

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO AT TACOMA

NO. 35527-2-II

In Re: HEI, Child
HECTOR EDUARDO ITURRIBAIRRÍA , Appellant

v.

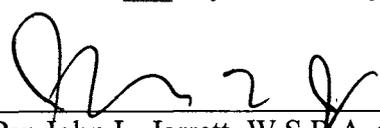
CECILIA BAZALDÚA GARCÍA, Respondent

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DIVISION II
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RESPONDENT'S BRIEF TO
APPELLANT'S OPENING BRIEF

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Certification: I certify that on this 26 day of February 08, I caused a true copy of this responsive brief of Respondent to be served upon Gary Preble, Attorney for Appellant by facsimile and through ABC Legal Messenger to his address of record.

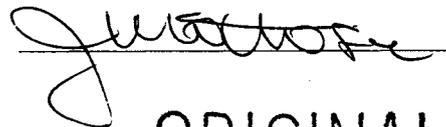

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A. ASSIGNMENTS OF ERROR and ISSUES

1. The court erred in seeking a determination under Article 15 of the Hague Convention (hereafter "Convention") because it constituted new evidence beyond the record on a Motion to Revise in violation of RCW 2.24.050. This assignment corresponds to Appellant's Assignments of error 1,2,7,8,9,10,11,18,19,20,21,22,24,25,26.

2. The Court erred in concluding a period "of one year or more" had lapsed from the Respondent removing the child from Mexico before the Appellant filed his Petition on September 28, 2005. This assignment of error relates to Appellants 3,4,5,6.

3. The Court erred in finding the Appellant knew or had confirmed via telephone and an address within a five day period after September 28, 2004. This assignment relates to Appellants 12,13,14,16,27.

B. STATEMENT OF CASE

For the purpose of the Responsive Brief, Respondent does not restate the statement of the case, except if redrafted it would not include all superfluous references not germane to deciding the issues with the exception that on page 8 in that the Appellant misstates the facts as to Appellant learning (receiving notice) that the Respondent and child had located in Shelton at the house of the Respondent's mother.

The record reflects that Appellant was advised by Respondent's mother directly within a few days of her arrival. PRP 3

Appellant was also specifically advised by Respondent's father that the mother and child had relocated in Shelton. This was communicated again to Respondent. PRP 4 Appellant called Shelton again and spoke directly to the child one week after they left Mexico on September 28. PRP 4

Mason County Commissioner Richard Adamson, on October 21, 2005 decided issues involving the Convention, both Article 3 and 5 "Rights of Custody", Article 12 relative to wrongful removal, and the timeliness of the Petition under Article 13.

At the initial hearing on Motion to Revise, the Superior Court raised on its own the issue of seeking a decision from the Mexican Court under Articles 15 and 3 of the Convention as to whether the mother's removal of the child was wrongful. 1 NRP 2 The Court resorted to Article 15 as an opportunity if it could be taken advantage of "to have a Judge in the country that is immersed in the law and the history of the law of the country of habitual residence to make a determination as to what certain terms mean within the [within the context] of the Hague Convention." 1 NRP 2

On January 13, 2006 and based upon Mason County LCR 59, the Respondent filed a Motion for Leave to File New Factual Material Contained in Response to Petition and to Plead Foreign Law, supported by a Declaration of the Respondent in support of the motion relative to the Petitioner's failure to pay child support and whether that forfeited his rights to *patria potestad*.

Ultimately, the issue of the Mexican Court interpreting its own order under the Convention, after a series of unsatisfactory correspondence from both the Mexican lawyer for the Appellant and lawyer for Respondent, came before the Court. The Court affirmatively ordered both Appellant and Respondent to cooperate and not delay the Mexican proceedings and to submit to jurisdiction of the Mexican Court. The Court even required the Respondent to file her own motion. CP 156, 5 NRP 5-6 The Court continued the matter for one month. 5 NRP 3

At the April 5, 2006 hearing, the Court was frustrated that there had been no determination from the Mexican Court. 6 NRP 4

Ultimately, the Court set a status conference for August 4, 2006 and a revision hearing for August 8, 2006, as well as a hearing on the Respondent's Motion for Leave to File New Factual Material Contained in Response to Petition and to Plead Foreign Law, which had not been ruled on. 12 NRP 4, CP 242-45

On August 8, 2006, the Court granted the Respondent's Motion to File a Response and to Supplement the Record with Mexican Law. The Court also interviewed the child Hectorín on camera to determine whether he is of suitable age in maturity to voice an opinion. The Court found that Hectorín is "well settled in both school and church communities". CP 125

The Findings of Fact, Conclusions of Law and Order on Motion to Revise Entered on September 13, 2006 determined that the Respondent's removal had not been wrongful because of the reason of failure to give a change of address, that the provisions related to the minor child's school were independent of the custody order, that under Article 12 of the Convention, a period of one year or more had elapsed from the time of removal of the child from the country to the commencement of the Petition filed September 28, 2005, that the child was well settled in his new environment and that "in light of the Court's Findings of Fact and Conclusions of Law..., it is not necessary to decide the issues presented by the pleading foreign law relative to the issue of forfeiture of *patria potestad*."

C. ARGUMENT

1. On a Motion for Revision, a Court has full jurisdiction to determine its own facts based upon the record or to conduct whatever further proceedings it deems necessary in its discretion.

The Appellant takes a great deal of time dealing with issues as to whether the Court first had jurisdiction to request of the applicant to obtain from the authorities of the State of the habitual residence of the child a decision or other determination of wrongful removal within the meaning of Article 3 of the Convention. Clearly, in this case the Court determined that it would be appropriate to have that decision be made by a jurisdiction that was familiar with terms used and the context of that jurisdiction in order to allow this Court to make a proper decision.

The Court, on Motion for Revision, is not bound to a review of the record per se, but “[takes] full jurisdiction of the entire case, [determine] its own facts based upon the record made before the Commissioner, and/or [conducts] such further proceedings as in its discretion [are] deemed necessary to resolve the matter.” *In Re Smith & Wn. App.* 285, 288-89, 505 P.2d. 1295 (1973)

Appellant concludes the seeking of an Article 15 determination was in essence the taking of new evidence and thus error.

A Superior Court Judge is permitted to take new evidence when considering a Motion to Revise the ruling of the Court Commissioner. *State v. Espinoza*, 112 Wn. 2d. 819, 824-825, 774 P.2d 1177 (1989); *In Re Welfare of McGee*, 36 Wn. App. 660, 662, 679 P. 2d. 933, Review Denied, 101 Wn. 2d. 1018 (1984)

The Appellant further argues that Mason County Local Rule 59 violates RCW 2.24.050 and is therefore somehow invalid. No authority is cited for this proposition and again, a Superior Court Judge has the right to conduct whatever proceedings it deems necessary to resolve the matter, such as was attempted in this case. *In Re BSS*, 56 Wn. App. 169, 782 P. 2d. 1100 (1989), Review Denied, 114 Wn. 2d. 1018, 791 P.2d. 536 (1990)

The same arguments are made by the Appellant in relation to assignment of error number 8, 9, 10, 11, 19, 20, 22, 24, 25, 26, 29. The Trial Court followed the requirements of the Convention. Judge Sheldon attempted to balance Article 2 of the Convention which states:

“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.”

And Article 15 which states:

“The judicial or administrative authorities of a Contracting State may, prior to making of an order for the return of the child, request

that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. ”

The Court in this matter determined that it was “far and above better for the origin to be able to interpret their own order” 1NRP. The Court even went as far as to require (without her objection) to submit herself to the jurisdiction of the Court. 7 NRP 5

It was only after the Court experienced the frustration of being led to believe that the Mexican Court would not decide until late August or September that the Court abandoned its efforts to have Mexico interpret its own order and opine on August 4, 2006:

“And so for those reasons and the overall concern or theme in the Hague Convention that these types of decisions should be made in an expeditious manner, the Court will hear the Motion for Revision next Tuesday, August 8 at 1:30.” 12 NRP 4

Obviously, it is easy to view the Court’s efforts in hindsight and conclude that she should have made this decision early on. It is curious that the Mexican Court’s determination could have only assisted the Appellant in obtaining the relief that is sought and it is now being used as

an effort to show hot air in a vacuum. That is, had the Court made its decision earlier, the decision would have obviously been the same.

2. The child was not wrongfully removed from Mexico

The Court concluded that the child had not been wrongfully removed from Mexico on September 28, 2004. CP 125

The Order scrutinized by the Court provided in part as follows:

“The appearing parties established that the guard in custody of their minor child mentioned shall be under the guard and custody of Ms. Cecilia Bazaldua Garcia,... with the understanding that any change of address from the place of residence will be communicated to Mr. Hector Eduardo Iturribarria Perez five days before or five days after such change”

The Court found that in Finding of Fact 1.11 “ 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 Hectorín and the Respondent were residence in Shelton, Washington.” CP 125

The Appellant himself admits in his declaration that he was advised within “about ten days”. CP 28 Other declarations establish that

the time period was shorter than ten days, specifically within five days.

Declaration of Cecilia Bazaldua Garcia dated October 14, 2005. CP 30, as well as the Appellant's testimony before Commissioner Adamson. PRP 4

The Appellant further argues that the Court abused its discretion in not concluding or even addressing that the Appellant was exercising his rights of custody at the time of removal. See Appellant Brief, II C. 2.

While the Appellant would ask the Trial Court and this Court to read a great deal into definitions provided in cases from other Latin American Countries, the Court did find as follows:

“the ‘guard in custody’ of Hectorín was placed with the Respondent... with the understanding that any change of address from the place or residence will be communicated to [appellant] five days before or five days after such change”. CP 125 Finding of Fact 1.10

Again, Appellant wishes to argue that there is authority from other jurisdictions defining rights of custody that can be read into terms used in the order at issue. It is interesting to note that there is not one citation from the Mexican Federal District Court nor is there a citation to Mexican Civil Law (Code of Civil Law of the Federal District) that would allow this Court to have specific authority, if it would have been impleaded by the Appellant, to define custody beyond the obvious language of the order itself which grants custody to the Respondent.

3. The Petition was not timely filed under the Convention

The Court did not error by concluding that the Appellants Petition filed September 28, 2005 was untimely under the Convention when the mother had left Mexico September 28, 2004.

The Appellant argues that the Trial Court erred by not applying CR6(a) to compute time relative to Article 12 of the Convention. CP 125

The language in Article 12 of the Convention is as follows:

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the proceeding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”

The Appellant argues a bright line should be established utilizing CR 6(a), which is consistent with FRCP 6(a).

The Court here determined that when talking about a period of months or years, CR 6(a) is not an appropriate guideline. CP 125, Finding of Fact 2.9

Appellant argues that under CR 6(a) the day of September 28, 2004 would not be included because that was the day the Respondent left Mexico. The Washington State Court of Appeals has determined that when talking about a period of months or years excluding the first day and including the last day which is the general rule contained within CR 6(a) would defy logic. *Olson v. Civil Service Commission*, 43 Wn. App. 812, 719 P.2d 1343 (1986). The same logic applies here that under a clear reading of the language of Article 12, September 28, 2004 should be included, "a period of less than one year has elapsed from the date of the wrongful removal or retention." That definition by itself says that the one year anniversary date is in fact September 27, 2005. The language from the date of, that date being September 28, appears within the definition of the Article itself. It is not necessary to resort to a Court Rule not designed to address language such as exists in the Convention, Article 12.

4. The Trial Court did not commit error in considering evidence of the child's acclimation to his environment.

Once the Court determined that the Petition was not filed within one year, the focus then turned to whether the child here is now settled in [his] new environment. The Court found that he is well settled in both the school and church communities. CP 125, Findings of Fact 1.15

The Appellant argues that there can be equitable tolling. While the authority cited by Appellant stands for the proposition that there can be equitable tolling, in the instant case, the Appellant was notified within three days of the location of the parties' minor child and can hardly be suggested that that constitutes either bad faith or some sort of concealment, especially when the Appellant himself recognizes within five days before five days after was complied with.

5. Appellant is not entitled to Attorney's Fees on Appeal.

Appellant argues that he is entitled to attorneys fees on appeal citing *Sarvis v. Land Res.*, 62 Wn. App 888, 815 P.2d 840 (1991). Although fees are allowable on appeal when allowed by contract or statute, there is no contractual agreement for fees nor statute in Washington allowing fees at the Trial Court level.

6. This matter should not be reversed or remanded based on harmless error.

Under assignments of errors 8, 9, 10, 11, 19, 20, 22, 24, 25, 26, 29 any error by the Trial Court constituted harmless error because the error, if any, does not form a basis for the Court's decision.

D. CONCLUSION

The Respondent would be remiss if she did not object to the suggested conclusion of the Appellant that the Court Commissioner's findings be substituted for the findings of the Superior Court. The matter certainly went to Superior Court on a De Novo during a Motion to Revise. The Court Commissioner's Findings of Fact were not appealed from. This Court, for the reasons cited herein, should affirm the ruling of the Trial Court.