Form 9. Petition for Review

[Rule 13.4(d)]

Court of Appeal Cause No. 71130-0-I
Supreme Court Cause No. ~~91309-1~~
91308-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Marie-Catherine Smith, Respondent

v.

Elika Kohen, Petitioner, Appellant

APPELLANT'S AMENDED PETITION FOR REVIEW

MAR. 3, 2015
(2nd *amendment*)

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

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A. IDENTITY OF THE PETITIONER

1. Petitioner Elika Kohen, the Appellant below, asks this court to accept review of the following Appellate Court decisions designated in Part B.

B. COURT OF APPEALS DECISIONS

2. (A.) Exhibit A-02 – Order Denying Motion for Reconsideration, Appendix G.3, pg. 32. **(B.)** Exhibit A-03 – Order Denying Motion to Take New Evidence, Appendix G.4, pg. 34; **(C.)** Exhibit A-04 – Opinion Affirming Trial Court's Decision, Appendix G.5, pg. 37.

C. ISSUES PRESENTED FOR REVIEW

C.1. ISSUE 01 – COMPLIANCE WITH THE HAGUE CONVENTION

3. Does the Choice of Court Agreement for Legal Separation in Washington State supersede a Petition for the Return of Children?

4. Did the Appellate Court have authority to modify international treaty by providing a Return Remedy over alleged Breaches of Rights of Access?

5. Does "Shared, Well-Settled Parental Intent" act as a surrogate in conclusions of Habitual Residence in cases of infant/very-young Children?

C.2. Issue 02 - Structural Errors

6. Summary Judgment[1]: Is it appropriate to remand to trial when material facts are in dispute—and when it is not proven there are no genuine disputes of material fact? CJC 2.6(A), CR 56(c); CPC 4.4;

7. The Laws of Quebec, Canada: Does the Hague Convention require examination of settled intent and rights attributed to *both* parents? Convention (28), Article 3,Article 600, C.C.Q.;

8. Failure to State a Claim: What is the claim and required burdens of proof for which a return can be ordered? Convention (28), Article 3.

9. Habitual Residence and Sabbaticals: Should analysis occur whether Habitual Residence had been retained in, or returned to, the United States?

10. Habitual Residence and Acclimatization: Is it appropriate to apply the Last Shared and Settled Intent of the parents *as and for* the conclusion of Habitual Residence of infant/very young children?

C.3. Issue 03 – Appellate Court Errors

11. Did the Appellate Court err, making two findings of its own without

1 "Structural Error," is used, herein, analogously to the term used in criminal contexts where individual rights are contravened—to assert the necessity of reversal and trial: "The right to trial [by jury] reflects, we have said, a profound judgment about the way in which law should be enforced and justice administered. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." Sullivan v. Louisiana, 508 U.S. 275, 282 (1993), internal quotes omitted.

remanding these issues for Trial, nor based on any substantial evidence, nor allowing the parties to respond, (RAP 12.1), that: **(A.)** "*Mr. Kohen informed Ms. Smith that he would not return the children to Canada*"; and **(B.)** "*Mr. Kohen cut off Ms. Smith's contact with the Children.*" See Opinion pg. 11, para. 1; U.S. Const. amend. XIV, § 1.

C.4. Issue 04 – Recognizability of Foreign Judgments

12. Are the Trial and Appellate Court's decisions manifestly incompatible with the policies of Quebec—specifically: statutory examination of *joint* exercise of parental authority, and proof of such intents? Articles 75-78, Article 600, C.C.Q., Convention (16), Article 5, Article 3155, C.C.Q..

13. Did Mr. Kohen have had an adequate time to respond, present evidences, and witnesses?

D. Statement of the Case

D.1. Issue 01 - Facts Re. the Hague Convention

14. Sep 2, 2013: The Parties lawfully entered into a Choice of Court Agreement, (under Article 3(c), Convention (37)), for Legal Separation and proceedings to occur in Washington State, proven by written messages between the parties, (CP 389, CP 429, Exhibits: *Ms. Smith's consent)*, and Ms. Smith's declaration to the Montreal Superior Court, (Exhibit A-123,

Motion to take new Evidence before the Appellate Court, Denied,Appendix G.4);

15. Ms. Smith, herself, declared that she consented, and acquiesced for the Children to return to the United States—explicitly for the purpose of the family's immigration, (CP 49, CP 149, CP 117, *Smith's Declarations*);

16. Ms. Smith proved that there was no settled intent for the family to remain in Quebec; **(A.)** Ms. Smith never attempted to sponsor Mr. Kohen's or the Children's immigration to Quebec, Canada, (CP 148-149); **(B.)** Mr. Kohen was never eligible for work in Canada, (*ibid*); **(C.)** The Children's brother was not enrolled in local school, but rather home-schooled, (*ibid*);

17. Feb. 8, 2012-Jul. 2, 2013: Ms. Smith, (9 months pregnant with Lydia-Maayan), and the Children Anya-Marie, and Hezekiah, left their home in Washington State to *visit* Ms. Smith's parents farm in Bristol, Quebec, *with Mr. Kohen's consent*, (CP 134-139, Exhibit: *Tickets*).

18. Feb. 8, 2012 – Jul. 2, 2013: Mr. Kohen proved that the parties planned, for well over a year, to return the family to the United States, (CP 378, CP 379, CP 383, CP 478-480, Exhibits: *Ms. Smith's Emails*).

19. Aug. 2, 2012: Mr. Kohen flew to Canada, to return his oldest daughter, Anya-Marie, to the United States, "in-lap", (CP 137, Exhibit: *Tickets*); **(A.)**

Ms. Smith had reported that her mother and aunt abducted Anya-Marie—while in Quebec, (CP 25, *Kohen's Declaration*):

20. Shared and Settled Decision: Mr. Kohen proved that Ms. Smith unequivocally communicated and demonstrated settled intent: **(A.)** Jul. 2, 2013: Ms. Smith began the immigration background check process—*even before the Children left Canada*; (CP 125-128, Exhibit: *FBI Background Check for immigration on Jul 2, 2013*); **(B.)** Jul. 15, 2013: Ms. Smith applied for immigration to the United States, (CP 118-123, *USCIS Exhibits*); **(C.)** Jul. 16, 2013: Ms. Smith provided the notice to abandon the family's residence in Quebec, (CP 143, Exhibit: *Metcap's confirmation of .Smith's notice to vacate*); **(D.)** Aug. 12, 2013: Ms. Smith executed a Power of Attorney, 1.5 months *after* the Children return to the United States proving that she unequivocally expressed intent for the Children to reside and be domiciled in Washington State, pending her own immigration, (CP 333, Exhibit: *Smith's Power of Attorney*); **(E.)** Aug. 18, 2013: Ms. Smith confirmed her plans to help support Mr. Kohen and the Children in Nov, 2013, beyond the return date of the flight on Oct 2 2013, (CP 60, Exhibit: *Smith's Email on Aug 25*; CP 423, Exhibit: *Smith's messages confirming support*; **(F.)** Aug. 25, 2013: Ms. Smith continued to

confirm that her decision was still well-settled, despite the breakdown of the marriage. See Section D.3, pg. 10;

21. Sep. 12, 2013: **(A.)** Ms. Smith alleged that she was unable to contact the Children, (CP 149, *Smith's Declaration*); **(B.)** Mr. Kohen did not answer this call at the direction of the Montreal Police, (CP 26, *Kohen's Declaration*); **(C.)** Mr. Kohen proved that afterwards he continued to facilitate Ms. Smith's contact with the Children. See Section C.3, pg. 5.

22. Oct 2, 2013: Ms. Smith ensured the flight would be missed, sending a last minute email, (CP 432, Exhibit: *Smith's Email 3 hours beforehand*).

23. Oct. 2nd, 2013: Ms. Smith executed an anticipatory Hague claim—*before* the Children missed their flight, alleging Wrongful *Retention*, (CP 49, para. 49, *Smith's Declaration, Oct. 2nd*).

D.2. Issue 02 – Facts Re. Structural Errors

24. Summary Judgment: There is no evidence in the record to substantiate the Appellate Court's new findings, (materially disputed facts), that Mr. Kohen refused to return the Children, nor that he cut off Ms. Smith's contact with the Children. See Opinion, pg. 10, para. 1.

25. Laws of Quebec Canada: The Records is absent any analysis regarding Rights of Custody attributed to *both* parents under Quebec law,

specifically, **(A.)** if these rights changed following their agreement, declarations, and actions to return the family to the U.S.; **(B.)** if Ms. Smith had a unilateral right to either expect or demand the return; or **(C.)** If Mr. Kohen had a right under Quebec Law to refuse to return the Children;

26. Failure to State a Claim: The record is void of any claim that the Return or the Retention of the Children breached Ms. Smith's rights of Custody under Quebec Law—as required by Article 3, Convention (28);

27. Habitual Residence and Sabbaticals: Neither Ms. Smith, nor the courts, addressed that the Habitual Residence in the United States was retained/maintained because of the temporary nature of the stay;

28. Habitual Residence and Acclimatization: No legal basis exists, under the Convention, that determinations of Acclimatization are possible in infant/very young children, nor that Duration of Domicile should be used.

D.3. ISSUE 03 – FACTS RE. APPELLATE COURT ERRORS

29. The Appellate Court injected an unsubstantiated allegation that Mr. Kohen cut of contact between Ms. Smith and the Children; **(A.)** Even Ms. Smith declared that she had remained in contact with the Children, (CP 150, *Smith's Declaration*); **(B.)** Evidence in the record shows that Mr. Kohen proved this allegation false, (CP 418, CP 419, CP 420, *Exhibits*);

30. Sep. 15, 2013: Ms. Smith alleged, (CP 149), that Mr. Kohen stated he refused to return with the Children, (Opinion, pg. 3, para. 2); **(A.)** Ms. Smith's allegation is unsubstantiated; **(B.) Oct. 3, 2013-Nov. 8, 2013: (B.1.)** Ms. Smith refused to exercise Rights regarding the Residence of the Children, refusing to even discuss rescheduling the flight, (CP 433-441, Exhibits: *Kohen's inquiries regarding returning*); **(B.2.)** In discussions about returning to Quebec, Ms. Smith breached her agreement to allow Mr. Kohen to use their abandoned residence, not following through, (CP 76-81, *Exhibits*); **(C.) Nov. 8, 2013:** Ms. Smith waited three days before the Nov. 13 hearing to tell Mr. Kohen she was staying in Quebec, not immigrating to the U.S., (CP 94, Exhibit: *Smith's Email*);

31. The Breakdown of the Marriage: The Appellate Court erred, (Opinion, pg. 3, par. 1), that Ms. Smith executed the Power of Attorney—before—the breakdown of the marriage; **(A.)** Mr. Kohen proved the marriage broke down irretrievably before this, when Ms. Smith detailed her other relationships and refused to end them, (CP 460, Exhibits, *Ms. Smith's emails*, CP 468 on Aug 4, CP 469, on Aug. 9, etc); **(C.)** Nevertheless, Ms. Smith continued to affirm her settled agreement, (CP 391, *Exhibit: Ms. Smith's email returning to U.S. on Aug 25, 2013*; CP 387; CP 56-62,

Exhibit: *Ms. Smith's emails on Aug. 25*; Exhibit: *Ms. Smiths Email on Aug 25;* CP 388, Exhibit: *Ms. Smith's email on Sep 2, moving to Vancouver obviating return tickets to Quebec*, etc.);

32. Jan. 12, 2015: **(A.)** Mr. Kohen could not have reasonably framed a response—since *even the Appellate Court* had to formulate another construction: **(B.)** In summary, the Appellate Court's restatement is: Mr. Kohen breached the agreement to return the Children to the *United States*, because he *supposedly* refused to return with the Children to *Quebec*, AND supposedly refused to allow Ms. Smith to maintain contact with the Children, (Opinion, pg. 11, para. 1).

33. Feb. 17, 2015: The Appellate Court rejected Mr. Kohen's Motion under RAP 12.1, (Motion for Reconsideration), to allow him to respond to newly injected issues, nor remanded this issue for trial.

34. Jan 12, 2015: The Appellate Court did not reverse the decision after finding that the Trial Court's findings of fact are actually conclusions of law, (Opinion, pg. 8, para. 3), clearly insufficient under CR 56.

35. The Appellate Court erred stating that it was uncontested why the Children were present in Quebec in the first place, (Opinion, pg. 1, para. 2): **(A.)** Mr. Kohen contends that it was a temporary stay, considered a

sabbatical under the Hague Convention, (CP 30); **(B.)** Ms. Smith declared they agreed to move the family to Quebec, contingent upon her agreement to sponsor the family's immigration to Quebec, (CP 148, *Ms. Smith's Declaration*); **(C.)** Ms. Smith breached what would have been a part of such an agreement, (CP 149) ; **(D.)** Ms. Smith contends that this move was the result of financial struggles, and because she did not have status to work in the U.S., (CP 148); **(E.)** However, Ms. Smith affirmed that Mr. Kohen in fact moved from Washington State to take a project in New Jersey, (*ibid*), and declared that she only began working 8 months later, as she was 9 months pregnant when she arrived in Quebec, (*ibid*).

D.4. ISSUE 04 – FACTS RE. RECOGNIZABILITY OF FOREIGN JUDGMENTS

36. Inadequate Time: Mr. Kohen argued to the Appellate and Trail Courts that he could not have reasonably have presented this evidence to the Trial Court because, (CP 298-299): **(A.)** Ms. Smith's Attorney, Ms. Stacy D. Heard, unnecessarily caused 5 different hearings to be heard on the same day, two at the same time, but before different justices, (2 more scheduled in addition to Mr. Kohen's two, plus the hearing for the Return of the Children which was not expected to occur until Dec. 6, 2013, (CP 190-192, CP 10, CP 442, CP 445, and other proceedings regarding the Petition

for Legal Separation, CP 298-299.

37. Oct. 16, 24, 2013: After having indicated that she was being compelled to make false accusations, (CP 400, Exhibit: *Smith's Email*), Ms. Smith began harassing Mr. Kohen to obstruct legal proceedings by submitting false police reports, such s claiming that he shaved the Children's heads, (CP 145, CP 147, Exhibits: *Police Reports*).

38. The basis for Ms. Smith's claim for sanctions against Mr. Kohen in the amount of $1000.00 was that the evidences Mr. Kohen presented were *irrelevant*, (CP 364, *Smith's Motion*); **(A.)** Mr. Kohen proved to both Trial and Appellate Courts that these evidences were material to decisions under the Hague Convention, (CP 18-98, *Kohen's Declaration*); **(B.)** The legal basis for Ms. Smith's motion was misplaced in this context, and applies to contempt of court—making it impossible to frame a response.

39. Oct. 2, 2013: Ms. Smith initially claimed that her Rights of Custody were breached, ambiguously citing the entire Civil Code of Quebec, (CP 43, *Smith's Hague Application*), *because* Mr. Kohen Petitioned for Legal Separation in Washington State, (CP 49, par. 49; *Smith's Declaration*); **(B.2.)** Nov. 3, 2013: Ms. Smith changed allegations, claiming, without substantiation, that Mr. Kohen *refused* to return the Children, (CP 149,

Smith's Declaration). CP 49, pars. 41-44, CP 149, Smith's Declarations).

40. Nov. 3, 2013: A month later, Ms. Smith vexatiously changed her allegation, precluding Mr. Kohen from framing a response—alleging that Mr. Kohen refused to return to Quebec with the Children—without providing *any* evidence, (CP 149, *Smith's Declaration*);

41. Jan. 12, 2015: The Appellate Court restated Ms. Smith's claim, injecting a new unsubstantiated allegation that Mr. Kohen cut off her contact with the Children, (Opinion, pg. 11, para. 1), and this breached their agreement to return the Children to the United States, (ibid.).

42. Additional Evidence - Feb. 17, 2015: The Appellate Court rendered an interlocutory decision, denying Mr. Kohen's Motion to take new evidence, *Smith's declaration to the Montreal Superior Court*), under the grounds that he did not have sufficient time, (RAP 9.11). Review of this decision, though the time limit has expired, can can be waived under RAP 1.2.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

E.1. LEGAL BASES FOR REVIEW

43. Legal Basis[2]: (A.) U.S. Const. amend. XIV, § 1, the Right to Due

2 Pro Se pleadings are to be liberally construed, given liberal construction, and held to less stringent standards, protecting the litigant in view of improper denomination of pleadings, and inartfulness. See Haines v. Kerner, *404 U.S. 519 (1972)*, Baldwin County Welcome Center v. Brown, 466 U.S. 147, 165 (1984), Estelle v. Gamble, 429 U. S., at 106, RAP 1.2.

Process of the Law—right to Trial, and Right to Equal Protection under the Law; **(B.)** Hague Convention (16) on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters; **(B.1)** Article 5(1), Convention (16), the decisions rendered were manifestly incompatible with the public policy of Quebec, Canada, which requires proofs of parental intent, (Articles 75-78, C.C.Q.); **(B.2.)** Article 5(1), Convention (16): renders these decisions unrecognizable because they resulted from proceedings incompatible with the requirements of due process of law, and because there was no adequate opportunity to fairly present a defense; **(C.)** Hague Convention (37) on Choice of Court Agreements; **(C.)** Washington State Rule of Appellate Procedure RAP 13.4 (b)(2) - Conflict with another decision of the Court of Appeals; **(D.)** RAP 13.4(b)(3) – Significant question of Constitutional Law regarding the Right to Due Process; **(E.)** RAP 13.4 (b)(4) – Significant Public Interest: this is an international Child Abduction case, which sets precedent and effects temporary foreign stays, (sabbaticals), of families.

E.2. ISSUE 01 – COMPLIANCE WITH THE HAGUE CONVENTION

44. There is no jurisdiction of this matter under the Hague Convention: **(A.)** The Choice of Court Agreement between the parties supersedes a

Petition for the Return of Children. Re C (Abduction: Settlement), EWHC 1245 (Fam), at 23 (28 May 2004). Droit de la famille - 123502, 2012 QCCS 6431; **(B.)** There are no return remedies for breaches of Rights of Access, (even if true). Redmond v. Redmond, 724 F.3d 729, 741 (7th Cir. 2013); **(C.)** The Hague Convention does not apply in Anticipatory Cases. Toren v. Toren, 191 F.3d 23, 28 (1st Cir. 1999); **(D.)** When there is no claim that the Return/Retention of the Children breached Rights of Custody attributed under the law of the foreign state, (Quebec Canada). Convention (28), Article 3; **(E.)** When there is only a "one-time dust-up", Roux v. Roux, 319 Fed.Appx. 569, 571 (9th Cir. 2009));

45. Toren v. Toren is an analogous case, and summarizes why the Hague Convention does not apply: **(A.)** in anticipatory cases, **(B.)** that a restraining order is an affirmative defense which prohibited Mr. Kohen from removing the Children from Washington State without Ms. Smith's consent; **(C.)** and a breach of Rights of Access does not does not lead to a Return remedy. See Toren v. Toren, Section G.1, Appendix - Cases, pg. 26.

46. "*Because the state court's ne exeat order does not constitute a "retention" within the meaning of the Hague Convention, we conclude that the district court did not err in granting McConnell's motion to dismiss.*"

Pielage v. McConnell, 516 F.3d 1289 (11th Cir. 2008), (ruling that the Convention was intended "to cover the situation where a child has been kept by another *person*, not necessarily by a court; **(D.)** Ms. Smith's *second* allegation, to the U.S. Department of State, was because of this Restraining Order, (CP 43, *Dept. of State Application*);

47. The Hague Convention apply does not apply, as Ms. Smith's parental Right of Custody to Determine their Residence was not possibly breached —because she did not attempt to exercise it; **(A.)** Ms. Smith refused. See Section D.1, Issue 01 - Facts Re. the Hague Convention, pg. 6.

48. The Appellate Court's Opinion states that a breach of access voids an agreement to change residence of the Children, (Opinion, pg. 11, para. 1); **(A.)** The Court's decision sets precedent, but is *internally inconsistent*, overlooking that Ms. Smith declared the Children's were in Quebec contingent on her agreement to sponsor the family's immigration, (CP 148, *Smith's Declaration*); **(B.)** Ms. Smith declared that she did not fulfill this agreement, even failing to extend their visitor's visas, (CP 149), proving no settled intent to remain in Quebec. Consistency, RAP 13.4(b)(2).

E.3. ISSUE 02 – STRUCTURAL ERRORS

49. FRCP 56(a) - Summary Judgment: **(A.)** There is no calculus under the

Convention for a return remedy on *one* uncontested fact—*the duration of the Children's domicile;* nor upon single, supposed, breach of Rights of Access; nor upon a supposed refusal to return;

50. Failure to State a Claim: **(A.)** The ONLY calculus under the Hague Convention is whether or not the return or retention of the Children to the United States breached Ms. Smith's Rights of Custody under Quebec Law, and ONLY if Mr. Kohen did not have the Right to refuse return under Quebec Law, (Article 3, Convention (28); Article 600, C.C.Q.); **(B.)** Article 600, C.C.Q., attributes Mr. Kohen the right to refuse to return the Children to Quebec. **(C.)** Neither Ms. Smith's claim, nor the Appellate Court's "restatement" of her claim meet the burden, under the Hague Convention to state a claim for which relief can be granted, FRCP 12(b)(6); **(D.)** Specifically, the claim must be made, and proven, that the Removal or Retention of the Children breached rights of Custody attributed to Ms. Smith under Quebec Law, (*specifically rights pertaining to the Determination of the Children's Residence*);

51. Obligation to Recognize the laws of Quebec: **(A.)** Article 600, C.C.Q.: No conclusions exist about the rights and last shared intent of—*both*—parents, nor regarding proof, (Articles 75-78, C.C.Q.); **(B.)** Courts remand,

for determinations of Breaches of Rights of Custody under the laws of the foreign state. Friedrich v. Friedrich, 983 F.2d 1396, 1403 (6th Cir. 1993).

52. Equal Protection under the Law: The Trial and Appellate Court's violated the Code of Judicial Conduct, CJC 2.3(A), resulting in significant prejudice: **(A.)** No analysis is in the record regarding the last shared settled intention of *both* parents—departing from the accepted precedent established by Mozes v. Mozes, 239 F.3d 1067, 1075 (9th Cir. 2001); **(B.)** Statutes codified *de jure* in Quebec, Canada, protect the rights of *both* parents. Articles 75-78, 600, C.C.Q.; **(C.)** For example, Mr. Kohen's and Ms. Smith's act to abandon their prior residence, to establish it elsewhere is materially relevant. Mozes v. Mozes, at 1076.

53. Habitual Residence and Acclimatization During Temporary Visits/Sabbaticals: **(A.)** The Trial Court found Habitual Residence, directly from their Duration of Domicile, (CP 17, *Trial Court Minute Entry*), which contravenes Hague Convention precedent; **(B.)** United States habitual residence retained after 8 months of an intended 4 year stay in Germany. Holder v. Holder, 392 F.3d 1009, 1014 (9th Cir. 2004); **(C.)** United States habitual residence retained during 32 month stay in Mexico. Ruiz v. Tenorio, 392 F.3d 1247, 1253 (11th Cir. 2004); **(F.)** United States

habitual residence retained during 27 month stay in Greece. Tsarbopoulos v. Tsarbopoulos, 176 F. Supp.2d 1045 (E.D. Wash. 2001).

54. Habitual Residence and Acclimatization: **(A.)** Shared, parental intent, supersedes and acts as a surrogate for the determination of Habitual Residence/Acclimatization in very young Children. See Holder v. Holder, 392 F.3d 1009, 1016 (9th Cir. 2004), Redmond v. Redmond, 724 F.3d 729, 746 (7th Cir. 2013); **(B.)** Habitual Residence retain even when infants are born abroad'; See Holder, at 1020 (9th Cir. 2004).

E.4. ISSUE 03 – APPELLATE COURT ERRORS

55. Ms. Smith's Allegations are without Factual Basis: **(A.)** Ms. Smith's declarations, (i.e. that Mr. Kohen refused to return), are not evidence, RCW 5.40.010—and she has therefore presented no substantial or objective evidence to preponder, (Opinion pg. 11); **(B.)** Courts must make determination from—*all*—available evidence. Mozes v. Mozes, 239 F.3d 1067, 1068 (9th Cir. 2001). Articles 75-78, C.C.Q..

56. The Appellate Court found that the Trial Court's findings of fact were conclusions of law, (Opinion, pg. 8, para. 3), and therefore *Notably* inadequate; **(A.)** This pervasive lack of sufficient findings is sufficient grounds to Reverse and Remand. Lawrence v. Lawrence, 105 Wn. App.

683, 20 P.3d 972 (2001); **(B.)** The Trial Court did not comply with court rule, CR 56(c), requiring Ms. Smith to prove that there were no genuine disputes of material fact, nor identified the reasons for its conclusions, CR 56(h), causing significant prejudice in the appeal process, (Opinion, pg. 13, fn. 9). **(C.)** The Trial Court's theory was Ms. Smith's instruction to be guided by the UCCJEA's home state Analysis, (*Smith's Memorandum of Law*, CP 156, *which as no legal effect in Quebec*), and the Trial Court's reliance on duration of the Children's domicile, (*Trial Court's Minute Entry*, CP 17); **(D.)** Findings of fact and conclusions of law are required in "connection with all final decisions in adoption, custody, and divorce proceedings." Marriage of Stern, 68 Wn. App. 922, 926, 846 P.2d 1387 (1993); CR 52(a)(2)(B).

57. No Return Remedy regarding Breaches of Rights of Access: **(A.)** There is no return remedy for claims of Breaches of Rights of Access, and these claims are pursued under Article 21, Convention (28). See Redmond v. Redmond, 724 F.3d 729, 741 (7th Cir. 2013); **(B.)** The Appellate Court's conclusion is unsound, (*even if the allegation was true*): that a denial of access constitutes a breach of agreement regarding settled intent of the Children's residence—and therefore a Return Remedy is available;

(C.) In effect this results in claims of Breaches of Rights of Access having a Return Remedy—a result not intended by the authors. **(D.)** The U.S. Supreme Court was unwilling to "effectively" rewrite international treaty in a similar way. Lozano v. Alvarez, No. 12-820, 17 (U.S. Mar 05, 2014).

E.5. ISSUE 04 – RECOGNIZABILITY OF FOREIGN JUDGMENTS

58. Quebec and Hague Convention law implement protect the due process rights of litigants. Article 3155, C.C.Q.. Article 5, Convention (16).

59. Fraud in the Procedural Sense: A decision is unrecognizable if there is demonstrable fraud in the procedural sense, (Article 3155, C.C.Q., Convention (16), Article 5; For example: **(A.)** Ms. Smith's attorney contravened the Rules of Professional Conduct, (RPC 4.4), using means to over-burden a third party. See overburdening facts, Section D.4, pg. 13. **(B.)** Mr. Kohen can not reasonably respond to changing claims. Section D.4, Issue 04 – Facts Re. Recognizability of Foreign Judgments, pg. 13.

60. Procedural Fraud: A 6 day notice is insufficient under the Court Rules invoked, CR 4.1, and under the rules of Summary Judgment, CR 56, and the Constitutional rights of Due Process. U.S. Const. amend. XIV, § 1. See CP 195-196, *Ms. Smith's Summons under* CR 4.1.

61. Inadequate Time: The Hague Convention mandates all available

evidence be considered. Mozes v. Mozes, 239 F.3d 1067, 1076 (9th Cir. 2001). **(A.)** The Civil Code of Quebec also affirms, Article 75-78, C.C.Q.; **(B.)** Mr. Kohen presented objections to Ms. Smith's act of scheduling hearings vexatiously, (CP 298-299), and the court should have taken appropriate action, CJC 2.15(D), on its own initiative, under CJC 2.6(A) and ensured time to present a defense.

F. CONCLUSION

62. For the reasons set forth above, Mr. Kohen respectfully requests the Supreme Court expedite this case by reversing the Trial Court's decision, and remanding these proceedings for trial in Montreal, Quebec, under the second Hague Convention case regarding Mr. Kohen's two daughters.

Dated this 3rd of March, 2015.

RESPECTFULLY SUBMITTED,

Elika Kohen

Appellant, Pro Se

G. APPENDIX

Therefore, we do not see how a petitioner like the father, alleging only an anticipatory retention, can invoke the protections of the Hague Convention. In addition to his anticipatory retention argument, the father articulates a denial of access argument. This argument is to the effect that the mother's conduct has so interfered with his rights of access to the children as to amount to a wrongful *2929 retention within the meaning of the Hague Convention.6 Specifically, the father points to the Further Temporary Order issued by the Massachusetts Probate Court, requiring both parties to obtain written permission from the court before removing the children from the Commonwealth. The father contends that such requirement is in direct violation of the terms of the parties' May 20 agreement. Again, it is unclear precisely which provisions of the May 20 agreement the father claims have been violated. To the extent that the father's argument refers to the jurisdictional provisions of the Israeli decree, we reiterate that the appropriate forum for such an argument is the Massachusetts Probate and Family Court. Such an argument has no bearing on the question before us, namely, whether a retention of children has in fact occurred. To the extent that the father is arguing that the order is violative of the visitation terms set forth in the May 20 agreement, we note that the order does not deny visitation rights. In other words, while the Further Temporary Order clearly imposes an additional requirement before the father can exercise his visitation rights, the requirement, on its face, does not amount to a denial of access sufficient to support a claim of a retention. Toren v. Toren, 191 F.3d 23, 28 (1st Cir. 1999).

G.2. EXHIBIT A-01 – STATUTES

Hague Convention (16) on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

Convention (16), Article 5

Recognition or enforcement of a decision may nevertheless be refused in any of the following cases -
(1) if recognition or enforcement of the decision is manifestly incompatible with the public policy of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law or if, in the circumstances, either party had no adequate opportunity fairly to present his case;
(2) if the decision was obtained by fraud in the procedural sense;
(3) if proceedings between the same parties, based on the same facts and having the same purpose -
a) are pending before a court of the State addressed and those proceedings were the first to be instituted, or
b) have resulted in a decision by a court of the State addressed, or
c) have resulted in a decision by a court of another State which would be entitled to recognition and enforcement under the law of the State addressed.

Hague Convention (28), on the Civil Aspects of International Child Abduction

Convention (28), Article 2

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

Convention (28), Article 3

The removal or the retention of a child is to be considered wrongful where -
a) it is in breach of rights of custody attributed to a person, an institution

or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Convention (28), Article 5

For the purposes of this Convention -
a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Convention (28), Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State.

The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Convention (28), Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Hague Convention (37) on Choice of Court Agreements

Convention (37), Article 3

Exclusive choice of court agreements

For the purposes of this Convention -
a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
c) an exclusive choice of court agreement must be concluded or documented -
i) in writing; or
ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Convention (37), Article 5

Jurisdiction of the chosen court
(1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
(2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
(3) The preceding paragraphs shall not affect rules -
a) on jurisdiction related to subject matter or to the value of the claim;
b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Articles 75-78, C.C.Q. - DOMICILE AND RESIDENCE

75. The domicile of a person, for the exercise of his civil rights, is at the place of his principal establishment.
76. Change of domicile is effected by a person establishing his residence in another place with the intention of making it his principal establishment.
The proof of such intention results from the declarations of the person and from the circumstances of the case.
77. The residence of a person is the place where he ordinarily resides; if a person has more than one residence, his principal residence is considered in establishing his domicile.
78. A person whose domicile cannot be determined with certainty is deemed to be domiciled at the place of his residence.
A person who has no residence is deemed to be domiciled at the place where he lives or, if that is unknown, at the place of his last known domicile.

Article 600, C.C.Q. - PARENTAL AUTHORITY

600. The father and mother exercise parental authority together.
If either parent dies, is deprived of parental authority or is unable to express his or her will, parental authority is exercised by the other parent.

Article 3155, C.C.Q. - RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

3155. A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:
(1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;
(2) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable;
(3) the decision was rendered in contravention of the fundamental principles of procedure;
(4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether or not it has acquired the authority of a final judgment (res judicata), is pending before a Québec authority, in first instance, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;
(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
(6) the decision enforces obligations arising from the taxation laws of a foreign State.

G.3. EXHIBIT A-02 – ORDER DENYING MOTION FOR RECONSIDERATION

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

In the Matter of the Application of MARIE-CATHERINE SMITH, a/k/a MARIE-CATHERINE KOHEN, Respondent, and ELIKA KOHEN, Appellant.	No. 71130-0-I ORDER GRANTING MOTION FOR EXTENSION OF TIME, DENYING MOTION FOR RECONSIDERATION, AND DENYING REQUEST FOR FEES AND COSTS

The appellant, Elika Kohen, has filed a motion for extension of time to file a motion for reconsideration along with a motion for reconsideration. The respondent, Marie-Catherine Smith, has filed a response to the motions and requests the court award her fees and costs. The court has taken the matters under consideration and has determined that the motion for extension of time should be granted, the motion for reconsideration should be denied, and the request for fees and costs should be denied.

Now, therefore, it is hereby

ORDERED that the appellant's motion for extension of time to file the motion for reconsideration is granted; and, it is further

ORDERED that the appellant's motion for reconsideration is denied; and, it is further

ORDERED that respondent's request for fees and costs is denied.

Done this 17th day of February 2015.

FOR THE COURT:

Trickey, J

G.4. EXHIBIT A-03 – ORDER DENYING MOTION TO TAKE NEW EVIDENCE

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

MARIE-CATHERINE SMITH, a/k/a MARIE CATHERINE KOHEN,	)	No. 71130-0-I
Respondent,	)	ORDER DENYING MOTION TO MODIFY
and	)	
ELIKA KOHEN,	)	
Appellant.	)	

Appellant Elika Kohen has moved to modify the commissioner's April 22, 2014 ruling denying his "Motion for the Acceptance of Testimony Regarding Proceedings as New Evidence." Respondent Marie-Catherine Smith has filed a response, and Kohen has filed a reply.

We have considered the motion under RAP 17.7 and have determined that it should be denied. To the extent that Kohen's motion to modify is a renewed request to supplement the record, it is also denied. Respondent's request for an award of attorney fees is denied without prejudice to renew at a later date.

Now, therefore, it is hereby

ORDERED that the motion to modify is denied; and, it is further

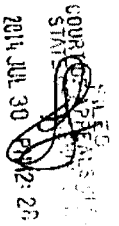
No. 71130-0-I/2

ORDERED that appellant's request to supplement the record is denied; and, it is further

ORDERED that respondent's request for attorney fees is denied without prejudice to renew at a later date.

Done this 30th day of July, 2014.

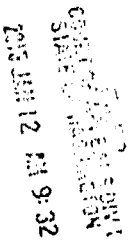
Spearman, C.J. Leach, J.



G.5. EXHIBIT A-04 – OPINION AFFIRMING TRIAL COURT'S DECISION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Application of MARIE-CATHERINE SMITH, a/k/a MARIE-CATHERINE KOHEN, Respondent, and ELIKA KOHEN, Appellant.	)	No. 71130-0-I DIVISION ONE UNPUBLISHED OPINION FILED: January 12, 2015



TRICKEY, J. — A trial court does not err in granting a petition to return minor children to their "habitual residence" pursuant to the Hague Convention on the Civil Aspects of International Child Abduction when the petitioner has demonstrated by a preponderance of the evidence that the children were wrongfully removed. Accordingly, we affirm the trial court's order granting Marie-Catherine Smith's petition to return the children to Canada and denying Elika Kohen's motion to dismiss.

FACTS

The following facts are not in dispute. Kohen, a United States citizen, and Smith, a Canadian citizen, were married on February 1, 2010 in New York. At the time of the marriage, Kohen and Smith lived in Canada with Kohen's seven-year-old son from a former relationship, H.K. In August 2010, Kohen, Smith, and H.K. moved to Seattle where Kohen had a job opportunity. Kohen and Smith's daughter, A.M.K., was born on September 12, 2010 in Seattle. The couple struggled financially because Kohen soon

lost his job and Smith did not have authorization to work in the United States. Consequently, on February 5, 2012, Smith returned to Canada with H.K. and A.M.K. in order to live with her parents, while Kohen remained in the United States. On March 15, 2012, Smith gave birth to the couple's second daughter, L.M.K., in Canada. After Kohen rejoined the family in Canada in July 2012, Smith supported the family with her job managing a Starbucks because Kohen did not have authorization to work in Canada. At some point, Kohen and Smith discussed moving back to the United States. With Smith's consent, Kohen purchased round-trip airline tickets from Montreal to Seattle for himself, H.K., A.M.K., and L.M.K., departing on July 2, 2013, and scheduled to return on October 2, 2013. On August 12, 2013, Smith notarized a document stating the following:

> I, Marie-Catherine H.A. Kohen, residing at 1800 Rue Crevier APT 4, Saint-Laurent, Quebec, H4L 2X5, Canada, hereby appoint Elika S. Kohen, residing at 3324 Wetmore Ave., Everett, WA, 98201, United States, as my as my [sic] Attorney-in-Fact ("Agent") to act in my capacity to any and all of the following:
>
> 1. Due to my temporary absence, (pending immigration to the United States), I am hereby affirming Elika S. Kohen's authority with the following extents, concerning the children: [H.K.] . . . [A.M.K.] . . . and [L.M.K.]:
>
> a. To make and maintain applicable life, health, and dental insurance policies.
> b. To make doctor's appointments and to make decisions for medical treatment.
> c. To file and make requests for United States and Canadian birth certificates, visas, and passports for our children.
> d. To file for and request Social Security Numbers within the United States, and Social Identification Numbers in Canada.
> e. To provide enrollment into school and childcare.
> f. To make travel arrangements when necessary.

> The rights, powers, and authority, as my Attorney-in-Fact and "Agent," to exercise any and all of the rights and powers herein granted shall commence and be in full force and effect from July 3rd, 2013.[1]

Shortly thereafter the couple's relationship began to deteriorate and Smith told Kohen she no longer desired to move to the United States and wanted the children to remain with her in Canada. On September 27, 2013, Kohen filed a petition for dissolution in Snohomish County Superior Court.[2] Kohen did not return to Canada with the children using the return airline tickets on October 2, 2013. The following day, Smith filed an application for return of the children with the United States Department of State.

On November 1, 2013, Smith filed a petition in Snohomish County Superior Court asserting that Kohen had wrongfully removed A.M.K. and L.M.K. from their habitual residence in Canada and requesting their return under the Hague Convention on the Civil Aspects of International Child Abduction. In support of her petition, Smith attached her own sworn declaration in which she stated that during August and September 2013, after Kohen left for the United States with the children, he told her she would no longer be able to see the children, refused to allow her to speak to A.M.K. on the telephone, and informed her he would not bring the children back to Canada. Smith stated, "Had I known [Kohen] would do this, I would have never consented to his departure from Canada with our children."[3]

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[1] Clerk's Papers (CP) at 39.
[2] The parties stipulated to a stay of the dissolution proceedings pending the outcome of the Hague Convention petition.
[3] CP at 149.

Kohen filed a response to the petition, consisting of an unsigned, unsworn declaration and several unauthenticated attachments, including nearly 50 pages of e-mails between the couple. Kohen also filed a motion to dismiss the petition, consisting of his own unsworn declaration and several unauthenticated attachments, some of which are the same as in his response to the petition.[4]

A hearing on Smith's petition was held on November 13, 2013.[5] The trial court granted Smith's petition and ordered A.M.K. and L.M.K. be returned to Canada. The trial court found:

> 1. The children were wrongfully removed from their habitual residence of Canada by the respondent father on or about October 3, 2013.
>
> 2. The petitioner mother had rights of custody, and was exercising those rights at the time of the wrongful removal of the children.
>
> 3. The application for return of the children was brought within one year of their removal.
>
> 4. The petitioner mother did not acquiesce or consent to the removal of the children.
>
> 5. The respondent father's claim of abuse is unsubstantiated, and even if substantiated, does not rise to the level of "grave harm" as contemplated by the Convention.
>
> 6. The respondent father's claim of significant danger in Canada is not substantiated.
>
> 7. The father shall turn over the children's passports to the mother's attorney by 5 pm on November 13, 2013. The children shall return to the

[4] Though the grounds upon which Kohen moved to dismiss the petition are not entirely clear from the record, Kohen's opening brief characterizes it as a CR 12(b)(6) motion to dismiss for failure to state a claim.

[5] Although it appears the trial court heard testimony, the record contains only declarations and documents submitted by the parties.

> habitual residence of Canada within 72 hours, without interference. The mother's designee shall travel to the U.S. to retrieve the children.
>
> 8. Neither party shall discuss the case with the children, other than to let them know that they will be returning to Canada with their mother.
>
> 9. The costs and expenses of the mother's designee for her airfare, hotel, car rental, children's expenses, and similar expenses, shall be reserved for the Canadian court.
>
> 10. Attorney's fees incurred by petitioner are reserved for the trial court in Canada.[6]

On the same day, the trial court denied Kohen's motion to dismiss the petition, and ordered Kohen to pay Smith $1,000 in attorney fees. Kohen appeals the trial court's orders granting Smith's petition, denying his motion to dismiss, and ordering attorney fees.

ANALYSIS

This court reviews a trial court's findings of fact for substantial evidence. In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). "Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted." Katare v. Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). "The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence." Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993). If substantial evidence supports the finding, it does not matter that other evidence may contradict it, because credibility determinations are left to the trier of fact and are not subject to review. State v.

[6] CP at 13-14.

Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We review conclusions of law de novo. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

A trial court's decision "is presumed to be correct and should be sustained absent an affirmative showing of error." State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of providing a record adequate to establish the errors claimed. Wade, 138 Wn.2d at 464; see also RAP 9.2, 9.9, 9.10. An "insufficient record on appeal precludes review of the alleged errors." Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

Return of the Children

The United States is a party to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 49 (hereinafter Hague Convention). In 1988, Congress implemented the provisions of the Hague Convention in the International Child Abduction Remedies Act (ICARA), former 42 U.S.C. sections 11601-11610 (reclassified as 22 U.S.C. sections 9001-9011, effective Dec. 16, 2014). A primary goal of the Hague Convention is to secure the prompt return of children wrongfully removed to or retained in any contracting country. Hague Convention, art. 1; 22 U.S.C. § 9001. The Hague Convention's focus is not the underlying merits of a custody dispute but instead whether a child should be returned to

a country for custody proceedings under that country's laws. Holder v. Holder, 392 F.3d 1009, 1013 (9th Cir. 2004).

To establish that a child has been wrongfully removed or retained, a petitioner must establish, by a preponderance of evidence, that

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

Hague Convention, art. 3; 22 U.S.C. § 9003(e)(1)(A). If the removal or retention was wrongful, then the court must order the child returned to his or her habitual residence for a custody determination, unless the respondent can establish one of the following exceptions: (1) more than one year has passed since the wrongful removal or retention and the child is settled in his or her new environment; (2) the petitioning parent was not actually exercising custody rights at the time of the removal or retention; (3) the petitioning parent had consented to or subsequently acquiesced in the removal or retention; (4) the child objects to being returned and is of an age and maturity level at which it is appropriate to take account of his or her views; (5) there is a "grave risk" that the child's return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;" or (6) the return of the child would be inconsistent with "fundamental principles . . . relating to the protection of human rights and fundamental freedoms". Hague Convention, arts. 12, 13, 20. The respondent

bears the burden of proving the first four exceptions by a preponderance of the evidence and the last two exceptions by clear and convincing evidence. 22 U.S.C. § 9003(e)(2).

Kohen challenges the trial court's finding that Canada was A.M.K. and L.M.K.'s "habitual residence." He argues that Canada was not the children's habitual residence because Smith clearly intended to move from Canada to the United States. He further claims that the trial court misapplied the law when it determined the children's habitual residence based on the "home state" concept of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), chapter 26.27 RCW, rather than the Hague Convention.

Neither the Hague Convention nor ICARA defines the term "habitual residence." In determining whether a child has acquired a new habitual residence, there must first be a "'settled intention to abandon the one left behind.'" Holder, 392 F.3d at 1015 (quoting Mozes v. Mozes, 239 F.3d 1067, 1075-6 (9th Cir. 2001)). There must also be (1) an actual change in geography, and (2) the passage of an appreciable period of time, one sufficient for acclimatization. Mozes, 239 F.3d at 1078.

Though labeled as a finding of fact, the trial court's determination that the children's habitual residence is Canada is actually a conclusion of law. Holder, 392 F.3d at 1015. But the trial court's conclusion is supported by the facts in the record. On the date that Kohen took the children to Seattle, A.M.K. had lived in Canada for the past 17 months and L.M.K. had lived in Canada her entire life. Moreover, the evidence does not support Kohen's claim that the United States has become the children's habitual

residence. Though Smith and Kohen discussed moving to the United States with the children, because Smith ultimately told Kohen she wanted the children to live with her in Canada, their intentions regarding the move cannot possibly be described as "settled."

Similarly, there is no evidence in the record before us that the trial court misapplied the law when determining the children's habitual residence. Smith's memorandum of law supporting her petition accurately summarizes the factors a trial court is to consider in determining a child's habitual residence under the Hague Convention. Kohen does not provide a verbatim report of proceedings for the hearing, which may have provided more context for the trial court's decision-making process. In the absence of an affirmative showing of error, we presume the trial court's decision to be correct.

Kohen argues the trial court erred in ordering A.M.K. and L.M.K.'s return because Smith "was not actually exercising . . . custody rights at the time of removal or retention," or had "consented to or subsequently acquiesced in the removal or retention."[7] In support of this claim, Kohen relies on the notarized document signed by Smith giving him the power to enroll the children in daycare, make their medical appointments, and apply for their Social Security numbers while she remained in Canada.

The Hague Convention does not define the "exercise" of rights of custody. The Sixth Circuit has stated that "in the absence of a ruling from a court in the country of

[7] Br. of Appellant at 5 (emphasis omitted) (quoting Hague Convention, art. 13).

habitual residence," the "only acceptable solution . . . is to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child." Friedrich v. Friedrich, 78 F.3d 1060, 1065 (6th Cir. 1996) (Friedrich II). The court went on to hold that "if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." Friedrich II, 78 F.3d at 1066.

Neither party disputes that Smith, as A.M.K. and L.M.K.'s mother, possessed custody rights with respect to the children. And the facts clearly indicate that Smith continued to exercise those rights during the time that A.M.K. and L.M.K. were in the United States with Kohen. For example, Smith attempted to maintain telephone contact with the children, but Kohen refused to allow her to do so. Moreover, Smith worked to ensure that the children's medical and educational needs would be met by giving Kohen the written authority to do things she could not while in Canada. There is no evidence in the record that Smith intended a "clear and unequivocal abandonment" of A.M.K. and L.M.K. by remaining in Canada and permitting Kohen to take the children to the United States.

The Hague Convention is equally silent on the terms "consent" and "acquiescence," but case law distinguishes the two defenses, providing that "[t]he consent defense involves the petitioner's conduct prior to the contested removal or retention, while acquiescence addresses whether the petitioner subsequently agreed to

or accepted the removal or retention." Baxter v. Baxter, 423 F.3d 363, 371 (3rd Cir. 2005) (citing Gonzalez-Caballero v. Mena, 251 F.3d 789, 794 (9th Cir. 2001)). When examining a consent defense, a court considers what the petitioner actually agreed to when allowing the child to travel outside of his or her country of residence and the scope of the petitioner's consent. Baxter, 423 F.3d at 371. A parent may consent to removal of a child for a period of time, under certain conditions or circumstances, but that does not make retention of the child beyond those conditions or circumstances necessarily permissible. Baxter, 423 F.3d at 370-1. A petitioner's conduct following the removal of a child is a key factor in ascertaining whether such consent was provided at the time of removal. Gonzalez-Caballero, 251 F.3d at 794. Acquiescence, on the other hand, has been held to require "an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time." Friedrich II, 78 F.3d at 1070 (footnotes omitted).

Kohen fails to meet his burden to prove the defense of consent or acquiescence by a preponderance of the evidence. Evidence in the record shows that Smith consented to the children's removal from Canada for a period of time and on the assumption that she would be able to stay in communication with them. But Kohen informed Smith that he would not return the children to Canada and cut off her contact with them. Because the condition on which Smith consented to the children moving to the United States was not met, there is no basis to conclude that she consented to Kohen's retention of the children in the United States. Moreover, Smith's conduct after

Kohen failed to return with the children is not consistent with that of a parent who has consented or acquiesced to her children remaining in the United States. The day after Kohen did not utilize the return airline tickets, Smith requested that the United States government intervene to secure the children's return. Because Kohen does not establish an exception to the children's return, the trial court did not err.[8]

Kohen argues the trial court erred in refusing to continue the hearing on the petition so that he could have more time to prepare. Because the record does not demonstrate that Kohen ever requested a continuance, we find no error.

Finally, Kohen contends that the proceedings violated his right to due process. Because Kohen fails to identify the basic components of a due process claim or support this claim with argument or relevant authority, we decline to address this issue.

Kohen's Motion to Dismiss

Kohen contends the trial court erred in denying his motion to dismiss the petition. We review a trial court's decision on a CR 12(b)(6) motion de novo. Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(6) motion "questions only the legal sufficiency of the allegations in a pleading." Brown v. MacPherson's, Inc., 86 Wn.2d 293, 298 n.2, 545 P.2d 13 (1975). Dismissal is appropriate only if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." Tenore v. AT&T Wireless Servs., 136 Wn.2d 322,

[8] Kohen further argues that his retention of the children in the United States was "unavoidable," because a temporary order entered in the dissolution action on September 23, 2013 prevented him from removing the children from Snohomish County, and this should thereby constitute an exception to their return. As Kohen was the party that initiated the dissolution action, this argument is unconvincing.

330, 962 P.2d 104 (1998). In other words, the purpose of CR 12(b)(6) "is to weed out complaints where, even if that which the plaintiff alleges is true, the law does not provide a remedy." Alexander v. Sanford, 181 Wn. App. 135, 142, 325 P.3d 341 (2014). Because Smith stated a cognizable claim that the children were wrongfully removed, the trial court did not err in refusing to dismiss the petition.[9]

Attorney Fees

Kohen assigns error to the trial court's imposition of attorney fees in relation to his motion to dismiss.[10] However, in his brief Kohen fails to offer any argument or authority supporting this assignment of error. Accordingly, we need not address the issue. RAP 10.3(a)(6).

Affirmed.

Trickey, J

WE CONCUR:

Dwyer, J.

Becker, J.

[9] Kohen argues that in the alternative, the trial court should have called for a more definite statement. This argument is meritless because Smith's petition is not legally insufficient, nor is there any evidence in the limited record before us that Kohen requested a more definite statement.

[10] Kohen also contends that the trial court awarded Smith attorney fees related to the Hague Convention petition. However, the record is clear that aside from the $1,000 imposed related to the motion to dismiss, the trial court reserved the issue of attorney fees for the trial court in Canada to determine.

OFFICE RECEPTIONIST, CLERK

To: e.s. kohen
Subject: RE: Kohen - 91308-1 Motion and 2nd Amended Petition for Review

Rec'd 3/4/2015

From: e.s. kohen [mailto:oneflame@windandflame.com]
Sent: Tuesday, March 03, 2015 5:04 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Kohen - 91308-1 Motion and 2nd Amended Petition for Review

To Whom it May Concern,

Following the Supreme Court's response that my initial Amendment would not be accepted because the amended page count was significantly higher than the 4 page concession made--I am resubmitting the Amendment to properly comply with the waiver that I received.

Respectfully,
Elika S. Kohen
oneflame@windandflame.com
425/954.7103