

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

11-12-2009

Summary of Ogawa v. Ogawa, 125 Nev. Adv. Op. No. 51

Zachary Lowe
Nevada Law Journal

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Law Commons](#)

Recommended Citation

Lowe, Zachary, "Summary of Ogawa v. Ogawa, 125 Nev. Adv. Op. No. 51" (2009). *Nevada Supreme Court Summaries*. 348.

<https://scholars.law.unlv.edu/nvscs/348>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Ogawa v. Ogawa, 125 Nev. Adv. Op. No. 51 (November 12, 2009)¹

FAMILY LAW – DEFAULT DIVORCE AND CHILD CUSTODY

Summary

Appeal from district court's amended default divorce decree determining custody of the parties' three minor children and dividing community property. The Court decided three separate issues in the appeal: (1) Whether the district court had home-state jurisdiction to make child custody determinations under the Uniform Child Custody Jurisdiction and Enforcement Act, codified at NRS Chapter 125A; (2) Whether the district court properly held that Nevada served as the children's "habitual residence" and granted immediate return of the children, even though Japan is not a signatory of Hague Convention on the Civil Aspects of International Child Abduction; (3) whether the district court properly entered the decree by default, notwithstanding, that Shinichi, through counsel, answered the divorce complaint and filed a countercomplaint for divorce?

Outcome

The Court answered the first question affirmatively holding the district court had home-state jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified at NRS Chapter 125A. The Court also found the district court within its authority to enter custody orders under UCCJEA. However, they noted the order is unenforceable under the Hague Convention, since Japan is not a signatory. Nevertheless the parties are free to pursue other remedies and the inapplicability of the Hague Convention did not limit the district court's authority to order the children's immediate return. Finally, the Court held that the district court erred in awarding the divorce decree by default because Shinichi made an appearance through counsel, answered the complaint, and demonstrated intent to defend against the action.

Factual and Procedural History

Appellant Shinichi Ogawa and respondent Yoko Ogawa married in Japan in 1997. Between 1998 and 2002, the parties had three children, all born in Japan. During this time the couple lived intermittently in the U.S. and Japan. Yoko became a permanent resident of the U.S. and the couple bought a home in Henderson, Nevada.

Although the parties ultimately settled in Japan, in early 2003, Yoko and the children traveled to the U.S. and she decided they should stay permanently in Henderson, Nevada. In 2004, the children returned to Japan for an alleged summer vacation. However, at the end of summer, Sinichi told Yoko the children would be staying. The children have resided with their father since that date.

Eight months after the children returned to Japan, Yoko filed for divorce in Nevada district court. She also petitioned the district court for the immediate return of her children. During a hearing, the district court noted it had subject matter jurisdiction over the custody issue, because Nevada was the children's "habitual residence."² Although Sinichi had not been served with any court documents, the court entered an ex parte order awarding Yoko temporary sole

¹By Zachary Lowe

² See International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11611 (1988).

custody of the children, and ordered Shinichi to return the children immediately on March 29, 2005.

Shortly after being served on January 10, 2006, Shinichi, through U.S counsel, moved to vacate the March order. He challenged the courts subject matter jurisdiction with respect to the custody issues. In February 2006, Yoko filed a motion for an order to show cause why Shinichi should not be held in contempt for failure to comply with the March order directing him to return the children to the Unites States. At a subsequent hearing on the motion, in which Shinichi appeared through counsel, the district court confirmed its subject matter jurisdiction pursuant to the UCCJEA and ordered Shinichi to appear and show cause why he should not be held in contempt.

On May 16, 2006 Shinichi filed an answer and countercomplaint for divorce. The district court heard the divorce proceeding on September 20, 2006. Once again Sinichi appeared solely through counsel. The district court declared that it would enter a default judgment against Shinichi based on his non-appearance. The district court explained that whatever Yoko requested in the order would be granted in the decree.

The district court entered a default divorce decree on November 22, 2006. The order gave Yoko sole legal and physical custody and ordered that Shinichi have “no contact with the minor children.” Furthermore, Yoko was awarded spousal and child support, the marital home, car, and all personal property. Shinichi timely appealed.

Discussion

The issues raised on appeal include whether the district court properly (1) exercised subject matter jurisdiction over the children; (2) relied on the Hague Convention and ordered the children’s return; and (3) entered a default divorce decree against Shinichi.

The district court properly determined that Nevada is the children’s home state

The Court held that the district court properly exercised jurisdiction to enter custody orders. Although the children had not physically been present in Nevada for eight months when Yoko filed her complaint, their absence was expressly due to Shinichi’s wrongful extension of what should have been a vacation. Therefore, the Court did not count the summer vacation months in determining home state jurisdiction.

The Court noted that the UCCJEA governs subject matter jurisdiction over child custody issues.³ The UCCJEA serves to prevent jurisdictional conflicts in child custody issues and to deter child abduction.⁴ The UCCJEA permits only one state, usually the “home state,” to have authority to make custody determinations.⁵ “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.⁶ Therefore, the Court recognized that a “temporary absence” during the six-month time frame of home-state residency does not extinguish state jurisdiction.⁷ Thus, the Court concluded that if Nevada is either the child’s home state when the child custody proceedings commence, or was the child’s home state

³ NEV. REV. STAT. § 125A.305 (2007).

⁴ UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 101 cmt. (1997); 9 U.L.A. 657 (1999) (explaining the UCCJEA’s purpose; *see also* Ruffier v. Ruffier, 190 S.W.3d 884, 889 (Tex. App. 2006); *see generally* NEV. REV. STAT. ch. 125A (2007).

⁵ *See* Hart v. Kozik, 242 S.W.3d 102, 106-07 (Tex. App. 2007).

⁶ NEV. REV. STAT. § 125A.085 (2007).

⁷ *See* Felty v. Felty, 882 N.Y.S.2d 504, 508 (N.Y. App.Div. 2009).

within six months before the proceeding commenced and the child is absent from Nevada, but a parent continues to live in Nevada, Nevada courts have jurisdictional priority to make initial child custody determinations.¹

In this case, the Court noted that substantial evidence supports the district courts finding that the children left Nevada and traveled to Japan for a three-month summer vacation. Consequently, pursuant to UCCJEA, the Court found Nevada to be the children's home state because the vacation from June through August did not interrupt the six-month pre-complaint residency requirement.

Although the Hague Convention does not provide a basis for the district court to order the children's return to the U.S., the district court had authority to enter custody orders, since it had jurisdiction over the custody dispute under the UCCJEA

The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty that promotes the prompt return of children wrongfully taken from their state of residence.⁸ When the district court ordered the return of the children it referenced the Hague Convention as authority. However, Japan is not a signatory to the Hague Convention; therefore, the Court ruled it did not apply to this case.²

Nevertheless, the Court did affirm the district court's authority to issue the order pursuant to the UCCJEA. Thus, it held the district court properly granted the motion for the children's immediate return even though the Hague Convention enforcement remedies do not apply.

Default Divorce Decree

Nevada Rule of Civil Procedure 55(a) governs default procedure, and provides, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."⁹

The Court concluded that default was inappropriate in this case because Shinichi answered the complaint and appeared at the divorce hearing through counsel.¹⁰ Therefore, the Court concluded that the district court erred in entering default against Shinichi.

¹ See NEV. REV. STAT. § 125A.305(1)(a) (2007).

⁸ 42 U.S.C. §§ 11601-11611 (1988).

² U.S. v. Amer, 110 F.3d 873, 881 (2d Cir. 1997) (explaining that the Hague Convention principles are applicable only to those countries that have signed the Convention and thereby agreed to abide by its terms); Taveras v. Taveras, 397 F. Supp. 2d 908, 912 (S.D. Ohio 2005) (acknowledging that there is no remedy under the Hague Convention when a nonsignatory country is involved and that "hard-line view" applies because "only those countries that are signatories have an obligation to reciprocate by affording litigants the same remedies in their courts"); Mezo v. Elmergawi, 855 F. Supp. 59, 63 (E.D.N.Y. 1994) (same); Matter of Mohsen, 715 F. Supp. 1063, 1065 (D. Wyo. 1989) (same); see also Smita Aiyar, *International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach*, 21 EMORY INT'L L. REV. 277, 294-97 (2007) (discussing remedies beyond the Hague Convention and noting that nonsignatory nations generally ignore signatory nations' requests for the children's return and instead apply their own laws to determine custody issues).

⁹ NEV. R. CIV. P. .55(a).

¹⁰ See *In Interest of M.M.*, 708 So. 2d 990, 992 (Fla. Dist. Ct. App. 1998) (providing that a trial court's decision to enter a default judgment against parties for failing to appear at a hearing was improper because the parties "'appear[ed]' through their counsel"); *Owen v. Healy*, 896 A.2d 965, 967-68 (Me. 2006) (pointing out that the "fact that a person is a party to a civil action does not in itself impose a legal obligation upon that person to be present at trial," and thus, when a party does not personally appear at trial, but his or her attorney does appear, a default against that party is not appropriate); *Rocky Produce, Inc. v. Frontera*, 449 N.W.2d 916, 917 (Mich. Ct. App. 1989) (reversing a default judgment entered based on a civil defendant's failure to personally appear at trial and holding

Conclusion

The Court concluded that, under the UCCJEA, Nevada is the children's' home state. Since Nevada is the home state, the district court exercised proper authority to render custody decisions. Furthermore, the Court concluded that the district court had authority to order the immediate return of the children pursuant to the UCCJEA. Finally, because [he] filed responsive pleadings and appeared through his attorney, the Court concluded that the district court erred in entering a default judgment against him. Accordingly, the Court reversed the district court's default judgment and remanded the matter to the district court for a decision on the merits.

that, "absent a subpoena or order from the court to appear, a defendant in a civil case is not required to appear in person for a scheduled trial"); *In re Brandon A.*, 769 A.2d 586, 589 (R.I. 2001) (defining "an appearance as '[a] coming into court as party to a suit, either in person or by attorney'") (quoting *Nisenzon v. Sadowski*, 689 A.2d 1037, 1048 (R.I. 1997)); *LeBlanc v. LeBlanc*, 778 S.W.2d 865, 865 (Tex. 1989) (concluding that if a party is represented at trial by counsel, there is no default judgment even if the party does not personally appear); *see also* *State v. Sargent*, 122 Nev. 210, 216, 128 P.3d 1052, 1056 (2006) (explaining, in the context of a criminal case proceeding in the justice court, that "when the defendant files a waiver of his personal appearance and his counsel appears at the preliminary hearing on the date and time required, the defendant's lack of personal appearance does not constitute a failure to appear"); *Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 653, 6 P.3d 982, 983 (2000) (indicating that a party may make an appearance either in person or through his or her attorney).