeded in Japan. The children were not simply "temporarily absent" from Nevada at some point within the six months preceding the filing of a custody action; they were not present in Nevada ***at all*** for ***eight*** months before the custody action was filed.

The purpose of the uniform acts is to provide ***certainty*** as to jurisdictional decisions – once facts are known (by admission or judicial decision), only ***one*** jurisdictional result should ever be possible under the rules they establish. By extending the objective 6-month look-back period set out in the UCCJEA by a totally subjective period in which the left-behind parent claimed she "thought" the children were "temporarily" absent, however, the Court has made determination of child custody jurisdiction in Nevada far more uncertain and subjective than the uniform act tries to make it.

Worse, the face of the opinion makes clear that the last time the parties had any unified intention, it was that the children lived in Japan and were only ***visiting*** the U.S. The mother simply changed her mind after coming here. If anything, those facts indicate that the "temporary absence" was from ***Japan***, not from the U.S. (although some fault must fall to the father for not initiating the custody case within six months after the children left Japan).

Rendering a ruling for the Nevada litigant on the basis set out was unfortunate. Others will review *Ogawa* elsewhere in years to come, and it may look like one of the sort of parochial decisions in favor of whichever party happened to live in the jurisdiction rendering the decision that tend to be condemned, if not ridiculed, by later reviewing courts.

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REMINDER INVITATION:

ALL RECIPIENTS OF THESE LEGAL NOTES ARE INVITED TO AN OPEN HOUSE: Bob Cerceo, Esq., and The Willick Law Group are pleased to provide an evening with "Tierra Negra & Muriel Anderson," in concert – new world flamenco guitar. At the Willick Law Center, 3591 East Bonanza, on Wednesday, January 6, from 5:30-7:30 p.m. Soft drinks, wine, beer, and light snacks provided, and CDs will be available.

To visit our web site and review its contents, go to http://www.willicklawgroup.com/home. For the Amicus brief and Opinion in this case, go to http://www.willicklawgroup.com/appeals.

This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.