71130-0

71130-0

No. 71130-0
COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

IN RE: PETITION FOR RETURN OF CHILDREN
UNDER THE HAGUE CONVENTION
ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD
ABDUCTION

MARIE-CATHERINE SMITH,

Petitioner / APPELLEE

v.

ELIKA KOHEN,

Respondent / APPELLANT

On Appeal From the
SNOHOMISH COUNTY SUPERIOR COURT
Cause No. 13-2-08326-2

The Honorable Richard T. Okrent, Judge

APPELLANT'S OPENING BRIEF[1]

Aug. 15, 2014

Elika S. Kohen, Pro Se
14702 32nd PL W
Lynnwood, WA 98087
(425) 954-7103

1 RAP 10.3(a)

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

I. INTRODUCTION

Mr. Kohen, the Appellant, and Ms. Smith have two children together: Anya-Marie, and Lydia-Maayan, (ages 3 and 1 at the time of the Trial Court's decision). On Nov. 13, 2013, the Trial Court ordered the Children's return to Canada, under the Hague Convention on the Civil Aspects of International Child Abduction.

Mr. Kohen, a *pro se* litigant, appeals the decision, *in good faith*, requesting interested parties to aid the parties and Court, in Brief regarding these complex issues of Private International Law.

II. ASSIGNMENTS OF ERRORS

II.1. THE TRIAL COURT DID NOT HAVE AUTHORITY TO ORDER THE RETURN OF THE CHILDREN

Error No. 1: The Trial Court *erred in law*, allowing the use of the Hague Convention for a one time dust up over a missed flight.

Error No. 2: The Trial Court *erred in law* disregarding the Choice of Court agreement between the parties for the resolution of custody.

Error No. 3: The Trial Court *erred in law* not requiring *all* burdens of proof be met before concluding it had authority to order the return of the children to Canada under the Hague Convention.

Error No. 4: The Trial Court *erred in law* neither concluding, nor attempting to conclude, that Ms. Smith's rights of custody were breached under the law of the State in which the Children were "habitually resident," (Quebec, Canada), immediately before their removal or retention.

II.2. ERRORS OF PROCESS

Error No. 5: The Trial Court *erred in law* ordering the return of the Children in Summary Judgment, (denying a continuance, and trial), even though facts, material under the Convention, were in dispute.

Error No. 6: The Trial Court *erred in law*, not ordering the dismissal of the Petition for the Return of the Children, or at least ordering a

more definitive statement.

II.3. Errors of Compliance and Discretion

Error No. 7: The Trial Court *erred in law,* contravening the Hague Convention making conclusions regarding Habitual Resdience, but disregarding all available facts.

Error No. 8: The Trial Court *erred in law* making its conclusion regarding "*Habitual Residence,*" (specifically in view of duration of domicile), according to the Uniform Child Custody Jurisdiction and Enforcement Act rather than within the meaning of the Convention.

Error No. 9: The Trial Court *erred in law* concluding that the children were *Wrongfully Removed, resultant and consequently of* being Wrongfully Retained.

Error No. 10: The Trial Court *erred in law* concluding that the Children were Wrongfully Retained in the United States.

Error No. 11: The Trial Court *erred in law* ordering attorney's fees in its denial of the Motion to Dismiss.

Error No. 12: The Trial Court *erred in law,* consequently, ordering attorney's and other fees for the Petition of the Return of the Children.

II.4. Errors of Fact

Error No. 13: The Trial Court *erred in fact*, finding that Mr. Kohen did not make any attempts to resolve any issues between himself and the petitioner, simply abducted the children without any discussion or agreement with, or knowledge of Ms. Smith.

Error No. 14: The Trial Court *erred in fact* in its finding of *who* was responsible for the Children's alleged "Wrongful Retention."

III. Statement of Issues

III.1. Did the Trial Court have Authority to Order the Return of the Children?

Issue No. 1: Does the Trial Court have authority to order the return of the Children, if the mandated Burdens of Proof are not met?

Issue No. 2: Under the Hague Convention, did the Trial Court have authority to disregard the *Choice of Court* agreement between the parties?

Issue No. 3: Under the Convention, does a Trial Court have authority to define "Habitual Residence," under the laws of the local "*State,*" (the UCCJEA in this circumstance), and not make determinations of "Habitual Residence" within the meaning of the

Convention?

Issue No. 4: Under the Hague Convention, does a Trial Court have authority to Order the return of Children without first determining if a party's rights of Custody were breached under the law of the State, (Quebec, Canada), in which the children were removed?

Issue No. 5: Under the Hague Convention, does a Power of Attorney, *executed a month and a half after the children arrived the United States*, constitute as and for Consent and/or Acquiescence for the Children to remain in the United States, at least for the duration and purpose specified?

Issue No. 6: As an *Issue of First Impression*, if a Trial Court does in fact find that action was wrongful, but the party in question is not at fault, does the Trial Court still have authority to order the Return of the Children under the Hague Convention?

III.2. Issues of Process

III.3. Issues of Compliance and Discretion

Issue No. 7: In the case of infant children, does shared and well-settled parental intent outweigh determinations of Habitual Residence found through duration of domicile?

Issue No. 8: As an *Issue of First Impression*, if the Trial Court concludes that the Removal and/or Retention of the Children was wrongful, yet the party in question is not at fault, (as in a case where the Retention was unavoidable), does the Trial Court have discretion to recognize this scenario as an affirmative defense and not order the return of the Children?

Issue No. 9: Even if the Choice of Court agreement between the parties is not recognizable, does their *act of trying* to settle the Choice of Court substantiate that both parties had a shared and well-settled intent for the children to be in the United States?

Issue No. 10: As an *issue of first impression*, can a Trial Court conclude that "Wrongfulness" should be assigned to the act of the Removal or Retention in question, but not impute "Wrongfulness" to a party, as would occur in a case if a Retention is unavoidable?

Issue No. 11: As an *issue of first impression*, can a party plead "no-fault" Removal and/or Retention as an affirmative defense so the Trial Court does not assign Wrongfulness to the action and the resulting decision is neutral in view of custody proceedings?

III.4. ISSUES OF PROCESS

Issue No. 12: Due Process: Under the Convention, did the Trial Court have Discretionary Authority to Deny a Continuance, or Trial as part of its mandate to ensure the most expeditious procedures available?

Issue No. 13: Vexatious Litigation: Under Washington State Law, is it frivolous for a *pro se litigant* to Motion for Dismissal, when the bases in fact and bases in common law are clearly apparent?

Issue No. 14: Habitual Residence: Under the Convention, can "Habitual Residence" be changed during a "Sabbatical" by the duration of domicile alone?

Issue No. 15: Abuse of the Convention: Does a Trial Court have Discretionary Authority to apply the Hague Convention to a "One Time Dust Up"?

Issue No. 16: Abuse of the Convention: Under the Convention, does "Wrongful Retention" equate to "Wrongful Removal" ?

II. STATEMENT OF THE CASE

1. Dec. 2009, (approx.): As Visitors, Mr. Kohen and his son, (8yrs

old), left Washington State, United States to briefly visit Quebec, Canada, and then shortly thereafter moved temporarily to Ottawa, Ontario, *(see CP 18, 19, 24-25, Parties, Children, and History of Residences)*.

2. Feb. 1, 2010: Mr. Kohen and Marie-Catherine Smith got married, traveling to Ogdensburg, NY, from Ottawa, Ontario, and returned, *(see CP 24, History of Residences)*.

3. Dec. 2009-Aug.2010, (8 mos.): Ms. Smith, Mr. Kohen and his son, (8 yrs old), lived in Ontario, Canada, as Visitors, *(see CP 24-25, History of Residences)*.

4. Aug. 2010-Feb.2012, (*18 Mos.*): The family "settled[2]" in Washington, United States, *(see CP 24-25, History of Residences)*.

5. Sep. 12, 2010: Anya-Marie Kohen was born in Washington, United States, only having U.S. Citizenship, *(see CP 19, Involved Children)*.

6. Feb. 7, 2012: Ms. Smith, and Anya-Marie, (*17 months old*), and her older brother, (*9 yrs old*), left Washington State, to Ontario, Canada, staying with her parents in Bristol, Quebec, *(see CP 24-25, History of Residence)*: **a.)** Ms. Smith mislead the Trial Court, stating

2 Material Fact: Is the duration at each domicile sufficient enough to determine if an infant has become "Acclimatized" to that residence?

that she returned to Canada, with the Children, living with her parents, to Sponsor Mr. Kohen's and his son's immigration to Canada—because "of financial reasons", *(See CP 147)*; **b.)** Mr. Kohen refuted Ms. Smith's unsubstantiated claim, providing evidence to the court that the intention of the visit was temporary, as Mr. Kohen accepted a job opportunity in New Jersey so that he could establish a residence for the family near the U.S./Canadian border to accommodate visits with Ms. Smith's family, *see CP ###*. Mr. Kohen's sizable tax return the following year clearly calls into question Ms. Smith's unsubstantiated claim regarding "financial issues"—especially so, as Mr. Kohen had only worked a few months before Ms. Smith asked him to intervene and returned to Canada, *see CP ###*.

7. Feb. 21, 2012: Mr. Kohen left Washington State, for New Jersey, having accepted a job, (*see CP 24, Timeline of Events)*.

8. Mar. 15, 2012: Lydia-Maayan Kohen was born in Ontario, Canada, *(see CP 25, History of Residences)*, during Ms. Smith's stay with her parents.

9. Feb. 21, 2012-Jul. 2012: Mr. Kohen frequently traveled to visit Ms. Smith and the children, New Jersey, United States to Bristol,

Quebec, Canada, every two weeks, according to Ms. Smith, *(See CP. 148, Ms. Smith's Declaration)*.

10. Jun. 23, 2012: Ms. Smith conveyed to Mr. Kohen that she was in extreme conflict with her family, stating, "get me out of here please," *(see CP 24, Timeline of Events)*.

11. Jul. 19, 2012: As Ms. Smith's request was urgent, and as Mr. Kohen had not yet established a residence for the family, Mr. Kohen established a residence for the family in Georgia, United States, *(see CP 24, Timeline of Events)*.

12. Jul. 27, 2012, approx.: Ms. Smith attempted to return to the children to the United States, (Mr. Kohen's son already being in the United States), but was denied entry into the United States, (*see CP 25, Timeline of Events).*

13. Jul. 27, 2012, approx: Ms. Smith reports to Mr. Kohen that their daughter, Anya-Marie, was abducted by her mother and aunt, (*see CP 25, Timeline of Events).*

14. Jul. 27, 2012: Mr. Kohen purchased a round-trip ticket to Ontario, Canada, to return his daughter, (in-lap), to the United States, (*see CP 25, Timeline of Events)*.

15. Aug. 2, 2012: Mr. Kohen arrived in Ottawa, Canada, and both

parties pursued support from Campbell's Bay Police, Montreal Police, the Children's Aid Society of Ottawa, and the CLSC, (Local Community Service Center), to ensure the safety of Ms. Smith and the children, and to ensure that Ms. Smith was pursuing counseling and treatment, (*see CP 25, Timeline of Events).*

16. Mr. Kohen was the primary caregiver for the children in Canada as he did not have status in Canada, (*see CP 178, Ms. Smith's Declaration).*

17. Mr. Kohen convinced Ms. Smith that the children should not be separated, See CP, and did not return to Georgia, United States with Anya-Marie as planned, (*see CP 149, Ms. Smith's Declaration)*.

18. Mr. Kohen, and Ms. Smith, made plans to utilize Mr. Kohen's tax return to pay for his, and the Children's return to the United States around March, 2013, as his "Visitor" status in Canada would expire then, (*see CP 25, Timeline of Events, CP 149. Ms. Smith's Declaration)*).

19. Feb. 11, 2013: Ms. Smith began making living arrangements for Mr. Kohen and the Children in the U.S., while she remained behind to file for immigration, *(see CP 25, Timeline of Events)*.

20. Mar. 13, 2013: Mr. Kohen applied to extend his Visitor's Visa, as his Income Tax return was significantly delayed, (*see CP 25, Timeline*

of Events).

21. Jun. 25, 2013: Mr. Kohen finally received his income tax return in the amount of $9,740.00 (USD), (*see CP 25, Timeline of Events).* **a.)** Mr. Kohen purchased tickets, with Ms. Smith's consent, for $1,468.17 for Mr. Kohen and the children departing Montreal on Jul. 2, 2013, with a return date of Oct. 2, 2013. **b.)** Mr. Kohen contends that the return tickets were purchased because: **c.)** they were Discounted "Priceline" Tickets, and the return tickets only costed about $50.00 more.; **d.)** As Ms. Smith has not firmly decided which country she wanted to live in, Mr. Kohen wanted the opportunity to return with the children in the event she changed her mind. **e.)** And primarily, Mr. Kohen wanted to ensure there was an opportunity to return in case there was an emergency, as when Ms. Smith attempted to return the children to the United States, the year prior, she experienced extreme conflict with her family, resulting in severe panic attacks, eventually involving the Campbell's Bay Police, Montreal Police, Youth Protection, Social Services, and Mr. Kohen had to fly to Canada to intervene.

22. Jul. 2, 2013: Ms. Smith firmly settled to move and immigrate to the United States and began the immigration process by having her

fingerprints taken for an FBI CJIS background check required for immigration, (*see CP 125, Exhibit E, FBI Application)*.

23. Jul. 2, 2013: Mr. Kohen, and the three children, (Anya-Marie, Lydia-Maayan, and their brother), left Canada to return to the United States, (*see CP 139-140,Exhibit J, Priceline Tickets)*.

24. Jul. 18, 2013: The United States Citizenship and Immigration Services received Ms. Smith's Applications to immigrate to the United States, (I-129F, and I-130), (*see CP 119-132,Exhibits B-G, USCIS Immigration Confirmations)*.

25. Aug. 12, 2013: Ms. Smith executed a Power of Attorney on Mr. Kohen's behalf, appointing him Attorney-In-Fact, explicitly stating: *"Due to my temporary absence, (pending immigration to the United States), I am hereby affirming [Mr, Kohen's] authority with the following extents, concerning the children: a. To make and maintain applicable life, health, and dental insurance policies. b. To make doctor's appointments and make decisions for medical treatment. c. To file and make request for United States and Canadian birth certificates, visa, and passports for our children. d. To file for and request Social Security Numbers within the United States, and Social Identification Numbers in Canada. e. To provide enrollment into school and childcare. f. To make*

travel arrangements when necessary. ... The rights, powers and authority, as my Attorney-In-Fact and "Agent", to exercise any and all of the rights and powers herein granted shall commence and be in full force and effect from July 3rd, 2013,(see CP 117, Exhibit A, power of Attorney)." The Power of Attorney was signed by three witnesses, and sealed by an authorized Notary in Quebec.

26. Aug. 26, 2013: The United States Citizenship and Immigration Services received Mr. Kohen's request for expeditious handling due to what Mr. Kohen believed was extreme urgent need, (*see CP 123, Exhibits D, USCIS Expedite Confirmation)*.

27. Sep. 2, 2013: Ms. Smith directed Mr. Kohen to Petition for Legal Separation in Washington State, United States, confirming this multiple times, (*see CP 26, Timeline of Events, and referenced Exhibits)*.

Sep. 23, 2013: Pursuant to Ms. Smith's continued relationship with her co-worker, and at Ms. Smith's insistence, Mr. Kohen Petitioned for Legal Separation in Washington State. **a.)** Ms. Smith deliberately falsified statements to the Trial Court that Mr. Kohen's Petition for Legal Separation were vexatious, and had she known he would do this, she would never have consented for Mr. Kohen to remove the children from Canada, (*see CP 149, Declaration of Ms.*

Smith), misleading the Trial Court denying there was a *Choice of Court Agreement*. **b.)** Mr. Kohen contends: *"Of Course"* he Petitioned for Legal Separation, *but only* because Ms. Smith insisted, directed him to do so, refused to address her health, because she stated she was abandoning the children, then stated that she wanted to separate them, and because she refused to stop the extra-marital affair, and stop living with her co-worker, (*see CP 27, Timeline of Events, note there is a clerical error in date, and the 23rd is correct.)*.

28. Jul. 2-Sep. 7, 2013: Mr. Kohen became extremely worried and afraid for the safety of Ms. Smith, making repeated and desperate attempts requesting the assistance of Montreal Police, the Local Center of Community Services, (CLSC), the Urgence Psychosociale-Justice (UPS-J), Ms. Smith's management at Target, and when they didn't respond, Mr. Kohen contact Target Global Compliance—repeatedly, (*see CP 25-26, Timeline of Events)*.

29. Jul. 2-Sep. 7, 2013: Though Ms. Smith had confided in Mr. Kohen that she had a relationship with her co-worker, Ms. Smith and her boyfriend continued to confirm that she was indeed "coming back" to the United States, although she would stay with a

friend, or move to Vancouver, British Columbia, Canada, nearby, (*see CP 20-21, Emails, Intentions, etc)*.

30. Jul. 2-Sep. 7, 2013: Ms. Smith confided in Mr. Kohen, in numerous voice, and video calls, and even emails, that her boyfriend was sexually harassing her at work, and harassing her to make a decision between him or Mr. Kohen, not taking "No" for an answer, (*see CP 25-26, Timeline of Events)*..

31. Jul. 2-Sep. 7, 2013: Ms. Smith told Mr. Kohen that her boyfriend was using alcohol to gain her consent for sex, and had sex with her when she was asleep, (passed out), and unaware, (*see CP 25-26, Timeline of Events)*.

32. Jul. 2-Nov., 2013: Mr. Kohen continuously contacted Ms. Smith, including email, to confirm her intentions about returning to the United States, and sent inquiries about returning to Canada, (those were ignored), (*see CP 20-21, Email Exhbits)*.

33. Nov. 8, 2013: For the first time, 5 days before the hearing, Ms. Smith told Mr. Kohen that she was not leaving Quebec, and would not be immigrating to the United States, (*see CP 21,Email, Questions about Care for Children)*.

34. Mr. Kohen continually asked Ms. Smith if the children were

going to return to an intolerable situation that she had described with her boyfriend—all of Mr. Kohen's inquiries about this were ignored. (*see CP 21,Email, Questions about Care for Children)*.

IV. ARGUMENTS

V. A FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED SHOULD BE DISMISSED

1. The Hague Convention on the Civil Aspects of International Child Abduction, U.S. Federal Law, and Hague Convention Precedent have all codified that in order to grant the "relief" of ordering the Return of the Children, Ms. Smith must at least state claims to fulfill the Burden of Proofs to show: **a.)** Ms. Smith was exercising Rights of Custody at the time of their Removal or Retention, or would have if not for the Removal or Retention, AND; **b.)** the Children were Habitually Resident in Quebec, Canada, from where they were removed, or retained from, immediately prior to their Removal or Retention, AND; **c.) Ms. Smith's is required, by law, to show how her rights of custody were breached under the laws of the Quebec, and Canada**, IF in fact the Habitual Residence of the was

Quebec, Canada.

2. Ms. Smith made no attempt to argue that her rights of custody were breached under the law of Quebec, Canada, nor could she as Mr. Kohen reaffirmed Ms. Smith's rights of custody by removing the Children from Canada and retaining them in the United States—because Ms. Smith directed him to do so—to settle them in the United States while she immigrated to the United States.

3. *So what* the Children were domiciled in Canada for 18 months? *So what* Ms. Smith was exercising her rights of Custody at the time of their Removal?

4. Neither the Hague Convention, Canada Law, U.S. Law, or case precedent, preclude parents from acting together to change the Habitual Residence of their family—working together to change residence only of the Children shows recognition and reaffirmation rights of custody.

5. As Ms. Smith did not even attempt to show how her rights of custody were breached under the law of the State in which the Children were removed, she consequently did not fulfill ALL necessary burdens of proof required by law.

6. Not fulfilling the Burden of Proof, Ms. Smith had no claim for

which the Trial Court could grant an Order for the Children's Return under the Hague Convention—and the case should have been promptly dismissed—or at the very least the Trial Court should have ordered a more definitive statement.

V.1. THE ALLEGATION OF WRONGFUL REMOVAL IS ABSURD

1. Article 13 of the Hague Convention states that as an affirmative defense, it must be shown by clear and convincing evidence that the applicant consented or subsequently acquiesced to their Removal or Retention, *(see Hague Convention, Article 13)*.

2. Ms. Smith provided a Power of Attorney consenting to the Children's presence in the United States in view of her temporary absence pending immigration to the United States.

3. The entire case, and allegation of Wrongful Removal of the Children from Canada, to the United States, should have been dismissed on the Court being asked to Take Notice of this evidence, *(see Federal Rules of Evidence, 201 (b), and Washington State Court Rule 12, Defenses on Objections, Failure to State a Claim ...)*.

4. Mr. Kohen contends that Ms. Smith's own sworn statements

before U.S. and Canadian Authorities, and her own Power of Attorney, are self-authenticating documents, and admissible under the Federal Rules of Evidence, Rule 201 (b), and 902 (8) and (10), and clearly provide the bases in fact regarding Mr. Kohen's allegations that Ms. Smith's Petition was vexatious and in contravention to Court Rules.

5. Ms. Smith submitted the completely novel—and absurd—argument that, *"[Mr. Kohen] failed to return to Canada with the children, thus wrongfully removing them, (see CP ###3, line 10),"* a legal conclusion that has no basis in the Hague Convention.

6. In Fact, Removal is proven when it is shown that the Children were removed from the Country—a self-evident fact which Mr. Kohen does not contest. Retention, on the other hand, is less self-evident, especially when the Removal was, in the first place, a Return of the Children from Canada to the United States—**in any case, Removal and Retention rely on vastly different bases in fact and law—incontrovertibly different concepts.**

7. Ms. Smith knew at the time of her statements under oath, and under the penalty of perjury, were false in violation of Court Rules, *(see Washington State Court Rule 11(a)(1), Signing of Pleadings, Motions,*

and Legal Memoranda: Sanctions), stating, *"[Mr. Kohen] did not make any attempt to resolve any issues between himself and [Ms. Smith], but simply abducted the children without any discussion or agreement with, or knowledge of [Ms. Smith], (see Memorandum of Law, pg.8, Lines 15-24, and pg. 9, pgs. 1-2)."*

8. Ms. Smith intentionally mislead the Trial Court, arguing in Memorandum, *"[Ms. Smith] did not acquiesce or consent to the Children's removal from Canada;" and, "There is no evidence that [Mr. Kohen] tried to discuss issues with his wife, [Ms. Smith], nor to have them all make a family decision. [Mr. Kohen] just uprooted the children and left, (see Memorandum of Law, pg.8, Lines 15-24, and pg. 9, pgs. 1-2)"*.

9. Pursuing a judgment that Mr. Kohen "Wrongfully Removed" the Children, rather than "Wrongfully Retained," was clearly vexatious and in violation of Court Rules, *(see Washington State Court Rule 11(a)(3), Signing of Pleadings, Motions, and Legal Memoranda: Sanctions)*, being interposed for the improper purpose of obstructing Legal Separation proceedings, (as they would be stopped pursuant to Article 16 of the Convention), and for the premeditated purpose of asking Canadian courts to make determinations on the merits of custody based on that decision, (in violation of Article 19 of the

Convention).

10. In Fact, Mr. Kohen's allegations of premeditated abuse are substantiated in the motion to Take New Evidence before this Appellate Court, (certain evidences conforming to the Federal Rules of Evidence, regarding Judicial Notice, Rule 201(b)(2)), Mr. Kohen submitting Ms. Smith's own, *new*, sworn and contradictory statements before a Canadian Authority, *after* the order for the Children's Return—with the evident intention of Article 19 of the Convention being violated.

11. Mr. Kohen could not have reasonably formed a response given the incredible absurdity of the accusation that he wrongfully removed the children, "just took the children and left, without discussion, or knowledge of Ms. Smith," or could have framed a response for the incredibly vague legal argument that Wrongful Retention equates to Wrongful Removal.

12. Ms. Smith contended that Mr. Kohen Petitioned for Legal Separation without her knowledge, or consent, and "had she known ..." she "would not have consented for the Children to leave Canada." **Ms. Smith's allegation is absurd—prima facie—OF COURSE Mr. Kohen Petitioned for Legal Separation, and it is**

absurd to consider that his Petition for Legal Separation was interposed for the purpose of gaining unilateral custody. Even if Ms. Smith had not directed Mr. Kohen to Petition for Legal Separation, Mr. Kohen's act of Petitioning for Legal Separation was well founded on the facts that Ms. Smith continued in an extramarital affair with her co-worker, was abandoning the children, and then stating her intention to separate the children. Further, Mr. Kohen and Ms. Smith has already made separate living arrangements for Ms. Smith, in Washington. Ms. Smith's declaration that she couldn't return because she was immigrating to the United States is also absurd—as the Summons to court resolved that issue, or she could have simply withdrawn her application to immigrate—but regardless, again, Ms. Smith reaffirms her intention had been to immigrate to the United States.

13. As a result of the absurdity of the accusation of Wrongful Removal of the Children, and the ambiguity of the legal equivocation with Wrongful Retention, the Trial Court should have ordered a more definitive statement, or dismissed the case altogether, *(see Washington State Superior Court Civil Rules, Rule 12 (e))*.

V.2. RIGHTS OF CUSTODY UNDER QUEBEC, CANADA, WERE NOT BREACHED

1. Desiring to expeditiously resolve, the question "if rights of custody were breached," Mr. Kohen proposes the Court suppose that Ms. Smith *had claimed* that her rights of Custody were Breached according to the U.S. Supreme Court's Decision that *Ne Exeat* rights are Common Law rights of Custody and are in fact rights of custody under the Hague Convention.

1. A *ne exeat* right, in view of the U.S. Supreme Court, is the right to determine the place of Children's residence, and even the right to deny their removal.

2. Mr. Kohen contends that Ms. Smith sabotaged the ability of the Children to return on October 2, 2013, and with intention, and neglect, ignored every attempt and request made by Mr. Kohen that acknowledged those rights.

3. Ms. Smith intentionally manipulated and abused the Hague Convention to separate the Children from their father and brother—because Hague Convention Decisions are incredibly material in the determination on the merits of custody issues even though parties

are forbidden to do this, *(see the Hague Convention on the Civil Aspects of International Child Abduction, Article 19)*.

4. Under the laws of the State where the Children lived immediately prior to the Removal, specifically, Quebec, the Civil Code of Quebec is explicitly clear on how a change of domicile, and thereby a change of residence can occur—*"The proof of such intention results from the* **declarations of the person and from the circumstances of the case**, *article 76, C.C.Q."*

5. .In Fact, Ms. Smith provided a *sealed and notarized Power of Attorney* explicitly stating her intentions to move to the United States, and that while this was pending, Mr. Kohen had authority to settle the Children in the United States.

6. Mr. Kohen introduced this evidence at the hearing, requesting the Trial Court take notice contending that it conforms to the Federal Rules of Evidence, Rule 201 (b), as it could be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, and as self authenticating evidence, according to Rule 902 (8) and (10).

7. But regardless, it is absolutely absurd, *prima facie*, to contend—*within the Hague Convention*—that a missed flight, a mechanical

failure, or other unavoidable circumstance is a breach of parental rights of custody. **The purpose of the Hague Convention is not to redress a one-time "dust up" over travel arrangements**, *(see Appendix VI.1.1., ROUX v. ROUX, 319 Fed.Appx. 571 (9th Cir. 2009))*.

8. Ms. Smith mislead the Trial Court to believe that Mr. Kohen's act of missing the return flight was an intentional denial of rights of custody—this is absolutely unsubstantiated by any evidence, and dispositively proven false by the evident circumstances of the case.

9. Did Mr. Kohen violate Ms. Smith's rights of custody, repeatedly having her confirm her consent—in writing, that she wanted him to Petition for Legal Separation in Washington State? Was the subsequent restraining order—automatically ordered by Court Rule, forbidding the removal of the Children from their residence in Washington State without written consent from the other party a violation of Ms. Smith's Rights of Custody?

10. Did Mr. Kohen violate Ms. Smith's rights of custody by failing to return the children on that flight, because Ms. Smith only granted Written Consent in compliance with the restraining order just three hours before the return flight?

11. As Ms. Smith was well aware, a last minute written email is

insufficient for immigration officials, and would not suffice; so was her failure to provide written consent the result of Mr. Kohen denying her Rights of Custody?

12. Can Ms. Smith's acts of ignoring Mr. Kohen, and other third parties, be imputed to Mr. Kohen as denials of her rights of custody?

13. Did Mr. Kohen violate Ms. Smith's rights of custody, somehow making it so that Ms. Smith ignored his, and third party requests—for months—asking for her help to reschedule the flight and making living arrangements?

14. Was Ms. Smith's lack of effort to come to the U.S./Canada border to pick up the children a demonstration of Mr. Kohen denying her rights of custody?

15. Ms. Smith saw an opportunity to separate the Children from Mr. Kohen and their brother, executed a signed affidavit in support of a Hague Convention application alleging Wrongful Retention—before they were even retained—and three hours before the flight was scheduled to leave, told Mr. Kohen that she was expecting them at the airport that night.

16. Ms. Smith then ignored every attempt to communicate by Mr.

Kohen, and the very next day, Ms. Smith rushed to make a Hague Convention application for their return, at 12:55 (EST), *(see CP ###)*.

V.3. Habitual Residence cannot be determined in Summary Judgment when Material Facts are in Dispute

1. What of resolving the issue of "Habitual Residence"? Can this issue be resolve conclusively with the facts already before the Court?

2. If facts regarding Habitual Residence are still contested, or to be contested, they are all materially relevant to the finding of Habitual Residence under the Convention, and pursuant to *Equal Opportunity Under the Law*, and the right of Due Process, the Trial Court erred in Law, subjecting the decision to Summary Judgment, rather finding facts in Trial.

3. Ms. Smith's entire Petition for the Return of the Children rests on two uncontested "facts": **a.)** the children were domiciled in Canada for 18 months. **b.)** Return tickets purchased.

4. As Mr. Kohen understands the Hague Convention, **"Habitual Residence," within the Convention, is essentially, "Juridical**

Residence," meaning, at the very least, and at the end of all analysis, "the locale which has Jurisdiction for custody matters."

5. Regarding the matter of Jurisdiction, Mr. Kohen alleges that the issue of "Juridical Residence," is clearly resolved by Ms. Smith's explicit consent and Choice of Court agreement, which under the Hague Convention, removes the issue of jurisdiction from the ambit of the Hague Convention entirely and the matter resolved, **(see).**

6. But if the validity of this agreement is called into question, (as the agreement was executed in email, and social networking websites, and didn't specify the name of the Court specifically), Mr. Kohen contends these objections are irrelevant in view of Common Law: any Reasonable or Officious Bystander would undoubtedly conclude that the Court in question for custody proceedings was Washington State.

7. Regardless of the validity of the Consent Order, the fact remains that this discussion did occur, and at the very least, it is clear that Mr. Kohen was still being led to believe that Ms. Smith consented to their retention in Washington State, at least until the custody matters were resolved in Court, and therefore the "Juridical" nature

of Habitual Residence is resolved.

8. Still, Habitual Residence is not changed by the desire and intent of one parent alone—especially in view of a temporary stay and sabbatical, *(see Appendix)*. **a.)** Mr. Kohen, Anya-Marie, and her brother, were still in Canada because of a forced circumstance, namely because Ms. Smith failed to return Anya-Marie and Lydia-Maayan to their Habitual Residence in the United States on or around July 27, 2013. **b.)** Believing that it was in the best interests of all of the children for them not to be separated, there was an agreement to temporarily remain in Canada until all of the children could return to the United States together, *(see Appendix Habitual Residence - Parental Intent)*. **c.)** Lydia-Maayan was born during this temporary stay, and sabbatical, becoming Habitually Resident in the United States, pursuant to Parental Intent, *(see Appendix Habitual Residence – Temporary Stays)*. **d.)** In the case of infant and new born children, their Habitual Residence is determined by the demonstrated, shared intent, of the parents, *(see Appendix Habitual Residence – Infant Children)* **e.)** Ms. Smith began the process of immigrating to the United States, after the tickets were purchased, and before the children left Canada, demonstrating settled intent for

the Children to remain in the United States by having her fingerprints taken for an FBI CJIS background check required for immigration. **f.)** Ms. Smith abandoned the family residence in Canada, and there was no home for the children to come back to. **g.)** Under the Law of Quebec, *(see Appendix, Habitual Residence in Quebec)*, Ms. Smith clearly demonstrated intent to change her own domicile and residence, and that of the children by applying to immigrate to the United States and abandoning the family residence in Quebec. **g.)** No Parental Intent was ever demonstrated to remain in Canada, as Mr. Kohen, Anya-Marie, and her brother, only had Visitor status in Canada, and no attempt was made to immigrate or settle in Canada. **h.)** Ms. Smith, in her own sworn testimony, proved that there was no intent to settle or habitualize the Children in Canada, substantiating Mr. Kohen's claim that efforts were made to ensure they were NOT habitualized, including not enrolling their brother, (10 yrs old), in school, etc.

9. It is impossible, given the entire list of circumstances relevant to this case, and relevant to the definition of Habitual Residence within the meaning of the Convention, to conclude that the Children's Habitual Residence was in Canada,

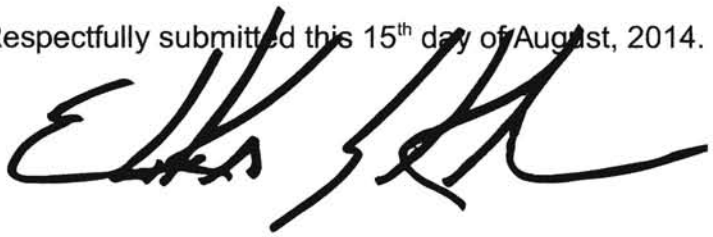
because this determination was based solely on two established facts, and the determination of Habitual Residence in view of the UCCJEA, and the duration of residence.

VI. CONCLUSION

The Trial Court granting of Summary Judgment was error because it denied Mr. Kohen the right of due process, the right to trial, when material facts, under the Hague Convention, were in dispute. It failed to uphold the values of the Convention to protect the Convention from abuse, so that the Convention could protect children from the abusive use of friendlier jurisdictions.

Mr. Kohen respectfully requests the Court of Appeals to reverse the Trial Court's Nov. 13, 2013 Summary Judgments and remand this case for trial.

Respectfully submitted this 15th day of August, 2014.



Elika S. Kohen

III. APPENDIX[3]

III.1. PURPOSE OF THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

III.1.1. *ROUX v. ROUX*, 319 Fed.Appx. 571 (9th Cir. 2009)

the **Hague Convention was designed to remedy wrongful removal and retention**, *and to ensure that rights of custody and access are effectively respected,* **not to redress a one-time visitation dust-up** *over which persons are authorized to drive the parties' youngsters. See Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501 (1980).*

III.1.2. *42 U.S.C. § 11601 (a) - Findings and Declarations*

(a) Findings ... The Congress makes the following findings:(1) The **international abduction or wrongful retention of children is harmful to their well-being**. *(2)* **Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention**.

III.1.3. *Hague Convention on the Civil Aspects of International Child Abduction, Preamble*

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention *and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,*

3 RAP 10.4(c) Issues that require study should be included in the text or appendix to the brief, including ,material portions of Statute, Rule, Jury Instruction or the Like.

III.1.4. ***Hague Convention on the Civil Aspects of International Child Abduction, Article 2***

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. **For this purpose they shall use the most expeditious procedures available**.

III.1.5. ***Hague Convention on Civil Aspects of International Child Abduction, Article 18***

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.
Abuse of the Hague Convention

III.1.6. ***Hague Convention on the Civil Aspects of International Child Abduction, Article 16***

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, **the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention** *or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.*

III.1.7. ***Hague Convention on the Civil Aspects of International Child Abduction, Article 17***

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, **but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention**.

III.1.8. ***Hague Convention on the Civil Aspects of International Child Abduction, Article 19***

A decision under this Convention concerning the return of the child

shall not be taken to be a determination on the merits of any custody issue.

III.2. DEFERENCE TO AND AUTHORITY OF INTERNATIONAL LAW

III.2.1. *ABBOTT v. ABBOTT, 130 S.Ct. 1983, (a), at 1 (U.S. 2010)*

*The ICARA instructs the state or federal court in which a petition alleging international child abduction has been filed to "***decide the case in accordance with the Convention***." §§ 11603(b), (d). P. 5.*

III.2.2. *ABBOTT v. ABBOTT, 130 S.Ct. 1983, (b) (3), at 3 (U.S. 2010)*

*the ICARA directs that "***uniform international interpretation" of the Convention is part of its framework***, see § 11601(b)(3)(B).*

III.2.3. *42 U.S.C. § 11601 (b) - Findings and Declarations*

(b) Declaration
The Congress makes the following declarations:
...
(3) In enacting this chapter the Congress recognizes—
(A) the international character of the Convention; and
(B) the **need for uniform international interpretation of the Convention**.

III.2.4. *Hague Statute of the Hague Conference on Private International Law, Article 1*

The purpose of the Hague Conference is **to work for the progressive unification of the rules of private international law**.

III.2.5. *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Article 4*

Recognition or enforcement of a decision may nevertheless be refused in any of the following cases -

(1) if recognition or enforcement of the decision **is manifestly incompatible with the public policy of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law or if, in the circumstances, either party had no adequate opportunity fairly to present his case;**
(2) if the decision was obtained by fraud in the procedural sense;

III.2.6. *Civil Code of Quebec, 3135*

3155. A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases: ...(3) the decision **was rendered in contravention of the fundamental principles of procedure**; *...(5) the outcome of a foreign decision* **is manifestly inconsistent with public order as understood in international relations**;

III.2.7. *Hague Convention on Choice of Court, Article 1*

In the matters to which this Convention applies and subject to the conditions which it prescribes, **parties may by an agreement on the choice of court designate, for the purpose of deciding disputes which have arisen or may arise between them in connection with a specific legal relationship**, *either -*

(1) the courts of one of the Contracting States, the particular competent court being then determined (if at all) by the internal legal system or systems of that State, or

III.2.8. *Hague Convention on Choice of Court, Article 4*

For the purpose of this Convention the agreement on the choice of court **shall have been validly made if it is the result of the acceptance by one party of a written proposal by the other party expressly designating the chosen court or courts**.

III.2.9. *Droit de la famille — 123502, 2012 QCCS 6431*

[40] The Court finds that **the Mother not only implicitly, but explicitly ceded any jurisdiction over the issue of custody, visitation and child support to the Superior Court of Quebec**.

[41] The agreement between the parties was a freely negotiated agreement which was seen, reviewed, approved and agreed to by both the Mother and the Father, as stated on the signature page of the Consent Order. Such an agreement, ratified by the Courts both in Rhode Island and in Quebec, cannot be taken lightly. Such consent orders or judgments ratifying consent agreements have serious juridical consequences.

[42] **The Hague Convention provides for the possibility of the parties to agree to settle the proceedings** *and the Consent Order represents their settlement agreement.*

[43] **The Mother cannot now, less than a year after she agreed to the Consent Order, change her mind** *and decide that the status quo of the child's physical residence in Rhode Island, a status quo permitted by the Consent Order, has suddenly transferred jurisdiction from the Superior Court of Quebec to the Courts in Rhode Island.*

[44] This is untenable. **Such a result would gravely undermine the purpose of the Hague Convention**, *as well as the possibility to conclude agreements in order to settle pending Hague Convention proceedings.*

III.2.10. *EWHC 1245 (Fam) (28 May 2004), Re C (Abduction: Settlement)*

12. I reached the following conclusions, and ruled accordingly during the second day of the March hearing (reserving to this judgment my detailed reasons).

- **If in such a case the court is satisfied that 'settlement' has taken place then the application falls from the Convention's ambit entirely, and no discretionary power to order return subsists**.

III.3. HAGUE CONVENTION - COMPLIANCE AND DISCRETION

III.3.1. *Hague Convention on the Civil Aspects of International Child Abduction, Article 3*

The **removal or the retention of a child is to be considered wrongful where** *- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone,* **under the law of the State in which the child was habitually resident immediately before the removal or retention***; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, **or by reason of an agreement having legal effect under the law of that State**.

III.4. HAGUE CONVENTION – AFFIRMATIVE DEFENSES

III.4.1. *42 U.S. Code § 11603 (e) (2) - Judicial remedies*

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—
(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and
(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

III.4.1.1. *Hague Convention on the Civil Aspects of International Child Abduction, Article 13*

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or **had consented to or subsequently acquiesced in the removal or retention**; *or*
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

III.5. HAGUE CONVENTION - WRONGFUL REMOVAL AND RETENTION

III.5.1. *42 U.S. Code § 11603 (e) (1) - Judicial remedies, Burdens of Proof*

(e) **Burdens of proof** *(1) A petitioner in an action brought under subsection (b) of this section* **shall establish by a preponderance of the evidence**—*(A) in the case of an action for the return of a child,* **that the child has been wrongfully removed or retained within the meaning of the Convention**; *and (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.*

III.5.1.1. ***Hague Convention on the Civil Aspects of International Child Abduction, Article 3***

III.6. HAGUE CONVENTION - RIGHTS OF CUSTODY

III.6.1. *ABBOTT v. ABBOTT, 130 S.Ct. 1983, (b) (1), at 2 (U.S. 2010)*

The Convention recognizes that custody rights can be decreed jointly or alone, see Art. 3(a), and Mr. Abbott's **ne exeat right** *is best classified as a "joint right of custody," which the Convention defines to "include rights relating to the care of the person of the child and,* **in particular, the right to determine the child's place of residence**,*" Art. 5(a).*

III.6.2. *ABBOTT v. ABBOTT, 130 S.Ct. 1983, (2), at 3 (U.S. 2010)*

(2) **This Court's conclusion is** *strongly supported and informed by the longstanding view of the State Department's Office of Children's Issues, this country's Convention enforcement entity,* **that ne exeat rights are rights of custody**.

III.6.3. Hague Convention on the Civil Aspects of International Child Abduction, Article 5

For the purposes of this Convention -
a) **"rights of custody" shall include** *rights relating to the care of the person of the child and, in particular,* **the right to determine the child's place of residence**;

III.6.4. *Civil Code of Quebec, Article 76 – Change of Domicile*

Change of domicile is effected by a person establishing his residence in another place with the intention of making it his principal establishment.

The proof of such intention results from the declarations of the person and from the circumstances of the case.

III.6.5. *Civil Code of Quebec, Article 77 – Resides, "Ordinarily"*

The residence of a person is the place where he ordinarily resides; if a

person has more than one residence, his principal residence is considered in establishing his domicile.

III.6.6. *Civil Code of Quebec, Article 78, Uncertain Domicile and Residence*

A person whose domicile cannot be determined with certainty is deemed to be domiciled at the place of his residence.

A person who has no residence is deemed to be domiciled at the place where he lives or, if that is unknown, at the place of his last known domicile.

III.6.7. *MOZES v. MOZES, 239 F.3d 1067, 1071 (9th Cir. 2001)*

*We begin by identifying the role of an appellate court in reviewing a determination of habitual residence under the Hague Convention. In doing so, we are mindful that Congress has emphasized "**the need for uniform international interpretation of the Convention**." 42 U.S.C. § 11601(b)(3)(B). The Perez-Vera Report describes **"habitual residence" as "a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile."** Perez-Vera Report at § 66. In seeking to understand this "well-established concept," id., we discover that although the term "habitual residence" appears throughout the various Hague Conventions,6 none of them defines it. As one commentary explains, "this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems." J.H.C. Morris, Dicey and Morris on the Conflict of Laws 144 (10th ed. 1980) ["Dicey Morris"]. ...*

Clearly, the Hague Conference wished to avoid linking the determination of which country should exercise jurisdiction over a custody dispute to the idiosyncratic legal definitions of domicile and nationality of the forum where the child happens to have been removed. **This would obviously undermine uniform application of the Convention and encourage forum-shopping by would-be abductors. To avoid this, courts have been instructed to interpret the expression "habitual residence"**

according to "the ordinary and natural meaning of the two words it contains[, as] a question of fact to be decided by reference to all the circumstances of any particular case." *C v. S (minor: abduction: illegitimate child), 2 All E.R. 961, 965 (Eng.H.L.).*

III.7. HABITUAL RESIDENCE - ABANDONMENT OF RESIDENCE

III.7.1. *HOLDER v. HOLDER, 392 F.3d 1009, 1019 (9th Cir. 2004)*

*Instead, the inquiry is, more generally, whether the children's lives have become firmly rooted in their new surroundings. Simply put, w***ould returning the children to Germany be tantamount to sending them home?** *In answering this question,* **we discuss the children separately because the five-year age gap between the two boys is relevant to the acclimatization analysis**.

III.8. HAGUE CONVENTION - HABITUAL RESIDENTCE, INFANTS

III.8.1. *HOLDER v. HOLDER, 392 F.3d 1009, 1020 (9th Cir. 2004)*

When and how does a newborn child acquire a habitual residence? The place of birth is not automatically the child's habitual residence. *See Delvoye v. Lee, 329 F.3d 330, 334 (3rd Cir.), cert. denied, 540 U.S. 967, 124 S.Ct. 436, 157 L.Ed.2d 312 (2003) (holding that a child born in Belgium was nonetheless habitually resident in the United States because the mother "traveled to Belgium to avoid the cost of the birth of the child and intended to live there only temporarily");*

*11. In B v. H, 1 Fam. L.R. 389 (Eng. 2002), an English court was faced with determining the habitual residence of a child who was conceived in England but born in Bangladesh. The court explained that "like the habitual residence of infants[,] the habitual residence of a new born baby is determined by the position of the parents who have parental responsibility for him and care and control of him." As the court emphasized, "***It is the settled intentions of the parents that render that***

`residence' of the baby habitual." *Id.*

III.8.2. *HOLDER v. HOLDER, 392 F.3d 1009, 1021 (9th Cir. 2004)*

*It is sufficient for the present case to conclude that J***eremiah has not established that the infant's limited time in Germany so firmly embedded his life there that his habitual residence shifted overseas despite the lack of shared parental intent**. *Cf. In re Ponath, 829 F.Supp. 363, 367 (D.Utah 1993) ("Although it is the habitual residence of the child that must be determined,* **the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant**.*").*

III.9. HAGUE CONVENTION – TEMPORARY, FOREIGN STAYS

III.9.1. *HOLDER v. HOLDER, 392 F.3d 1009, 1018 (9th Cir. 2004)*

On the other end of the spectrum "are cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period. In these cases, courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence." Id. at 1077. **In the middle rest cases where a parent "had earlier consented to let the child stay abroad for some period of ambiguous duration**." *Id. The Holders' case presents yet another marker on the continuum.*

*This case falls closer to the end of the continuum marked by moves for "specific, delimited" periods of time, id., such as sabbaticals and other conditional stays. See, e.g., Ruiz, 2004 WL 2796553, at *11 (deferring to district court's finding that there was no shared intention to abandon the prior United States habitual residence based on the conditional nature of the move to Mexico);*

III.10. AUTHENTICATION OF EVIDENCE

III.10.1. *Federal Rules of Evidence, Judicial Notice, Rule 201 (b)*

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

III.10.2. *42 U.S. Code § 11605 - Admissibility of documents*

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, **no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court**.

III.10.3. *RCW 5.40.010 , Pleadings do not constitute proof*

Pleadings sworn to by either party in any case shall not, on the trial, be deemed proof of the facts alleged therein, *nor require other or greater proof on the part of the adverse party.*

III.10.4. *42 U.S. Code § 11607 - Costs and fees*

(b) Costs incurred in civil actions
(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).
(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.
(3) Any court ordering the return of a child pursuant to an action brought

under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, **unless the respondent establishes that such order would be clearly inappropriate.**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 1

Marie-Catherine Smith, Respondent, vs. Elika Kohen, Appellant.	**WASHINGTON STATE APPELLATE COURT** **DIVISION 1:** **No. 71130-0** **APPELLANT'S CONFIRMATION OF SERVICE**

Documents Served

1. Appellant's Opening Brief

Method of Service

In accordance with the previous stipulation between both parties filed with the Snohomish County Superior Court, and in accordance with the General Order of the Appellate Court:

To: stacy@heard-law.com & paralegal@heard-law.com **At:** Aug 15, 2014 @ 15:49pm PST

I, Elika Kohen, the Appellant, and Undersigned, certify that on Aug 15, 2014, I caused to be served via email a true and correct copy of these documents submitted to the Snohomish County Superior Court;

Signature of the Defendant
Elika Kohen
14702 32 PL W, Lynnwood, WA, 98087
425/954.7103

Gmail — es kohen <oneflame@windandflame.com>

RE: Kohen/Smith: Service - The ACTUAL Opening Brief

Heard Law Paralegal <paralegal@heard-law.com> Fri, Aug 15, 2014 at 6:51 PM
To: es kohen <oneflame@windandflame.com>
Cc: Stacy Heard <stacy@heard-law.com>, paralegal@heard-law.com

Received.

From: es kohen [mailto:oneflame@windandflame.com]
Sent: Friday, August 15, 2014 5:49 PM
To: Heard Law Paralegal; Stacy Heard
Subject: Kohen/Smith: Service - The ACTUAL Opening Brief

Ms. Heard,

Please confirm receipt.

As you have designated Supplemental Papers, it may be necessary to amend this.

Please let me know if there is anything that you and I can agree to expedite this.

Regards,

Elika Kohen

oneflame@windandflame.com

425/954.7103