

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE.....	1
A. Background of Marriage, Parties And Birth of Nicole.....	1
B. Mr. Hurtado Is Personally Served In Washington With The Petition, Case Schedule And Motion For Temporary Orders And Contacts Lawyer Stacey Nossaman-Petitt To Assist Him.....	3
C. Mr. Hurtado Participates In The USA Dissolution Process And Hires Counsel In Mexico.....	7
D. Mr. Hurtado Refuses To Return Nicole To Ms. Root At The End Of June, 2013 As He Was Obligated To Do Under The Agreed Temporary Parenting Plan.....	9
E. On June 25, 2013, Ms. Root Hires Mexico Attorney Eddie Varon Levy.....	11
F. Ms. Root Files A Motion To Enforce Parenting Plan In King County Superior Court And Court Orders Mr. Hurtado To Return Nicole By August 27, 2013.....	12
G. Nicole Is Returned To Ms. Root On December 13, 2013 In Cabo San Lucas.....	14
H. Trial Is Conducted On December 19, 2013.....	15
I. The Trial Court Denies A Motion To Vacate The Final Judgment And Final Orders Entered By The King County Superior Court On December 19, 2013.....	17
J. Before The Parties Were Married They Executed A Separate Property Agreement.....	17
II. ISSUES ON APPEAL.....	17

III.	ARGUMENT	19
A.	The Trial Court Correctly Denied Mr. Aguilar Hurtado’s Request For A Trial Continuance.....	19
B.	The Trial Court Had Subject Matter Jurisdiction To Enter A Parenting Plan	21
	1. Nicole Had No Home State When The Petition For Dissolution Was Filed In King County Superior Court.....	22
	2. Nicole And Ms. Root Have Significant Connections With Washington State.....	23
C.	Both Parties Agreed That The United States Is The Child’s Habitual Residence For Purposes Of The Hague Convention.....	24
D.	The Final Parenting Plan And Final Order Of Child Support Were Properly Entered By The Trial Court Because Neither Party Filed A Proposed Final Parenting Plan Prior To Trial.....	28
E.	The Decree Of Dissolution And Findings Of Fact Were Properly Entered By The Trial Court Under Washington’s Established Practice Of “Notice” Pleading.....	32
F.	The February 14, 2013 And The October 17, 2012 Orders Were Properly Entered By The Trial Court Because Mr. Hurtado Was Personally Served In Washington And The Parties Had A History Of Accepting Service Of Pleadings By Email.....	33
IV.	CONCLUSION	37

TABLE OF AUTHORITIES

Page

Cases

Batten v. Abrams, 28, Wn. App. 737, 739 n. 1,
626 P.2d 984 (1981).....26

Empens v. Tomer, 170 Wash. 524,
17 P.2d 21 (1932).....19

Griffith v. City of Bellevue, 130 Wn.2d 189, 192
922 P.2d 83 (1996).....35

In re GLG Life Tech Corp. Securities Litigation,
287 F.R.D. 262 (U.S.D. Ct. N.Y).....37

In re Marriage of Leslie, 112 Wn.2d 612,
772 P.2d 1013 (1989).....29

In re Marriage of McDermott, 175 Wn. App. 467,
307 P.3d 717 (2013).....22

Kelsey v. Kelsey, 179 Wn. App. 360, 368,
317 P.3d 1096 (2014).....26

Matter of the Marriage of Steadman, 36 Wn. App. 77, 79,
671 P.2d 808 (1983).....23

Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).....26, 27

Volkswagenwerk v. Schlunk, 486 U.S. 694,
108 S.Ct. 2104, 100 L.Ed.2d 722 (1988).....34, 35, 36

Statutes

RCW 4.36.240.....37

RCW 26.09.181.....28

RCW 26.19.071(2).....	30
RCW 26.27.021(7).....	18, 22
RCW 26.27.201(1)(b).....	22
RCW 26.27.201(1)(b)(i).....	23

Rules

CR 40(d).....	19
GR 5(b)(7).....	36
LFLR 10.....	30
UCCJEA.....	21

International Conventions

Hague Convention.....	11, 16, 24, 25, 34, 35, 36
Hague Convention on the Civil Aspects of International Child Abduction.....	16

I. STATEMENT OF THE CASE

A. Background Of Marriage, Parties And Birth Of Nicole

The mother, Jennifer Root, is 30 years old and is a resident of the State of Washington. Jennifer and Mr. Hurtado met in December of 2005 when Ms. Root was vacationing in Mexico (CP 222). Jennifer moved to Cabo San Lucas in November of 2006 to live with Mr. Hurtado, in Cabo San Lucas (*Id.*). The parties were married on April 6, 2008 in Cabo San Lucas.

Mr. Hurtado is a Mexican citizen and has resided in Mexico during his life. Mr. Hurtado has worked in Mexico and surrounding countries as a music performer. He regularly works at the Cabo Wabo nightclub in Cabo San Lucas (CP 223). Mr. Hurtado is a skilled musician who speaks English and sings in English. He tours with his band in Mexico (CP 223). His music career requires Mr. Hurtado to work six or seven nights a week often until 3:00 a.m. *Id.* Mr. Hurtado previously taught English as a second language (CP 532). Jennifer and Mr. Hurtado spoke English during their marriage. *Id.*

The parties' child, Nicole L. Aguilar Root, was born on November 21, 2009 at Cabo San Lucas, Mexico. Nicole has dual citizenship (CP 223). Because Salvador worked nights, Jennifer was Nicole's primary caregiver. *Id.* The parties resided in Cabo San Lucas from November of

2009 through November of 2011 when Jennifer moved back to Seattle and moved in with her grandmother (CP 43). Ms. Root obtained a job in December of 2011 as an infant care teacher in Bellevue through the Seven R Corporation (CP 224). Beginning in November of 2011, Nicole began traveling back and forth every three months between Cabo San Lucas and Seattle to see each parent (CP 224). Nicole was in Seattle with Jennifer the following times before the dissolution case was filed in Washington State:

- November of 2011 to mid-January of 2012
- April to June of 2012
- August 11, 2012 to January of 2013 (CP 4)

Overall, since Jennifer moved back to Bellevue in November of 2011, Nicole lived 10 months in Bellevue and 6 months in Mexico before the Petition for Dissolution was filed in King County Superior Court in January of 2013. The parenting situation for Nicole, however, when she was in Mexico was unacceptable to Jennifer because Mr. Hurtado still worked at his music career until 2:00 a.m. each night and slept until noon each day. As such, he was unable to care for Nicole in Mexico in the mornings and most of the days. As a result, his parents cared for Nicole the bulk of the time when she was in Mexico (CP 224).

Since obtaining employment at the Seven R Corporation, Jennifer has worked Monday through Friday (9:00 a.m. to 5:30 p.m.). While she is at work, her grandmother, Joyce Root, cares for Nicole or she attends pre-school next door to her work (CP 224). Nicole and her grandmother have a very close bond. *Id.*

B. Mr. Hurtado Is Personally Served In Washington With The Petition, Case Schedule And Motion For Temporary Orders And Contacts Lawyer Stacey Nossaman-Petitt To Assist Him

Ms. Root filed the Petition for Dissolution in the King County Superior Court on January 7, 2013 (CP 1-6). Mr. Hurtado was personally served with the Petition for Dissolution and the Motion for Temporary Orders in Seattle (CP 19). The Petition for Dissolution alleges in Section 1.14 that the King County Superior Court has jurisdiction over Nicole for the following reasons:

The child and the parents or the child and at least one parent or person acting as a parent have significant connection with the state other than mere physical presence; and substantial evidence is available in this state concerning the child's care, protection, training and personal relationships; **and the child has no home state elsewhere.** No other state has jurisdiction (emphasis supplied) (CP 3).

Section 1.15 of the Petition sets forth the residences of the parties during the five years preceding the divorce filing (CP 4).

At the same time that the Petition was filed, Ms. Root also filed a Motion for Temporary Orders (CP 220). A hearing was set for February 14, 2013. The Motion for Temporary Orders included a Proposed Temporary Parenting Plan which was the same plan that Mr. Hurtado signed (CP 26; CP 59). This Proposed Temporary Parenting Plan proposed a temporary visitation schedule for Mr. Hurtado to exercise visitation with Nicole in Seattle. The Temporary Parenting Plan also provided in Section 3.1:

The child has dual citizenship and it is in the child's best interests at this age to spend substantial time in Mexico with her father.

Section 3.2 of the Proposed Temporary Parenting Plan provided that Nicole would reside with Ms. Root "the majority of the time." Ms. Root was designated in Section 3.12 as the custodian of Nicole for purposes of all other State and Federal Statutes (CP 11 and CP 13). Page 9 of the Proposed Parenting Plan included a Section called "International Travel." The final sentence of this Section (CP 17) provides:

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.

Mr. Hurtado also received the Case Schedule for the King County Superior Court dissolution case on January 9, 2013 (CP 20). The Case Schedule identified a trial date of December 16, 2013.

After receiving the Petition and Motion for Temporary Orders, Mr. Hurtado contacted lawyer Stacey Nossaman-Petitt, who resides in Nebraska (CP 43). Ms. Petitt requested by email on February 6, 2013 that pleadings be sent to Mr. Hurtado by email at his email address of chavaah@yahoo.com.mx (CP51 and CP 494). The first sentence of attorney Petitt's February 6, 2013 email to attorney Schnuelle provides:

The parenting act information can be sent to
Chava at his email address:
chavaah@yahoo.com.mx (CP 494).

Ms. Petitt advised that she was meeting with Mr. Hurtado in Las Vegas on Friday, February 8, 2013 "to go over the paperwork and get it signed." *Id.*

On February 7, 2013, the mother's attorney emailed attorney Petitt the Temporary Motion documents including the Temporary Parenting Plan (CP 53 and 54).

On February 8, 2013, attorney Petitt mailed a response to the Petition to the King County Superior Court Clerk on Mr. Hurtado's behalf (CP 335). The Response admits paragraphs 1.1 through 1.16 of the Petition (CP 336). Mr. Hurtado requests in his Petition that he have

“50%” parenting time with Nicole and that his child support obligation be abated. *Id.* Mr. Hurtado requests the following relief in response:

WHEREFORE the Respondent, Salvado [sic] Aguillar Hurtado, prays this Court will enter a Decree of Dissolution of marriage, and upholding the parties’ property settlement agreement and parenting plan, providing for additional parenting time, and providing for an abatement of his child support obligation. In addition, the Respondent prays that each party shall be responsible for his or her own attorney’s fees and costs expended herein (CP 336).

As such, Mr. Hurtado admitted in his Response that Nicole had no home state other than the State of Washington. Nowhere in the Response does Mr. Hurtado or his attorney object to Washington as Nicole’s home state nor does he allege that Mexico is her home residence.

On February 12, 2013, Ms. Root filed a Reply Declaration in support of the Motion for Temporary Orders because Mr. Hurtado had not yet signed the Agreed Parenting Plan (CP 57). Mr. Hurtado emailed attorney Schnuelle’s office directly on February 12, 2013 from his chavaah@hotmail.com.mx email address to confirm that his response to the Petition for Dissolution had been received (CP 61).

Attorney Petitt emailed attorney Schnuelle the signed Response, Agreed Temporary Parenting Plan and Agreed Temporary Orders to the McKinley Irvin law firm on February 12, 2013 (CP 59). This Response

was mailed to attorney Schnuelle by attorney Petitt (CP 61). Mr. Hurtado did not make any changes to the Temporary Parenting Plan before he signed the Plan in Las Vegas on February 12, 2013. As such, Mr. Hurtado had the Temporary Parenting Plan in his possession for nearly a week before he decided to sign the Temporary Plan.

At no point did Ms. Root or Ms. Root's counsel tell Mr. Hurtado that he must sign the Temporary Parenting Plan in order to see his daughter (CP 553). In fact, attorney Schnuelle never personally spoke with Mr. Hurtado at any time. *Id.* Rather, she communicated with Mr. Hurtado, attorney Petitt and his attorney relative in Mexico City, Asdrual Drake Hurtado, only through email. *Id.*

C. Mr. Hurtado Participates In The USA Dissolution Process And Hires Counsel In Mexico

After signing the Temporary Parenting Plan, Mr. Hurtado began complying with the Temporary Orders and case obligations in the dissolution case. He paid monthly child support in the amount of \$486 in accordance with the Temporary Order of Child Support (CP 263). Nicole remained with her mother in Seattle during the January through April 2013 time frame (CP 10).

On April 22, 2013, Mr. Hurtado purchased the packet for the mandatory parenting seminar (CP 367). Later, on May 1, 2013, attorney

Schnuelle filed a Confirmation of Issues with the Superior Court (CP 231).

This Confirmation of Issues was signed by Salvador pro se. *Id.*

In June of 2008, Mr. Hurtado hired a relative attorney in Mexico, Asdfuval Drake Hurtado, to handle divorce proceedings in Mexico and communicate with attorney Schnuelle in the King County Superior Court case (CP 131). Attorney Schnuelle began communicating by email with attorney Hurtado on June 8, 2013. Attorney Schnuelle began sending copies of the orders and pleadings from the USA case to attorney Hurtado (CP 131-146). On June 25, 2013, attorney Hurtado wrote attorney Schnuelle the following email (CP 146):

My client is informing me that he got a message of your client asking him what time he would think he'll be at her house with Nicole.

He doesn't understand cause previously they agreed he'd take her back to Seattle a few weeks after she has her new baby, so she can recover and take care of Nicole properly without leaving her to others in charge.

We'd like your client to stick to their agreements.

Attorney Schnuelle then sent all future motions and orders by email to BOTH Mr. Hurtado and attorney Hurtado. *Id.*

D. Mr. Hurtado Refuses To Return Nicole To Ms. Root At The End Of June, 2013 As He Was Obligated To Do Under The Agreed Temporary Parenting Plan

After entry of the Temporary Orders, Mr. Hurtado paid child support in accordance with the Temporary Orders. Nicole flew to Mexico on April 25, 2013 in accordance with the Temporary Parenting Plan to exercise visitation with Mr. Hurtado. Under the schedule set forth in Section 3.1 of the Agreed Temporary Plan, Nicole was to return to Seattle on June 30, 2013 (CP 10).

In late May-early June of 2013, Ms. Root began efforts to confirm when Nicole would be returning in Seattle at the end of June, 2013 (Trial Exhibit 11). On June 7, 2013, attorney Schnuelle emailed Mr. Hurtado a demand that he confirm Nicole's return date and flight information (CP 110). Mr. Hurtado responded indicating that he had hired counsel in Mexico and that Ms. Root's attorneys should contact his Mexico attorney (CP 128). The attorney in Mexico, Asdrual Drake Hurtado, acknowledged the Agreed Temporary Orders in Washington State (CP 131-132). On June 12, 2013, attorney Schnuelle wrote the attorney in Mexico and provided a copy of the Temporary Parenting Plan (CP 137).

On June 25, 2013, attorney Schnuelle emailed attorney Hurtado and advised counsel:

My client has responded to this e mail and has indicated to me that she never agreed to a later return date. As such, the underlying parenting plan governs. I have attached the underlying parenting plan to this order. As you can see, your client is to return the child by the end of June. If he fails to have her on a plane by that time, he will be in violation of the parenting plan and I will be advising my client of her legal remedies to address this violation. ... (CP 144).

On July 22, 2013, attorney Schnuelle wrote the following email to

Mr. Hurtado:

As you are aware, your client is in gross violation of the temporary parenting plan entered on February 14, 2013 in this matter. Please advise me when he is planning to return the parties' child to Washington State and provide me with her flight itinerary. Please also let him know that I have conferred with my client and advised her of all possible legal remedies against him, both here and in Mexico. If he would like to avoid this legal action from occurring, he must return the child to my client immediately (CP 146).

On August 28, 2013, Ms. Root continued her pleas with the father to allow Nicole to return to Seattle. Ms. Root's text message dated August 28, 2013 provides:

Will you please tell me when I will see her again? She's as much my daughter as she is yours, and do you think it's really fair to her to deprive her of her mom? All I'm asking is that you communicate with me, or do you

plan on never letting me see her again? Not knowing anything is killing me inside, there isn't a day or night that goes by that I don't cry because I miss my baby girl (Trial Exhibit 23).

E. On June 25, 2013, Ms. Root Hires Mexico Attorney Eddie Varon Levy

On June 25, 2013, Ms. Root hired attorney Eddie Levy, a Hague Convention specialist attorney based in both Mexico and Los Angeles (Verbatim Report of Proceedings at p. 17). Mr. Levy was hired to pursue a Hague Convention case in Mexico against Mr. Hurtado to restore Nicole to the mother's care (CP 46). Attorney Levy filed the necessary pleadings with the Mexican Supreme Court to establish Ms. Root as Nicole's primary guardian (Verbatim Report of Proceedings at p. 22).

A Petition to recover Nicole was filed with the Mexican Central Authority (Mexican Ministry of Foreign Relations) in July of 2013 by attorney Levy on behalf of Ms. Root. The Central Authority issued a letter ruling transferring the case to the Supreme Court of Baja California Sur, which is located in La Paz B.C.S. The B.C.S. Supreme Court then opened a case and transferred it to the court in Las Cabos. Las Cabos Court then opened a local case.

Mr. Hurtado filed a competing divorce action in the Mexican courts in July of 2013. *Id.*

F. Ms. Root Files A Motion To Enforce Parenting Plan In King County Superior Court And Court Orders Mr. Hurtado To Return Nicole By August 27, 2013

On July 24, 2013, Ms. Root filed a Motion for Contempt/Motion to Enforce the Temporary Parenting Plan in the King County dissolution action (CP 40). The hearing was set for August 22, 2013 (CP 40-41). Through her attorneys, Ms. Root pled this Motion in the alternative in case it proved impossible to personally serve Mr. Hurtado in Mexico with the Contempt Motion (CP 46). Ms. Root was indeed unable to personally serve Mr. Hurtado in Mexico with the Contempt Order. The Motion and supporting documents were mailed by first class and registered mail as well by Federal Express to the father in Cabo San Lucas (CP 249, 151-156). These pleadings were also emailed to Mr. Hurtado (*Id.*). On August 6, 2013, attorney Zimmerman again emailed all of the show cause documents to Mr. Hurtado (father) for the August 22, 2013 hearing (CP 157).

Despite clearly getting notice of the show cause hearing, Mr. Hurtado failed to appear for the August 22, 2013 hearing. At the hearing, the Family Law Court granted Ms. Root's Motion to Enforce the February 14, 2013 Temporary Parenting Plan and ordered Mr. Hurtado to return Nicole by August 27, 2013 (CP 158-160). The court also ordered that a fine of \$500 per day would accrue each day thereafter that he did not

return the child to Ms. Root. *Id.* An attorney's fee Judgment in the amount of \$3,000 was entered against Mr. Hurtado (*Id.*). A review hearing to monitor compliance and/or enter a Judgment against him was set for October 17, 2013. *Id.* Mr. Hurtado received notice of the Order granting the Motion to Enforce the Temporary Orders by email and Federal Express although Mr. Hurtado refused to accept delivery of the package (CP 287 and 291). This notice also advised Mr. Hurtado of the October 17, 2014 review hearing. *Id.* Again, Mr. Hurtado did nothing to respond to the Order as Nicole remained in his care. The pleadings provided by attorney Schnuelle were again sent by regular mail, Federal Express and email (CP 172).

Mr. Hurtado again chose not to participate in the October 17, 2013 review hearing. At this review hearing, the Family Law Court upheld the earlier August 22, 2013 Order and entered a Judgment against Mr. Hurtado in the amount of \$25,500 in accordance with the \$500 per day fine previously ordered (CP 168-170). The court also ordered an additional Judgment of \$1,003 against him for further attorney's fees. *Id.* The orders were sent by attorney Schnuelle's firm to Mr. Hurtado by email and first class mail (CP 171-172). Mr. Hurtado took no action to try to set aside the orders.

On October 23, 2013, the trial court held a Pretrial Conference. Mr. Hurtado failed to appear at the Pretrial Conference (CP 503-505). The court issued an Order from the Pretrial Conference that set various deadlines for the parties to file exhibits and financial documents with the trial court. The trial court found that no parenting evaluation was required and that the mediation requirement would be waived because the father was not participating in the Washington dissolution case (CP 298-299). The Proposed Final Parenting Plan and other Orders were due to the court on the day of trial by email to the bailiff.

Attorney James Clark of Oseran Hahn appeared for Jennifer on November 7, 2013. On December 10, 2013, attorney Clark's office sent Mr. Hurtado the Witness and Exhibit List, Trial Brief and mother's Financial Declaration by email (CP 514).

**G. Nicole Is Returned To Ms. Root On December 13, 2013
In Cabo San Lucas**

Attorney Levy obtained an Order on December 13, 2013 in the Cabo San Lucas court that allowed Ms. Root to obtain immediate custody of Nicole in Mexico and to return to Seattle (Verbatim Report of Proceedings pp. 77-78). On December 13, 2013, the Mexican police were able to locate Nicole at her school and she turned her over to the custody of Ms. Root. Ms. Root then returned to Seattle with Nicole traveling

across the border in Tijuana because Mr. Hurtado possessed Nicole's U.S. passport.

H. Trial Is Conducted On December 19, 2013

On December 18, 2013, attorney Clark sent Mr. Hurtado an email informing him that the trial date had been changed (CP 516). Mr. Hurtado responded to the email requesting a continuance (CP516). On the day of trial, December 19, 2013, attorney Roni Ordell appeared at the trial with a limited Notice of Appearance for the purpose of requesting a continuance of the trial date. The court properly denied the request for a continuance of the trial date and Mr. Ordell left before the trial started.

Although Mr. Hurtado had 12 months notice of the December trial date, he chose not to appear at the trial. Instead he hired counsel, Roni Ordell, on the day of the trial. The court denied the Motion for a Continuance. At the trial, Jennifer Root and Eddie Varon Levy testified. Mr. Levy reviewed his legal efforts in Mexico to obtain an order from the Mexican courts allowing Nicole to return to her mother. At the trial, the court asked an interpreter to read the December 12, 2013 Order from the Cabo San Lucas court into the record (CP 418-422) (Verbatim Report of Proceedings at p. 79, ll. 18-20).

Section 2.18 of the Findings of Fact identified Washington as Nicole's home state on the following basis (CP 186):

The court made a determination in this regard on February 14, 2013.

Any absences from Washington since that time have been only temporary and have been unilaterally undertaken by the respondent in violation of the February 14, 2013 temporary parenting plan.

The child and the parents or the child and at least one parent or person acting as a parent, have significant connection with the state other than mere physical presence; and substantial evidence is available in this state concerning the child's care, protection, training and personal relationships; and

The child has no home state elsewhere.

Further, the court made a finding that Mr. Hurtado had wrongfully abducted Nicole for purposes of the Hague Convention. The final paragraph of Finding 2.18 provides (CP 186):

Other: The respondent has failed to return the child from his court ordered residential time pursuant to the February 14, 2013 parenting plan. The February 14, 2013 parenting plan holds that the United States is the habitual residence of the child and a refusal to return the child to the United States is conclusively deemed wrongful under the Hague Convention on the Civil Aspects of International Child Abduction.

I. The Trial Court Denies A Motion To Vacate The Final Judgment And Final Orders Entered By The King County Superior Court On December 19, 2013

On February 25, 2014, Mr. Hurtado filed a Motion for Order to Show Cause to Vacate the Final Dissolution Orders (CP 304-325). Jennifer's response is set forth in CP 481-538. Mr. Hurtado's Motion to Vacate was denied by the trial court.

J. Before The Parties Were Married They Executed A Separate Property Agreement

Before the parties were married, they signed a document entitled "Convenio De Separacion De Bienes" (CP 520-529). This document simply states that the parties were married under a separate property marriage (CP 527). In Mexico, parties that get married can choose whether the marriage will accumulate separate or joint property. *Id.* Here, the parties chose to sign a "Separacion De Bienes" agreement. At no point did Mr. Hurtado advise Ms. Root that this document was a Prenuptial Agreement as Mr. Hurtado now claims in this appeal. Jennifer did not receive any of Mr. Hurtado's separate property assets in the Decree of Dissolution so this issue is a mere "red herring" argued by Mr. Hurtado.

II. ISSUES ON APPEAL

A. Did the trial court abuse its discretion in denying the father's motion for a continuance when Mr. Hurtado had notice of the

III. ARGUMENT

A. The Trial Court Correctly Denied Mr. Aguilar Hurtado's Request For A Trial Continuance

The trial court was correct in denying Mr. Hurtado's Motion for Continuance because Mr. Hurtado had sufficient time to prepare for trial. A continuance is within the trial court's discretion and will not be disturbed absent a showing of abuse. *Empens v. Tomer*, 170 Wash. 524, 539, 17 P.2d 21 (1932). CR 40(d) provides: "when a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance."

In this case, the court did not abuse its discretion because Mr. Hurtado cannot show good cause for his request for a continuance. On January 7, 2013, Mr. Hurtado was personally served with the initial dissolution pleadings, including the Case Schedule. The Case Schedule stated that trial was set for December 16, 2013. As such, Mr. Hurtado had 11 months to prepare for trial. Initially, Mr. Hurtado participated in the Washington case by: (1) filing a Response to Petition (CP 336), (2) emailing Jennifer's counsel directly (CP 496), (3) signing the Confirmation of Issues (CP 231), (4) obtaining the King County mandatory parenting seminar materials (CP 367), and (5) complying with

the Temporary Plan until July 1, 2013 when he decided to keep Nicole in Mexico.

Mr. Hurtado provides no evidence to support his statement on page 5 of his Appellate Brief that he “was unable to find and retain an attorney in Washington willing to represent him.” He contacted attorney Pettitt immediately after receiving the initial dissolution pleadings and met with her to sign the Temporary Parenting Plan. During the pendency of this litigation, Mr. Hurtado received actual notice of every Motion and pleading filed in the lawsuit. Either he or his attorney/friend, Stacey Pettitt, communicated with counsel for Ms. Root at every stage of the dissolution case until he decided to keep Nicole in Mexico. Mr. Hurtado provides no evidence that he actually tried to hire hire a lawyer in Washington before the eve of trial.

Further, Mr. Hurtado hired an attorney, Asdrual Drake Hurtado, in Mexico in June of 2013 to file a divorce case in Mexico and communicated with attorney Schnuelle in Washington (CP 131-146). Both attorney Hurtado and Mr. Hurtado received all orders and pleadings filed in the King County case.

Despite all of these lawyer contacts, Mr. Hurtado waited until the day before trial to hire Washington counsel. Once the July 1, 2013 deadline for Mr. Hurtado to return Nicole to Seattle had passed, Mr.

Hurtado simply chose not to participate in the Washington proceeding until the Central Authority physically took the parties' daughter away from him. Mr. Hurtado did not have good cause for a continuance on the day of trial. He certainly did not have "clean hands" when he came to court for trial in December of 2013.

In contrast, Ms. Root complied with all court Orders, including the Order from Pretrial Conference. Ms. Root appeared on the day of trial, ready and prepared. Ms. Root's Mexican counsel, Mr. Eddie Varon Levy, traveled from Mexico City to testify regarding Mr. Hurtado's wrongful withholding of the parties' daughter. Under the circumstances, the trial court did not abuse its discretion when it denied Mr. Hurtado's request for a continuance at the 11th hour the day of trial.

B. The Trial Court Had Subject Matter Jurisdiction To Enter A Parenting Plan

The trial court was correct in entering a Final Parenting Plan because Nikki has "no home state elsewhere" and the "significant connection" and "substantial evidence" elements of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") are satisfied in this situation because of Nicole's many contacts with the State of Washington.

The UCCJEA provides that Washington courts have jurisdiction over a child if Washington is the home state of the child. Pursuant to

RCW 26.27.021(7), “home state” is defined as “the state in which the child lived with a parent... for at least six consecutive months immediately before the commencement of a child custody proceeding...a period of temporary absence of a child, parent, or person acting as a parent is part of the period.” However, when a child has no home state, a court may exercise jurisdiction over the child when:

- (i) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
- (ii) Substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships.

RCW 26.27.201(1)(b); *In re Marriage of McDermott*, 175, Wn. App. 467, 485-86, 307 P.3d 717 (2013).

Here, Mr. Hurtado admitted in his Response to Petition that Washington was Nicole’s home state (CP 336).

1. Nicole Had No Home State When The Petition For Dissolution Was Filed In King County Superior Court

Upon separation of the parties in November 2011, Ms. Root moved back to Washington with the intent to remain. Ms. Root accepted full-time employment in Washington as a child care provider and has

continued to reside in Bellevue, Washington since November of 2011. The parties agreed to share custody of Nicole so that Nicole would retain strong connections with both parents (CP 224). Mexico ceased to be Nicole's home state when the parties decided in November of 2011 that she would share residences in both Washington and Mexico and commencing a pattern of Nicole living three months in the USA and three months in Mexico from November of 2011 through August of 2012. Moreover, at the time of filing, Nicole had lived in Washington for five consecutive months.

2. Nicole And Ms. Root Have Significant Connections With Washington State

Determining whether a significant connection exists under RCW 26.27.201(1)(b)(i) is a factual determination. In the *Matter of the Marriage of Steadman*, 36 Wn. App. 77, 79, 671 P.2d 808 (1983). Courts have found a significant connection where there is "a presence of several supportive family members." *Id.* at 79-80.

In this case, Ms. Root was born and raised in Bellevue, Washington. Until Ms. Root moved to Mexico after marrying Mr. Hurtado, Washington was her only place of residence. Ms. Root and Nicole have lived with Ms. Root's grandmother, Joyce Root, since November of 2011 which has allowed Nicole to develop an extremely close relationship with Joyce. Ms. Root's remaining family also reside in

Washington, including Nikki's half-sister, Lily. Both Ms. Root and Nikki have significant connections to Washington State.

C. Both Parties Agreed That The United States Is The Child's Habitual Residence For Purposes Of The Hague Convention

It was unnecessary for the trial court to make a finding or order that the U.S. is the habitual residence of Nicole for purposes of the Hague Convention because Mr. Hurtado agreed that the U.S. was Nicole's habitual residence in the Temporary Parenting Plan. Mr. Hurtado reached this agreement in February of 2013 after meeting with his attorney friend, Ms. Pettit, in Las Vegas (CP 51). The existence of this agreement rendered it unnecessary for the trial court to analyze which country is Nicole's habitual residence. Mr. Hurtado did not "waive" any right to have the court determine the child's habitual residence, rather he agreed that the U.S. is the habitual residence and never filed any pleadings in the King County Superior Court case refuting this position. Mr. Hurtado's Response to Petition fails to object to Washington jurisdiction over Nicole. He made this agreement after Jennifer and Nicole had lived six consecutive months (August of 2012 through February of 2013) in Bellevue.

The provision contained within the Temporary Parenting Plan that recognizes the U.S. as the habitual residence is not "buried" in the Plan as

the father claims in his Appellate Brief. Rather, a review of the Temporary Parenting Plan in whole indicates that both parties intended that the U.S. would be Nicole's habitual residence. Section 3.1 of the Parenting Plan sets forth the temporary visitation schedule. This Section provides in pertinent part:

Prior to enrollment in school, the child shall reside with the **petitioner**, except for the following days and times when the child will reside with or be with the other parent:

The child has dual citizenship and it is in the child's best interests at this age to spend substantial time in Mexico with her father ... (emphasis supplied) (CP 27)

Further, Section 3.12 provides that the "child named in this parenting plan is scheduled to reside the majority of the time with the **petitioner**" (CP 13). These provisions are consistent with the "International Travel" Section and the provision that designates the U.S. as the habitual residence.

Mr. Hurtado has cited no case law that precludes the parents from agreeing for purposes of the Hague Convention that a specific country will serve as the "habitual residence" for the child. Because Mr. Hurtado was assisted by attorney Petitt when he signed the Temporary Parenting Plan, he was fully aware that Jennifer was to act as the primary caregiver for

Nicole in Bellevue. Even if Mr. Hurtado was acting pro se when the Temporary Parenting Plan was signed, Washington law recognizes that:

... a pro se litigant is held to the same standard as an attorney. *Batten v. Abrams*, 28, Wash.App. 737, 739 n. 1, 626 P.2d 984 (1981). *Kelsey v. Kelsey*, 179 Wn. App. 360, 368 (2014).

While this Appellate Court need not conduct this analysis given Mr. Hurtado's agreement that the USA is Nicole's habitual residence, an application of the legal principles announced by the 9th Circuit in *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) leads to the conclusion that the U.S. is Nicole's habitual residence. Even if Nicole lived in Mexico for the first two years of her life, both parents undertook a concerted effort to make the U.S. Nicole's habitual residence. The circumstances which existed between November of 2011 and January of 2013, when the Petition for Dissolution was filed, demonstrate an intent on the part of both parents to abandon Mexico as the habitual residence and adopt the U.S. When Mr. Hurtado signed the Temporary Parenting Plan in February of 2013, Nicole had lived 10 out of the previous 16 months in Seattle including the 6 months leading up to his execution of the Temporary Parenting Plan. This pattern demonstrates an intent on the part of both parties to acclimate Nicole to the U.S. Further, Ms. Root had lived consecutively for 15 months in Seattle before the Petition for Dissolution was filed (CP 223).

It is well settled in case law that a child can lose its habitual residence to a place “even without a parent’s consent.” In *Mozes, supra* at 1081, the case notes:

Even when there is no settled intent on the part of the parents to abandon the child’s prior habitual residence, courts should find a change in habitual residence if “the objective facts point unequivocally to a person’s ordinary or habitual residence being in a particular place...

The court further states at page 1082:

It is entirely natural and foreseeable that, if a child goes to live with a parent in that parent’s native land on an open-ended basis, the child will soon begin to lose its habitual ties to any prior residence. **A parent who agrees to such an arrangement without any clear limitations may well be held to have accepted this eventuality** (emphasis supplied).

Here, Mr. Hurtado voluntarily allowed Nicole to reside for 10 of the 16 months in the U.S. immediately preceding the filing of the Petition for Dissolution. Nicole resided for five consecutive months in the U.S. before the Petition for Dissolution was filed. These objective facts point to Nicole’s habitual residence being in the U.S.

D. The Final Parenting Plan And Final Order Of Child Support Were Properly Entered By The Trial Court Because Neither Party Filed A Proposed Final Parenting Plan Prior To Trial

Father argues that the Final Parenting Plan entered by the trial court should be “void” because Jennifer did not file a Proposed Final Parenting Plan under RCW 26.09.181. While it is true that NEITHER party filed a Proposed Final Parenting Plan, Salvador cites no legal authority that would authorize this court to void the Final Parenting Plan solely based on this technicality.

There is no remedy provided in RCW 26.09.181 should both parties fail to file a Proposed Parenting Plan within 180 days of the dissolution filing. Rather, the only remedy described by this statute for a party’s failure to file a Final Parenting Plan is identified in the “historical and statutory notes” to RCW 26.09.181. These statutory notes provide:

Submission of proposed plans. The petition and the response shall contain a proposed parenting plan where there are minor children of the parties. Where the petition or the response does not contain a proposed parenting plan, the party who has filed a proposed permanent parenting plan may move for a default.

Thus, only a party that has actually filed his or her own Proposed Final Parenting Plan can move for entry of a default against the remaining parent based on the remaining parent’s failure to file a Proposed Final

Parenting Plan. Here, Mr. Hurtado never filed his own Proposed Final Parenting Plan and never moved for any type of Default Order against Jennifer based on her failure to file a Proposed Final Parenting Plan.

Mr. Hurtado cannot successfully argue that he was not aware of the contents of Ms. Root's Proposed Final Parenting Plan that was ultimately executed by the trial court. At the time the Final Parenting Plan was entered with the court, Mr. Hurtado had kept Nicole in Mexico from July 1, 2013 through December 13, 2013 in violation of the Temporary Parenting Plan. Ms. Root had obtained two orders from the King County Superior Court requiring Mr. Hurtado to return Nicole. Under these circumstances, the trial court properly entered a Final Parenting Plan that provided supervised visitation rights for the father in Section 3.1 of the Final Plan (CP 175).

Mr. Hurtado's reliance on *In re Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989) is misplaced. In *Leslie*, supra, the court modified a divorce decree because certain relief exceeded the relief sought in the complaint. The court found that requiring the respondent to pay expensive orthodontic work exceeded the allowable relief when such relief was not requested in the complaint. *Id.* at 621. The court also noted that only *those portions* which exceeded relief were void. *Id.*

Here, at trial, the court divided the property and liabilities, approved the petitioner's proposed parenting plan, and entered an order of child support for the parties' daughter-exactly what the Petitioner's complaint requested. The court did not order any excessive relief, such as expensive orthodontic work (CP 486-487).

Mr. Hurtado's Appellate Brief incredibly suggests that Ms. Root has a history of neglecting the child. This allegation did not appear in Mr. Hurtado's Response to Petition nor did the father file any pleadings which alleged this fact at any point in the USA dissolution case. If Mr. Hurtado wanted a parenting evaluator or GAL, he had every opportunity to request one. The trial court, in the order from pretrial conference, found that a parenting evaluation was not required (CP 503-505).

Mr. Hurtado argues that there was no basis for the trial court to enter a Final Order of Child Support on the basis that Jennifer did not comply with RCW 26.19.071(2) and LFLR 10. This argument fails because Mr. Hurtado was provided with all of Jennifer's financial information, including paystubs, tax returns and bank statements as part of the Motion for Temporary Orders filed at the beginning of the USA dissolution case. Mr. Hurtado was served with all of these pleadings at the time he received the Motion for Temporary Orders. The Affidavit of

Service dated January 7, 2013 indicates that Salvador received Jennifer's Financial Declaration and Sealed Financial Source Documents (CP 19).

Further, Mr. Hurtado signed both the Temporary Order of Child Support and Temporary Child Support Worksheets (CP 76-87). The Agreed Order of Child Support identified Jennifer's net monthly income at \$1,533 and imputed income to Mr. Hurtado in the amount of \$3,307 (CP 78). The trial court relied on the Temporary Financial Orders in executing the Final Order of Child Support.

Jennifer also provided evidence at trial of her paystubs and work earnings (Trial Exhibit 27 and 28). According to the transcript of trial proceedings, Jennifer's Financial Declaration was provided to the court as Trial Exhibit 28. This Financial Declaration identified Jennifer's monthly net income at \$1,655 (Verbatim Report of Proceedings, p. 53-54).

With respect to Mr. Hurtado's income, he had every opportunity to provide the court with his actual income numbers prior to the trial date. He voluntarily elected not to provide any income information to the trial court. Thus, the court was justified in utilizing the same level of income for Mr. Hurtado as was identified in the Agreed Temporary Order of Child Support. In the Temporary Order of Child Support, Mr. Hurtado agreed it was appropriate to impute income to him in the net amount of \$3,307 on the basis that "the obligor's income is unknown" (CP 77). Because Mr.

Hurtado refused to provide any income information to the trial court, the trial court correctly adopted they total monthly transfer payment of \$486 per month consistent with the Agreed Temporary Order of Child Support (Verbatim Report of Proceedings p. 60).

E. The Decree Of Dissolution And Findings Of Fact Were Properly Entered By The Trial Court Under Washington's Established Practice Of "Notice" Pleading

Jennifer's Petition for Dissolution requests general requests for relief to divide the parties' property and liabilities, approve the Petitioner's Parenting Plan and enter an Order of Child Support. This is the exact relief that the trial court ultimately granted in the Decree of Dissolution and Findings of Fact. The trial court did not order any relief in excess of the prayer for relief.

Washington courts allow "notice" pleadings.

Mr. Hurtado raises an issue concerning the division of assets and liabilities contained in the Decree of Dissolution. Jennifer received NONE of Mr. Hurtado's assets in the final Decree. The trial court awarded Jennifer her minimal separate property which included only her vehicle, animals and bank accounts in her name (CP 200). There is no evidence that Jennifer has any ownership interest in the Seven R Corporation which she does not. Mr. Hurtado received all other assets,

including his real property, vehicle, retirement funds and all other personal property. *Id.*

The document Mr. Hurtado claims is a prenuptial agreement is simply a standard form signed by marriage participants at the time of marriage in Mexico. The document was not identified in the Mexican courts as a prenuptial agreement (CP 526-527). Jennifer had believed the document to be a Prenuptial Agreement (CP 532). This document has no impact on the enforceability of the final orders.

F. The February 14, 2013 And The October 17, 2012 Orders Were Properly Entered By The Trial Court Because Mr. Hurtado Was Personally Served In Washington And The Parties Had A History Of Accepting Service Of Pleadings By Email

Mr. Hurtado does not deny that he received notice of EVERY single pleading filed in the USA dissolution. There is no dispute that attorney Schnuelle sent every single pleading to Mr. Hurtado by email, regular mail and Federal Express. Mr. Hurtado admits that he understand English (CP 467). Once attorney Hurtado began representing Mr. Hurtado on June 8, 2013, he received all pleadings by email (CP 131-148).

For example, the Motion to Enforce/Contempt that Jennifer filed on July 25, 2013 was sent to Mr. Hurtado by first class, registered mail and International Federal Express (CP 148-149). This Motion was both a Motion to Enforce and a Motion for Contempt because Jennifer was

concerned that she would not be able to get personal service on Mr. Hurtado. Despite his allegation that he never received the Federal Express package, Mr. Hurtado even signed for the Federal Express package containing the Motion papers on August 5, 2014 (CP 152). As such, Mr. Hurtado was fully aware of the August 22, 2013 hearing and chose not to participate.

Similarly, Mr. Hurtado received notice of the October 17, 2013 review hearing and elected not to participate. The service provisions of the Hague Convention are inapplicable here because Mr. Hurtado was originally served here in Washington. Mr. Hurtado appeared and even filed a Response to Petition here where he consented to the jurisdiction of Washington (CP 336). He never objected to Washington's jurisdiction in the Response. Service was complete at that point under Washington State law.

Under United States case law, once service is made in the forum state (Washington) then the forum law applies. Mr. Hurtado chose to come to Washington and was served here. Once service is accomplished in the forum state there is no obligation to comply with the Hague Convention service requirements. In *Volkswagenwerk v. Schlunk*, 486 U.S. 694, 108 S. Ct. 2104, 100 L.Ed.2d 722 (1988) our Supreme Court ruled:

...the Hague Service Convention does not apply when process is served on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service.

Further, the case of *In re GLG Life Tech Corp. Securities Litigation*, 287 F.R.D. 262 (U.S.D. Ct. N.Y) summarized the *Volkswagenwerk* case, *supra*, as follows:

FN7. The Supreme Court's ruling in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 108 S.Ct. 2104, 100 L.Ed. 2d 722 (1988), is not to be contrary. While *Volkswagenwerk* noted in dictum that "**compliance with the [Hague] Convention is mandatory in all cases to which it applies,**" *id.* at 705, 108 S.Ct. 2104, *Volkswagenwerk* involved an interpretation of Article I of the Hague Convention, which states that the Convention applies "**where there is occasion to transmit a judicial or extrajudicial document for service abroad.**" Hague Convention, art. 1, 20 U.S.T. 361 *1. *Volkswagenwerk* held only that the Hague Convention did not apply where service was made on a foreign citizen's agent within the United States. It held that the Convention did not apply because no judicial document was actually transmitted for service abroad, *id.* at 707-08, 108 S.Ct. 2104, even though it was obvious that the domestic agent would ultimately transmit the service documents to the defendant in the foreign country, see *id.* at 707, 108 S.Ct. 2104 ("**Whatever internal, private communications take**

place between the agent and a foreign principal are beyond the concerns of this case.”). Thus, *Volkswagenwerk* does not hold or even suggest that the Hague Convention must always be complied with before alternative service is ordered.

While the *Volkswagenwerk* case, *supra*, references a corporation, the analogy is applicable here because Mr. Hurtado was personally here in Washington when he was served. Once he was personally served with the Petition, Mr. Hurtado consented to the jurisdiction of Washington when he was served here and the laws of our Washington courts are applicable to any service issues. There was no need for Jennifer to send pleadings abroad for service.

Washington Court Rules allow service by email. GR 5(b)(7) provides that service may be accomplished:

Service by Other Means. ...including facsimile **or electronic means, consented to in writing by the person served.** Service by facsimile or electronic means is complete on transmission when made prior to 5:00 p.m. on a judicial day (emphasis supplied).

While the parties did not sign a formal agreement to accept service by email, the parties established a pattern/history of accepting pleadings by email throughout the case. Pleadings were sent to the father by email and established a course of conduct. Neither Mr. Hurtado nor attorney

Hurtado objected to delivery of the documents by email. Attorney Pettit even requested pleadings be sent to Mr. Hurtado by email (CP 494).

Our Washington Courts have long adopted civil rules that place substance over form and aim to resolve cases on the merits. In *Griffith v. City of Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 83 (1996), the Court stated:

[T]he basis purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized ... 'the sporting theory of justice.' Thus, whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.

Further, RCW 4.36.240 provides:

The court shall, in every stage of action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party;

Mr. Hurtado received notice of every pleadings in this matter and had every opportunity to participate in the Washington dissolution but chose not to. His due process rights were not violated in any respect.

IV. CONCLUSION

For the reasons stated herein, the final orders of the trial court should be affirmed in all respects.

RESPECTFULLY SUBMITTED on August 15, 2014.

OSERAN HAHN, P.S.

By 

JAMES H. CLARK, WSBA #18862
Attorneys for Respondent Jennifer Root

PROOF OF SERVICE

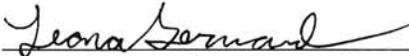
TO: Clerk, Division One, Court of Appeals

AND TO: Ron Ordell, Attorney for Appellant Salvador Hurtado

PLEASE TAKE NOTICE on the 15th day of August, 2014, the Response Brief of Respondent was filed with Division One, Court of Appeals and served via ABC Legal Messengers, Inc. on the following:

Ron Ordell
705 2nd Ave Ste 1300
Seattle, WA 98104-1797

Dated this 15th day of August, 2014.



Leona Bernard, Legal Assistant