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REPLY TO RESPONDENT'S BRIEF

1. Respondent's Statement of Case and Mr. Iturribarría's knowledge of Ms. Bazaldúa's residing in Shelton.

Ms. Bazaldúa claims Mr. Iturribarría misstates the facts on page eight of Appellant's Brief as to when he learned Ms. Bazaldúa had relocated to Shelton, Washington to her mother's house, claiming "[t]he record reflects that Appellant was advised by Respondent's mother directly within a few days of her arrival. PRP 3." Respondent's Brief at 2. The record, however, states otherwise.

Ms. Bazaldúa bases her claim on her response to Commissioner Adamson's question which was objected to by Mr. Iturribarría's attorney.

THE COURT: [A]fter you arrived at your mother's residence here in Shelton, did you at any time, and if so when, contact your husband to let him know that you were in Shelton?

MS. BAZALDÚA: No, my father and my mother telephone he (sic).

MR. PREBLE: Object to not - object to everything after the no.

THE COURT: Well, I . . .

MR. JARRETT: No, that's responsive.

THE COURT: Okay, it is responsive. Go ahead, Karen. What was the answer?

THE INTERPRETER: My mom and dad talked to him immediately. I didn't talk to him until a few days later.

...

THE COURT: Okay. Now she has indicated that her mother and father contacted you and let her - let you know that she was here in Shelton. Is that correct?

MR. ITURRIBARRÍA: They didn't call to me. I called to everybody's - of their relatives, and his (sic) father finally told me exactly. . . . But they didn't call to me.

PRP 3-4 Ms. Bazaldúa's statement that her parents had called Mr. Iturribarría immediately was hearsay, and it appears the Commissioner disregarded it as such. *See*, PRP 2 Though her mother resided in Shelton, she did not testify; and though her father submitted a declaration, PRP 9-10, he did not corroborate the hearsay.

Having heard the testimony of both parties, Commissioner Adamson obviously found Mr. Iturribarría more credible, stating in Finding of Fact 8: "Petitioner was not able to confirm [Ms. Bazaldúa and HEI] were in Shelton until approximately 10 days later." CP 277

Mr. Iturribarría's statements of time are consistent:

- "After two days of September 28, I knew from her friends in Mexico that she was to (sic) United States." PRP 4, CP 600
- Mr. Iturribarría called all her relatives. None of them called him. PRP 4
- I obtained the "missing flyer" prior to learning from her father where exactly she was. PRP 4-6
- I spoke to HEI "one week later" (from either September 28 or 30). PRP 4
- A week and a half after she left "I confirmed that my son is, since then, with Cecilia Bazaldúa García, in the house of her mother" CP 600
- "I learned within about 10 days of her whereabouts." CP 624

In addition, at the time he sought relief under the Hague Convention, CP 600, and even as late as when he filed his petition, CP 607, Mr. Iturribarría

was unclear as to the address where HEI lived.¹ See also, Ms. Bazaldúa's unsigned and incomplete "declaration" giving another address unknown to Mr. Iturribarría, CP 564, and the U.S. Department of Homeland Security letter giving yet another address unknown to him. CP 571

Though Mr. Iturribarría said from the beginning he heard September 30, 2004, that Ms. Bazaldúa had gone to the United States on September 28, it does not follow that he knew she was in Shelton. Ms. Bazaldúa also had relatives in Oregon. CP 116 And though he called all her relatives, no one returned his call or messages. The record supports Commissioner Adamson's findings that Mr. Iturribarría did not know where HEI was for 10 days. And Judge Sheldon was remiss in not deferring to his finding.² See, Appellant's Brief, at 32-33. Ms. Bazaldúa thus violated the Mexican order requiring her to give Mr. Iturribarría notice of relocation within five days. CP 583, 280.

¹ Though not before the commissioner, Mr. Iturribarría's timeline filed in the Revision process shows he did not have the grandmother's address in Shelton until she told him by phone on December 17, 2004. CP 159; *see also*, CP 180

² In Finding of Fact 1.11, Judge Sheldon found that "the great weight of evidence establishes and confirms that within three days of September 28, 2004, on or about September 30th, the Petitioner received confirmation that [HEI] and the Respondent were resident in Shelton, Washington." CP 32 Even apart from the issue of deference to the one who hears live testimony, it is difficult to understand how, absent bias or unwarranted assumption, Ms. Bazaldúa's hearsay can be fairly considered to be of "great weight" and Mr. Iturribarría's consistent testimony be completely disregarded. *See also*, Appellant's Brief, at 39-41, 21-22, regarding disparate and mistaken treatment of the statements of the parties' Mexican attorneys.

2. Discretion of Superior Court judge to conduct further proceedings on Motion to Revise under RCW 2.24.050.

Respondent cites several outdated cases in support of her contention that Judge Sheldon was justified in taking new evidence on revision. Those cases have been narrowed or overruled *sub silentio* by *Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240 (1999), which stated:

We recognize that the Court of Appeals' opinion in *In re Welfare of Smith*, 8 Wn. App. 285, 505 P.2d 1295 (1973), is somewhat unclear in that it could be interpreted to allow a superior court judge to conduct whatever additional proceedings the judge believed necessary to resolve the case on review. See, e.g., *State v. Charlie*, 62 Wn. App. 729, 732, 815 P.2d 819 (1991); *In re Welfare of McGee*, 36 Wn. App. 660, 662, 679 P.2d 933 (1984); [Richard D. Hicks, *The Power, Removal, and Revision of Superior Court Commissioners*, 32 Gonz. L. Rev. 1, at 42-43 (1996-97).] We do not read *Smith* so broadly. The statute limits review to the record of the case and the findings of fact and conclusions of law entered by the court commissioner. RCW 2.24.050. In an appropriate case, the superior court judge may determine that remand to the commissioner for further proceedings is necessary. Generally, a superior court judge's review of a court commissioner's ruling, pursuant to a motion for revision, is limited to the evidence and issues presented to the commissioner.

137 Wn.2d at 992-3. Respondent's reliance on *Smith*, *McGee* and *State v. Espinoza*, 112 Wn.2d 819, 824-25, 774 P. 2d 1177 (1989) is thus misplaced. *Smith* was clearly narrowed (if not overruled) by *Moody*, and the latter two cases rely directly on *Smith*.

Respondent also cites *In re B.S.S.*, 56 Wn. App. 169, 782 P.2d 1100 (1989) for the same proposition that Judge Sheldon could conduct

whatever proceedings necessary on revision. *B.S.S.*, which also relied directly on *McGee*, is also no longer viable for that point after *Moody*. Respondent's bald assertion to the contrary, Mason County LCR 59(5.1), purporting to allow such discretion to the judge on revision, can make no plausible claim to validity after *Moody*. Judge Sheldon's attempt on revision to pursue an Article 15 determination under the Hague Convention was thus reversible error.

3. Wrongful removal of child.

Respondent cites no legal authority for her argument. *See*, Appellant's Brief, at 35-42 for argument on wrongful removal.

4. Timely filing of petition under Hague Convention.

The issue of whether the Petition, filed on September 28, 2005, was timely filed when the child was removed from Mexico on September 28, 2004, has been thoroughly addressed in Appellant's Brief, at 42-46. The Respondent and the trial court make the same logical error in claiming the time requirements of CR 6(a) are trumped in the present case by the case of *Olson v. Civil Service Commission*, 43 Wn. App. 812, 719 P.2d 1343 (1986).³

The logical error is the conflation of a status with the passage of a period of time. In *Olson*, the court addressed whether a terminated

³ Interestingly, while attempting to avoid the clear language of CR 6(a) and settled case law so as to claim Mr. Iturribarría filed one day late, the Respondent doesn't hesitate to dismiss three days in order to disregard the admittedly valid doctrine of equitable tolling. Respondent's Brief at 12.

policeman had completed six months of probation when he had been hired and began working on May 15 and was fired on November 15. The specific language in issue was: “No appointment, employment or promotion in any position in the classified service shall be deemed complete until after the expiration of six months probationary service . . .” *Id.* at 814. To not count the first partial day, when the employee actually worked, would be to disregard his having worked that first day. His status was that he was employed from the very beginning, with the authority of a police officer, and the first day was counted. Unless the court was to count minutes and hours, it was inappropriate to not count the first partial day of probationary service.

In the present case the issue is not whether a certain status exists, but whether a period of time—a year—has elapsed since a particular “date”. The language at issue from Article 12 of the Hague Convention is “Where ... a period of less than one year has elapsed from the date of the wrongful removal ...”, and the next paragraph states “... after the expiration of the period of one year referred to in the preceding paragraph ...” The measuring point is a date, not a minute. It is also the occurrence of an event, not the beginning of a status. Under such circumstances, the long-settled rule in Washington recognized in CR 6(a) should control, ensuring that time computation will be carried out in an easy, clear and consistent manner. *See*, Appellant’s Brief, at 43.

5. Child settled in new environment.

See, Appellant's Brief, at 45-46, where the child's new environment is addressed.

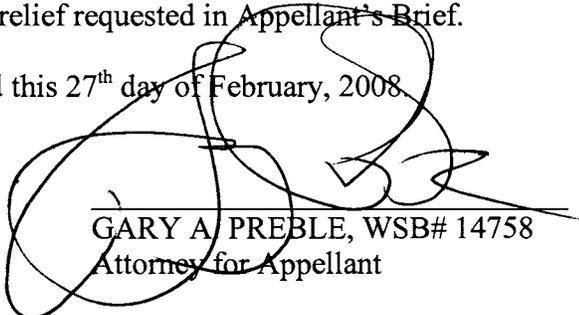
6. Attorneys fees on appeal.

Respondent's is mistaken in claiming there is no statute in Washington allowing attorneys fees in this case for Mr. Iturribarria. Fees and costs are presumptively awarded under 42 U.S.C. 11607(b)(3), which is made applicable to Washington courts by 42 U.S.C. 11603.

CONCLUSION

Having fully replied to the brief of Respondent, Mr. Iturribarria requests the court to grant the relief requested in Appellant's Brief.

Respectfully submitted this 27th day of February, 2008.



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