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No. 71414-7-I  
King County Superior Court No. 13-3-00237-3 SEA

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

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In re the Marriage of:

SALVADOR AGUILAR HURTADO,  
Appellant

and

JENNIFER ROOT,  
Respondent.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

The Honorable Suzanne Parisien, Judge

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APPELLANT'S OPENING BRIEF

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ORIGINAL

**TABLE OF CONTENTS**

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF THE CASE.....3

IV. ARGUMENT.....5

    A. THE TRIAL COURT ERRED IN DENYING MR. AGUILAR  
    HURTADO’S REQUEST FOR A TRIAL CONTINUANCE .....5

    B. THE TRIAL COURT DID NOT HAVE SUBJECT  
    MATTER JURISDICTION TO ENTER A FINAL PARENTING  
    PLAN IN THIS CASE PURSUANT TO THE UCCJEA.....6

    C. THE PARTIES CANNOT WAIVE THE  
    DETERMINATION OF HABITUAL RESIDENCE UNDER  
    THE HAGUE CONVENTION.....9

    E. THE DECREE OF DISSOLUTION & FINDINGS OF FACT  
    AND CONCLUSIONS OF LAW ARE VOID AS A MATTER  
    OF LAW .....19

    F. THE ORDER GRANTING MOTION TO ENFORCE  
    FEBRUARY 14, 2013 AGREED TEMPORARY PARENTING  
    PLAN AND FOR ATTORNEY’S FEES AND SANCTIONS  
    ENTERED ON AUGUST 22, 2013 AND JUDGMENT FOR  
    ATTORNEY’S FEES & SANCTIONS ENTERED ON  
    OCTOBER 17, 2012 ARE VOID AS A MATTER OF LAW .....21

V. CONCLUSION.....26

## TABLE OF AUTHORITIES

### Cases

<i>Blandzich v. Demeroto</i> , 10 Wn.App. 718, 720, 519 P.2d 994 (1974).....	5
<i>In re Marriage of Kastanas</i> , 78 Wash.App. 193, 197, 896 P.2d 726 (1995).....	6, 7
<i>In re Adoption of Buehl</i> , 87 Wash.2d 649, 655, 555 P.2d 1334 (1976).....	7
<i>Skagit Surveyors &amp; Eng'rs, LLC v. Friends of Skagit County</i> , 135 Wash.2d 542, 556, 958 P.2d 962 (1998).....	7
<i>In re Marriage of Scanlon</i> , 110 Wash.App. 682,685, 42 P.3d 447 (2002)..	7
<i>In re Marriage of Hamilton</i> , 120 Wash.App. 147, 157, 84 P.3d 259 (2004).....	8
<i>Cole v. Harveyland, LLC</i> , 163 Wash.App. 199, 205, 258 P.3d 70 (2011)..	9
<i>Friedrich v. Friedrich</i> , 983 F.2d 1396 at 1401 (1993).....	10
<i>Mozes v. Mozes</i> , 239 F.3d 1067 (2001).....	10, 12, 13, 14
<i>Gitter v. Gitter</i> , 396 F.3d 124, 131 (2d Cir. 2001).....	12
<i>Nicolson v. Pappalardo</i> , 605 F.3d 100 .....	13
<i>Maxwell v. Maxwell</i> , 588 F.3d 245, 251 (4th Cir.2009).....	13, 14
<i>Ruiz v. Tenorio</i> , 392 F.3d 1247 at 1252 (11th Cir.).....	12
<i>Feder v. Feder</i> , 63 F.3d 217, 224 (3d Cir.1995).....	13, 14
<i>Barzilay v. Barzilay</i> , 600 F.3d 912, 918 (8th Cir.2010).....	13
<i>Koch v. Koch</i> , 450 F.3d 703 (2006).....	14

<i>In re Marriage of Leslie</i> , 112 Wn.2d 612, 617, 772 P.2d 1013 (1989).....	15,20
<i>In re Marriage of Waggener</i> , 13 Wn.App. 911, 538 P.2d 845 (1975).....	17
<i>In re Marriage of Thompson</i> , 32 Wn.App. 179, 185 646 P.2d 163 (1982).....	17, 18
<i>In re Custody of BJB &amp; BNB</i> , 146 Wn. App. 1, 189 P.3d 800 (2008).....	18
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 305, 494 P.2d 208 (1972)...	19
<i>In re Marriage of Soriano</i> , 31 Wn.App. 432, 437, 643 P.2d 450 (1982).....	20
<i>In re Marriage of Hardt</i> , 39 Wn.App. 493, 693 P.2d 1386 (1985).....	20
<i>Sheldon v. Sheldon</i> , 47 Wn.2d 699, 289 P.2d 335 (1955).....	21
<i>R.R. Gable, Inc. v. Burrows</i> , 32 Wn. App. 749, 649 P.2d 177 (1982).....	21
<i>Broad v. Mannesmann Anlagenbau, A.G.</i> , 141 Wn.2d 670, 10 p.3d 371 (2000).....	24
<i>Little v. King</i> , 160 Wn.2d 696, 722–23, 161 P.3d 345 (2007).....	26
<i>Port of Port Angeles v. CMC Real Estate Corp.</i> , 114 Wn.2d 670, 674, 790 P.2d 145 (1990).....	26
<i>In re Ellern</i> , 23 Wn.2d 219, 222, 160 P.2d 639 (1945).....	26

**Statutes**

RCW 26.09.181.....	1, 3, 16, 17
RCW 26.27.201(1)(a).....	7

RCW 26.27.231.....	7
RCW 26.27.021(7).....	7
RCW 26.27.201(1)(b).....	8
RCW 26.50 et. seq.....	9
RCW 26.09.191(5).....	14
RCW 26.19.071(2).....	18
RCW 26.19.035(2).....	18
RCW 26.09.080.....	20
42 USC § 11601 et. seq.....	1, 2, 13

**Rules**

RAP 2.5(a)(1).....	7
CR 60(b)(5).....	15
CR 60(b)(1).....	25
CR 4(d)(4).....	22
GR 30(b).....	23, 26
LFLR 10.....	18

**International Conventions**

The Hague Convention on the Civil Aspects of International Child Abduction.....	1, 2, 9, 10, 12
The Hague Convention on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters.....	23, 24, 25 26
The Inter-American Convention of Letters Rogatory.....	24, 25

**I.**  
**ASSIGNMENTS OF ERROR**

The trial court erred in:

1. Refusing to grant a continuance to the Respondent on the morning of trial as he had just retained counsel and was unprepared for trial;
2. Determining that it had subject matter jurisdiction to enter a Final Parenting Plan in this case under the Uniform Child Custody Jurisdiction Enforcement Act.
3. Failing to independently determine the child's "habitual residence" pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (codified at 42 USC § 11601 et. seq.);
4. Entering the Final Parenting Plan proposed by the Petitioner absent compliance with RCW § 26.09.181
5. Entering a Decree of Dissolution & Findings of Fact and Conclusions of Law that exceeded the prayer in the Petition for Dissolution.
6. Confirming Judgments entered against Respondent absent proof of proper service or notice to the Respondent.

All of these specific errors contributed to the overarching error: entry of final orders which exceeded the prayer in the petition, entry of a parenting plan absent subject matter jurisdiction, and confirmation of judgments that were entered against Mr. Aguilar Hurtado absent proper service or notice.

**II.**  
**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Ms. Root filed a generic petition for dissolution of marriage and did not state what her proposal to divide the property and liabilities was nor what the values of each item of property or liabilities were. Ms. Root did not disclose the existence of a prenuptial agreement the parties signed in Mexico, nor did she disclose her ownership interest in the Seven R Corporation where she is the Vice President and Secretary. Should the trial court have entered a decree of dissolution and findings of fact and conclusions of law absent the full disclosure of this information as well as proof that her proposal for such division was provided to the Respondent?
2. Did the trial court improperly enter a final parenting plan absent a finding that it had subject matter jurisdiction pursuant to the UCCJEA?
3. Did the trial court improperly enter a final parenting plan without conducting an analysis of the “habitual residence” of the child under the Hague Convention on the Civil Aspects of International Child Abduction (codified at 42 USC § 11601 et. seq)?

4. Did the trial court improperly enter a final parenting plan without requiring Petitioner's compliance with RCW § 26.09.181?
5. Did the trial court improperly confirm judgments entered against the Respondent absent evidence that Respondent's due process rights were not violated by him receiving proper service and/or notice?
6. In view of the many errors at trial, should the Court reverse and remand for a new trial?

### **III. STATEMENT OF THE CASE**

Salvador Aguilar Hurtado was born in Mexico, lived his entire life in Mexico, and continues to reside in Mexico. CP 218-219. Jennifer Root met Mr. Aguilar Hurtado at the Cabo Wabo Cantina in Cabo San Lucas, Mexico where Mr. Hurtado is employed as a music performer. The parties were married on April 6, 2008 at Cabo San Lucas, Baja California Sur, Mexico and resided in Mexico during the entirety of their marriage until separation.

During the marriage, the parties conceived a child, Nicole L. Aguilar Root. Nicole was born on November 21, 2009 at Cabo San Lucas, Mexico. In August, 2012, Ms. Root left Mexico with Nicole to travel to the Seattle area. She did not return and instead filed for dissolution on

January 9, 2013. CP 1-6. Mr. Aguilar Hurtado was personally served with the Petition for Dissolution and Motion for Temporary Orders shortly thereafter when he arrived in Seattle to see Nicole.

Mr. Aguilar Hurtado was unrepresented during the vast majority of these proceedings. He agreed to temporary orders, including a temporary parenting plan while unrepresented and with the understanding that this would be the only way he would be able to see Nikki. Mr. Aguilar Hurtado was unaware that a provision buried in Section IV, the “Other Provisions” section of the parenting plan attempted to establish that Nikki’s habitual residence was the United States of America and waive the required analysis as to what Nikki’s true habitual residence actually is. CP 34.

Pursuant to the Temporary Parenting Plan, Nikki arrived in Mexico in May, 2013. CP 27. Mr. Aguilar Hurtado obtained an order from the Mexican courts that granted him full custody and prohibited Nikki’s removal from Mexico due to allegations of abuse and neglect and the report of 3<sup>rd</sup> parties. In December, 2013, Ms. Root obtained an order from the Mexican courts authorizing Nikki’s return to the United States of America and setting a return hearing for January 16, 2014. On December 19<sup>th</sup>, 2013, Mr. Aguilar Hurtado appeared at trial through his attorney’s limited appearance to request a continuance. I RP 7. That continuance was

denied. I RP 31-32. A brief trial took place without Mr. Aguilar Hurtado and his attorney and final orders were entered by Judge Parisien later that day.

This appeal was timely filed on January 7, 2014. On April 3, 2014, the court denied Mr. Aguilar Hurtado's Motion to Vacate.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT ERRED IN DENYING MR. AGUILAR HURTADO'S REQUEST FOR A TRIAL CONTINUANCE**

In determining whether a continuance is appropriate in a given situation, the Court may consider a number of factors:

“The necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the Court.” *Blandzich v. Demeroto*, 10 Wn.App. 718, 720, 519 P.2d 994 (1974).

During the pendency of this litigation, Mr. Aguilar Hurtado was unable to find and retain an attorney in Washington willing to represent him, presumably because he lived in Mexico and is a Mexican citizen. On the eve of trial, Mr. Aguilar Hurtado was able to find an attorney willing to take the case on the condition that a continuance could be obtained. Mr. Aguilar's attorney appeared on the morning of trial and requested a

continuance which the Court denied, partly due to the presence of Mr. Eddie Varon Levy, Esq. who had traveled from Mexico City to testify at trial. I RP 31.

Neither party had previously requested a continuance. Mr. Aguilar Hurtado needed a continuance in order to properly prepare for trial with the assistance of newly retained counsel. He had the added challenge of litigating this case from Mexico. While Ms. Root may have suffered some prejudice due to the travel arrangements made for Mr. Varon Levy's live testimony at trial, his testimony could have been perpetuated or taken by telephone at a later date and thus any prejudice could have been reasonably mitigated. Nikki had already been transferred to Ms. Root, so she did not suffer any prejudice with regards to residential time Nikki.

After application of the factors and the circumstances of this case, including the high stakes regarding where Nikki would reside primarily, a continuance should have been granted to Mr. Aguilar Hurtado. The trial court abused its discretion in failing to grant a continuance to Mr. Aguilar Hurtado.

**B. THE TRIAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ENTER A FINAL PARENTING PLAN IN THIS CASE PURSUANT TO THE UCCJEA**

The determination of subject matter jurisdiction is a question of law and it is reviewed de novo. *In re Marriage of Kastanas*, 78 Wash.App.

193, 197, 896 P.2d 726 (1995). Subject matter jurisdiction is “the authority of the court to hear and determine the class of actions to which the case belongs.” *In re Adoption of Buehl*, 87 Wash.2d 649, 655, 555 P.2d 1334 (1976). A superior court always has jurisdiction to determine whether it has subject matter jurisdiction and whether it should exercise its jurisdiction. *Kastanas*, 78 Wash.App. at 201, 896 P.2d 726. A party may raise a lack of subject matter jurisdiction argument at any time during a proceeding, and failure to raise it in an initial appearance does not waive the argument of lack of subject matter jurisdiction. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 556, 958 P.2d 962 (1998). A trial court’s lack of subject matter jurisdiction may be raised for the first time on appeal. RAP 2.5(a)(1); *In re Marriage of Scanlon*, 110 Wash.App. 682,685, 42 P.3d 447 (2002).

RCW 26.27.201(1)(a) states as follows:

(1) Except as otherwise provided in RCW 26.27.231, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

According to RCW 26.27.021(7), “home state” means either (1) the state where the child lived with a parent or a person acting as a parent for at

least six consecutive months immediately before the commencement of a child custody proceeding or (2) if the child is less than six months old, the state where the child has lived from birth with a parent or person acting as a parent. Under RCW 26.27.201(1)(b), a “significant connections” analysis will apply “only if the child has no home state or the home state has declined jurisdiction on the ground that Washington is the more appropriate forum.” *In re Marriage of Hamilton*, 120 Wash.App. 147, 157, 84 P.3d 259 (2004).

In this case, Nikki was removed from Mexico, the country in which she was born and had lived her entire life and was brought to United States when she was more than six (6) months old. Mr. Aguilar Hurtado understood that Nikki’s trip to the United States was temporary and for the purpose of visiting family and that she would be returned to Mexico. Mr. Aguilar Hurtado was never told, prior to Ms. Root’s filing of her Petition for Dissolution of Marriage that she did not intend to return Nikki to Mexico and did not intend to return to Mexico herself.

Relying on the statements made in Ms. Root’s Petition for Dissolution of Marriage in Section 1.15 she states in relevant part “During the last five years, the child has lived: August 11, 2012 – present” (which would indicate January 9, 2013) which were the dates immediately before the commencement of these proceedings. CP 4. The period of time

between August 11, 2012 – January 9, 2013 is less than 6 months, the amount of time the UCCJEA requires prior to jurisdiction being established. Therefore, Washington had no subject matter jurisdiction to enter a parenting plan for Nikki since Washington was not Nikki’s home state, no emergency was pled and there was no pending action under RCW 26.50 et. seq. A judgment entered by a court that lacks subject matter jurisdiction is void.” *Cole v. Harveyland, LLC*, 163 Wash.App. 199, 205, 258 P.3d 70 (2011). Since there was no subject matter jurisdiction over Nikki, the final parenting plan entered in this case is void.

C. THE PARTIES CANNOT WAIVE THE DETERMINATION OF HABITUAL RESIDENCE UNDER THE HAGUE CONVENTION

Both the United States of America and Mexico are signatories to the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”). Since Nikki was taken across international borders instead of between states, the Hague Convention also applies to this case.

The temporary parenting plan signed by both Ms. Root and Mr. Aguilar Hurtado states in relevant part “The U.S. is the habitual residence of the child and a refusal to return the child to the U.S. by either parent shall be conclusively deemed wrongful under the Convention”. CP 34. This provision sought to waive analysis to determine the child’s “habitual

residence” a court must make when determining which country is a child’s home country.

While it is possible that this provision in the parenting plan waived the forum in which habitual residence would be determined for the purpose of determining a temporary parenting plan, there is virtually no guidance from Courts in Washington as to whether parents can actually waive the habitual residence analysis, especially when they disagree as to the habitual residence of a child at the time of trial.

The Hague Convention does not define “habitual residence”. Instead, the Federal Courts have shed some additional light as to how a child’s habitual residence is to be determined.

Not all Federal Circuits are in agreement on the role or significance of parental intent in resolving habitual-residence determinations. In an early U.S Court application of the Hague Convention, the Sixth Circuit held that “[t]o determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.” *Friedrich v. Friedrich*, 983 F.2d 1396 at 1401 (1993). The Sixth Circuit has focused on habitual residence from a child's perspective while somewhat downplaying the parents’ intent.

The Ninth Circuit has emphasized the parents' perspective, explaining in *Mozes v. Mozes*, 239 F.3d 1067 (2001) that the concept of habitual

residence is based on the “settled purpose” to live in a particular place. *Id.* at 1074. It is not the child's purpose that matters, however. “[T]he intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence”—usually, the parents. *Id.* at 1076. When parents jointly intend to raise a child in a place and actually live there, that place becomes the child's habitual residence. The child's habitual residence may change later if the parents mutually intend to abandon the residence in favor of a new one, but only a shared intent will do; the unilateral intent of a single parent will not. *Id.* at 1075–77.

In some circumstances “a child's life may become so firmly embedded in the new country as to make it habitually resident even though there be lingering parental intentions to the contrary.” *Id.* at 1078. But “in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned.” *Id.* at 1079. A court should infer a change in habitual residence only where “the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place”; that is, when the court “can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would

now be tantamount to taking the child out of the family and social environment in which its life has developed.” Id. at 1081.

A majority of the circuits have preferred the Ninth Circuit's approach and adopted the “Mozes” approach. See also *Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir.); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir.2009); *Ruiz v. Tenorio*, 392 F.3d 1247 at 1252 (11th Cir.).

The question of whether there exists a settled intention to abandon the old residence sufficient to change a child’s habitual residence is a question of fact. The overall “habitual residence” analysis in a case brought under Hague Convention is a mixed question of fact and law; The Federal Court of Appeals reviews a District Court's findings on essentially factual questions for clear error, and ultimate issue of habitual residency de novo. International Child Abduction Remedies Act, § 4(e)(1), 42 U.S.C.A. § 11603(e)(1); International Child Abduction Convention, Art. 1 et seq., 1988 WL 411501.

The habitual residence is the “locus of the children's family and social development.” *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir.2001) Id at 1084. The burden is on Ms. Root to show that by the time of the children's removal, the United States had become their habitual residence. 42 U S C. § 11603(e)(1)(A). She has not done so.

The Ninth Circuit has made it clear that, irrespective of the parents' intentions to make a permanent move, “the passage of an appreciable period of time, one that is sufficient for acclimatization” is a precondition for a change in habitual residence. *Mozes* at 239 F.3d 1078, see also *Feder v. Feder*, 63 F.3d 217, 224 (3d Cir.1995) (habitual residence is the place where the child “has been physically present for a time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective”). No matter what the parents' intentions for the future, acclimatization is necessary before a court can say that the new country has “supplanted” the other “as the locus of the children's family and social development.” *Mozes*, 239 F.3d at 1084 (change in habitual residence cannot be accomplished “by wishful thinking alone”).

When the persons entitled to fix the child's residence no longer agree on where it has been fixed, then the Courts must determine from all available evidence whether the parent petitioning for return of a child has already agreed to the child's taking up habitual residence where it is. International Child Abduction Remedies Act, § 2, 42 U.S.C.A. § 11601.

Generally, it is “the parents' shared intent or settled purpose regarding their child's residence” that guides our inquiry. *Nicolson v. Pappalardo*, 605 F.3d 100 at 103–04 (citing *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir.2010); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th

Cir.2009); *Koch v. Koch*, 450 F.3d 703 (2006) at 715; *Gitter v. Gitter*, 396 F.3d 124, 131–32 (2d Cir.2005); *Mozes*, 239 F.3d at 1076–81; *Feder*, 63 F.3d at 224). One parent's wishes are not sufficient, by themselves, to effect a change in a child's habitual residence. See *Feder*, 63 F.3d at 224–26 (finding a unilateral decision or change of heart by one party cannot alter the parties' shared intent regarding habitual residence). Nevertheless, “a child can lose its habitual attachment to a place even without a parent's consent ... if the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place.” *Mozes*, 239 F.3d at 1081. After all, “[h]abitual residence is intended to be a description of a factual state of affairs.” *Id.*

There does not appear to be any published case interpreting whether parents may waive the habitual residence analysis conducted by the Court, particularly when there is a disagreement as to the child's habitual residence. There is little doubt the parties here disagreed as to what Nikki's habitual residence was and is.

Regardless of what the agreed temporary parenting plan states, pursuant to RCW 26.09.191(5), “In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.” At the time of trial, there was no doubt that the parties disagreed as to Nikki's habitual residence. Mr. Aguilar Hurtado

contends that Nikki's habitual residence was and is Mexico. Ms. Root presumably will argue that Nikki's habitual residence is in the United States. Given the existence of such disagreement, the Court at trial should have made an independent determination as to Nikki's habitual residence as of August, 2012, prior to entering a final parenting plan and pursuant to the case law. The court made no such inquiry. Absent such inquiry and determination, the Court had no authority to enter a final parenting plan, especially one that granted essentially full custody to Ms. Root. Thus the final parenting plan entered is void as a matter of law and should be vacated.

**D. THE FINAL PARENTING PLAN & FINAL ORDER OF CHILD SUPPORT ARE VOID**

A court has no authority to grant relief beyond that sought in the complaint. *In re Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989). To grant such relief without notice and an opportunity to be heard denies procedural due process and is a violation of the 14th amendment of the U.S. Constitution. To the extent a judgment exceeds relief requested in the complaint, that portion of the judgment is void. CR 60(b)(5).

Here, Ms. Root's petition for dissolution stated that she would file a proposed permanent parenting plan at a later date. CP 4. She never did. Accordingly, her petition did not specify the relief she sought regarding the parenting of the parties' child. Thus, any permanent parenting plan

approved absent compliance with RCW 26.09.181 was automatically beyond the relief requested in her petition. This is no mere technicality.

RCW 26.09.181 provides:

(1) SUBMISSION OF PROPOSED PLANS. (a) In any proceeding under this chapter, except a modification, each party **shall** file and serve a proposed permanent parenting plan on or before the earliest date of:

(i) Thirty days after filing and service by either party of a notice for trial; or

(ii) One hundred eighty days after commencement of the action which one hundred eighty day period may be extended by stipulation of the parties.

There is no indication in the record as to any obstacles Ms. Root faced which prevented her from filing a proposed parenting plan within 180 days after commencement of the action, in accordance with the express terms of the statute. Ms. Root was represented by experienced counsel during the entirety of this case. Ms. Root never complied with the statutory requirement to file a proposed permanent parenting plan at least within 180 days of filing of the petition for dissolution pursuant to RCW 26.09.181, nor to give notice to Mr. Aguilar of what she sought with respect to the parenting plan for the child. Rather, she moved for entry of a final parenting plan on December 19<sup>th</sup>, 2013 at trial.

Ms. Root failed to comply with RCW 26.09.181 and did not obtain an order waiving its requirements. Mr. Aguilar was never, at any time during these proceedings, given notice of the parenting schedule Ms. Root requested or proposed. On December 19, 2013, a Final Parenting Plan was entered which, for the first time, revealed what Ms. Root was seeking. Mr. Aguilar learned of Ms. Root's proposal only after it was a final order. Mr. Aguilar's procedural due process rights were violated and the Final Parenting Plan is void on its face and due process demands that it be vacated.

Not only should the Final Parenting Plan be vacated due to violations of Mr. Aguilar's due process rights, it should also be vacated due to the fact that it did not address or take into account the best interests of the child. Mr. Aguilar has alleged that Ms. Root has a history of neglecting the child. A parenting evaluator or GAL was never requested or appointed and a parenting evaluation was never performed. (See *In re Marriage of Waggener*, 13 Wn.App. 911, 538 P.2d 845 (1975). The best interests of the parties' four-year-old daughter can only be served if this matter is re-opened and a proper investigation and evaluation is performed. As the Court in *In re Marriage of Thompson*, 32 Wn.App. 179, 185 646 P.2d 163 (1982), states, "[a]t stake is the welfare of the children who play no active role in this litigation, but who are directly affected by the outcome." The best interests of the child will only be served if each party is allowed to

present evidence and testimony related to the other party's ability to parent and to otherwise defend against the other party's proposal. Mr. Aguilar was denied this right when he was not provided notice of Ms. Root's proposal. Therefore, the Final Parenting Plan should be vacated. In *in re Marriage of Thomson*, 32 Wash. App. 179, 646 P.2d 163 (1982), our Court of Appeals determined that the husband had not amended his petition regarding his intent to seek custody of the children. The court found that "[a]bsent a proper amendment of the petition and notice to wife, the default order and decree were void as to the custody issue, and in that respect should have been vacated." *Thompson*, 32 Wn. App. At 185.

Here, because there was no basis upon which to enter a Final Parenting Plan, there was no basis to award child support. Additionally, Ms. Root failed to fully comply with RCW 26.19.071(2) and LFLR 10. Failure to provide financial documentation to the Court per the statute and local rule made it virtually impossible for the Court to make specific written findings of fact supported by the evidence as required by RCW 26.19.035(2) and thus it did not make written findings of fact supported by the evidence. This Court of Appeals held, in *In re Custody of BJB & BNB*, 146 Wn. App. 1, 189 P.3d 800 (2008), that basing an income determination solely on testimony and without documentation to verify such income was a basis for remand back to the trial court. The testimony taken at trial was insufficient to determine Mr. Aguilar Hurtado's income. I RP 60. For the

foregoing reasons, the Final Order of Child Support should be vacated as well and new trial ordered.

E. THE DECREE OF DISSOLUTION & FINDINGS OF FACT  
AND CONCLUSIONS OF LAW ARE VOID AS A MATTER OF  
LAW

The Petition for Dissolution filed by Ms. Root is commonly referred to as a “generic” petition, one that did not completely specify what relief she requested. CP 1-6. Ms. Root claimed that the parties acquired property and incurred debt during the marriage and requested that the division of all community property and liabilities should be determined by the court at a later date. CP 2-3. Ms. Root did not reveal the existence of the prenuptial agreement she and Mr. Aguilar entered into, but knowingly allowed a Findings of Fact and Conclusion of Law, which stated under Section 2.7 that “there is no written separation contract or prenuptial agreement” to be entered by the Court. CP 184. Ms. Root never revealed that she had an ownership interest in Seven R Corporation nor that she is the Vice President and Secretary of that corporation. She testified at trial that she worked for that corporation. I RP 53.

Ms. Root never filed or served an amended petition identifying what specific relief she sought as a basis upon which final papers could be entered. In a dissolution action, all property, both community and separate, is before the trial court for distribution. *Friedlander v. Friedlander*, 80

Wn.2d 293, 305, 494 P.2d 208 (1972). The court must dispose of all of the parties' property which is brought before it. *In re Marriage of Soriano*, 31 Wn.App. 432, 437, 643 P.2d 450 (1982). With generic petitions for dissolution of marriage, there is simply no basis upon which the Court can complete a “just and equitable distribution of property” pursuant to RCW 26.09.080, if the Court does not know what specific tangible or intangible pieces of property exist. Here, there was no basis to make a specific award of assets and liabilities or attorney’s fees. Numerous family law cases stand for the proposition that granting relief beyond that which is requested in a specific petition, a joint petition, or where a default is taken, violates due process and that such final orders are void. See, for example, *In re Marriage of Hardt*, 39 Wn.App. 493, 693 P.2d 1386 (1985) and *Matter of Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989). Cases such as these hold that the decrees or portions of the decrees providing relief beyond that which was pled are void.

The record does not demonstrate that any inquiry was made by the Court as to the value of these assets, whether the division of assets and liabilities was fair and equitable or whether the list was complete. Further, Ms. Root failed to disclose the existence of the prenuptial agreement both parties signed prior to marriage as well as the nature and extent of her ownership interest in the Seven R Corporation to which she is listed as the Vice President and Secretary. Therefore, there was no way the Court could

know whether the division of the assets and liabilities was fair and equitable, what values were assigned to each asset or liability or whether the list was complete, Mr. Aguilar was provided no notice as to how Ms. Root proposed to divide the community assets and liabilities. A more detailed petition should have been filed. Mr. Aguilar's request for a continuance the day before trial and his separate request for a continuance through counsel on the morning of trial were denied, and therefore, Mr. Aguilar's due process right to be heard was violated because Ms. Root's prayer for relief was not specific, and thus, Mr. Aguilar had no notice of how Ms. Root sought to specifically divide the community assets and liabilities. A judgment entered without due notice and opportunity to be heard is void. *Sheldon v. Sheldon*, 47 Wn.2d 699, 289 P.2d 335 (1955). In *Sheldon*, the court held that granting the plaintiff additional relief without first giving the defendant notice of its proposed action and an opportunity to be appear and defend was error. See also *R.R. Gable, Inc. v. Burrows*, 32 Wn. App. 749, 649 P.2d 177 (1982). Therefore, the Decree of Dissolution and the Findings of Fact & Conclusions of Law should be vacated and a new trial ordered.

F. THE ORDER GRANTING MOTION TO ENFORCE  
FEBRUARY 14, 2013 AGREED TEMPORARY PARENTING  
PLAN AND FOR ATTORNEY'S FEES AND SANCTIONS  
ENTERED ON AUGUST 22, 2013 AND JUDGMENT FOR  
ATTORNEY'S FEES & SANCTIONS ENTERED ON  
OCTOBER 17, 2012 ARE VOID AS A MATTER OF LAW

CR 4(d)(4) authorizes an alternative to service by publication and states as follows:

"In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at his last known address or any other address determined by the court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. The summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint within 90 days from the date of mailing. Service under this subsection has the same jurisdictional effect as service by publication."

Ms. Root never obtained an order allowing service by mail, yet attempted to serve Mr. Aguilar with Contempt papers via International Federal Express. CP 148-157. Mr. Aguilar did not receive those papers as

the Federal Express deliveryman demanded additional payment from Mr. Aguilar prior to delivering the documents.

Ms. Root never obtained an order that suspended GR 30(b), which permits e-mail service of documents by parties *only by agreement* and reads in relevant part as follows:

(3) Electronic Transmission from the Court. The clerk may electronically transmit notices, orders, or other documents to a party who has filed electronically, or has agreed to accept electronic documents from the court, and has provided the clerk the address of the party's electronic mailbox. It is the responsibility of the filing or agreeing party to maintain an electronic mailbox sufficient to receive electronic transmissions of notices, orders, and other documents.

(4) Electronic Service by Parties. Parties may electronically serve documents on other parties of record only by agreement.

Therefore, service of her motion for contempt was never completed and the Court had no authority or jurisdiction to enter the Order Granting Motion to Enforce February 14<sup>th</sup>, 2013 Agreed Temporary Parenting Plan and For Attorney's Fees and Sanctions entered on August 22<sup>nd</sup>, 2013 (CP 158-160) or the Judgment for Attorney's Fees & Sanctions entered on October 17<sup>th</sup>, 2013. CP 168-170.

Both the United States of America and Mexico are signatories to the Hague Convention on the Service Abroad of Judicial and Extrajudicial

documents in Civil or Commercial Matters, November 15, 1965. (hereinafter “Hague Convention on Service”), and the Inter-American Convention of Letters Rogatory (hereinafter “Inter-American Convention”). Our Supreme Court confirmed that application of the Hague Convention on Service in state law actions in *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 10 p.3d 371 (2000). In order to properly serve legal documents upon a Mexican citizen in Mexico, specific steps must be followed pursuant both conventions. None of these steps were taken by Ms. Root and neither convention was followed. Therefore, Ms. Root never accomplished service upon Mr. Aguilar and the Order Granting Motion to Enforce February 14, 2013 Agreed Temporary Parenting Plan and For Attorney’s Fees and Sanctions entered on August 22, 2013 is void as a matter of law. Further, the Judgment for Attorney’s Fees & Sanctions entered on October 17<sup>th</sup>, 2013 is also void as a matter of law.

Pursuant to the Hague Convention on Service, art. 3, judicial documents to be served upon a citizen of Mexico in Mexico must be forwarded to the designated Central Authority. Once the Central Authority determines that the documents meet certain requirements, the Central Authority *shall itself* serve the document or arrange to have it served by an appropriate agency. Hague Convention on Service, art. 5. Further, any document to be served must be accompanied by the corresponding Spanish

translation. *Id.* Mexico has specifically opted out of Article 10 of the Hague Convention on Service and prohibits service by mail. Government of the United Mexican States Declaration of May 2011.

Similar to the Hague Convention on Service, the Inter-American Convention, April 15, 1980, requires the interested party to obtain a letter rogatory to be transmitted through consular or diplomatic channels, or through the designated Central Authority. Inter-American Convention, art. 4. Ms. Root took no action to obtain a letter rogatory. Further, the Inter-American Convention, just like the Hague Convention on Service, requires the letter rogatory and the appended documentation to be “translated into the official language of the State of destination” art. 5(b). None of the documents Ms. Root attempted to serve upon Mr. Aguilar by mail were translated into Spanish, the official language of Mexico. Even if Ms. Root had obtained an order allowing service by mail, and even if Mr. Aguilar had received the documents sent by International FedEx, service would have been ineffective. In Mexico, according to the conventions, personal service is the only legitimate way to accomplish service of process.

CR 60(b)(1) allows the trial court to vacate a judgment due to an “irregularity in obtaining a judgment or order....” An irregularity is an action that does not follow a prescribed rule or mode of proceeding, including the failure to take an action that is necessary for the due and orderly conduct of a lawsuit or taking a necessary action in an improper

manner. *Little v. King*, 160 Wn.2d 696, 722–23, 161 P.3d 345 (2007) (citing *Port of Port Angeles v. CMC Real Estate Corp.*, 114 Wn.2d 670, 674, 790 P.2d 145 (1990) (quoting *In re Ellern*, 23 Wn.2d 219, 222, 160 P.2d 639 (1945))).

Ms. Root obtained an Order to Show Cause re Contempt by filing a Motion for Contempt. Ms. Root attempted to serve the contempt documentation by International FedEx upon Mr. Aguilar in Mexico. Ms. Root, contrary to her assertion in her declaration (made under penalties of perjury), did not accomplish personal service. Ms. Root never obtained an order allowing service by mail, nor did not obtain an order suspending the operation of GR 30(b). She further never complied with the Hague Convention on Service or the Inter-American Convention because none of the documents she attempted to serve in Mexico were translated into Spanish. Further, Mexico has specifically opted out of the provision in the Hague Convention on Service that allows service by mail. Like all temporary orders, these orders for sanctions and attorney’s fees were interlocutory orders that could have been changed by the trial court.

## V.

### CONCLUSION

Based on the foregoing argument, this Court should vacate the Decree of Dissolution, Findings of Fact and Conclusions of Law, Final Parenting Plan, Final Order of Child Support, and Final Child Support

Worksheets and remand this case with the following directions: for the trial court to set a new trial date and issue a new order setting case schedule; for the trial court to assign this case to a different judicial officer; and for the trial court to make an independent determination as to whether Washington State is the appropriate forum for the determination of parenting arrangements based on either the UCCJEA, the definition of “habitual residence” under the Hague Convention or both.

DATED this 16<sup>th</sup> day of May, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Roni E. Ordell', written in a cursive style.

Roni E. Ordell, WSBA # 42690  
Attorney for Salvador Aguilar Hurtado

**CERTIFICATE OF SERVICE**

I, Roni E. Ordell, hereby declare under penalties of perjury of under the laws of the State of Washington, that on the date listed below, I served by Legal Messenger, one copy of the foregoing brief on the following:

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