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Court of Appeals Cause No. 71130-0-1  
Snohomish County Cause No. 13-2-08326-2

**SUPREME COURT OF STATE OF WASHINGTON**

**MARIE-CATHERINE SMITH,**

Respondent,

v.

**ELIKA KOHEN,**

Petitioner.

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**ANSWER TO PETITION FOR REVIEW**

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Stacy D. Heard  
WSBA No. 28856  
Attorney for Respondent

THE LAW OFFICE OF STACY D. HEARD, PLLC  
520 Pike Tower  
520 Pike Street, Suite 2600  
Seattle, WA 98101  
206.447.8200

ORIGINAL

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**I. IDENTITY OF RESPONDENT**

Marie-Catherine Smith, by and through her attorney of record, respectfully requests this Court deny review of the January 12, 2015 unpublished opinion of the Court of Appeals, Smith v. Kohen, No. 71130-0-1. This decision upheld the return of the children to their “habitual residence” pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

**II. ANSWER TO ISSUES PRESENTED FOR REVIEW**

- A. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.
- B. The decision of the Court of Appeals is not in conflict with a decision of another decision of the Court of Appeals.
- C. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States.
- D. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

**III. STATEMENT OF THE CASE**

A. Background Facts. Mr. Kohen and Ms. Smith were married in February 2010 in New York. At the time of the marriage, the parties lived in Ottawa, Canada, with Mr. Kohen’s then 7-year-old son from a previous

marriage, Hezekiah. The parties have two daughters of the marriage, Anya-Marie Kohen, DOB September 12, 2010, and Lydia-Maayan Kohen, DOB March 15, 2013. Anya was born in Seattle, Washington and Lydia-Maayan was born in Ottawa, Ontario, Canada. Mr. Kohen is an unemployed, retired veteran. Ms. Kohen is currently unemployed. CP 147-153.

In August 2010, the parties moved to Seattle because Mr. Kohen told Ms. Smith that he had a good job opportunity. Mr. Kohen moved to Seattle in July 2010 while Ms. Smith stayed in Canada with his son. Ms. Smith was pregnant with Anya at the time. When Ms. Smith arrived in Seattle, she learned that Mr. Kohen did not have a job. At the end of August, Mr. Kohen started working for Boeing as a solution architect. Anya was born on September 12. Mr. Kohen was terminated from Boeing in November 2010. *Id.*

In January 2011, Mr. Kohen enrolled in North Seattle Community College to study architecture. He attended school through his VA benefits, but dropped out and the parties had to repay the cost to Veteran's Affairs. Ms. Smith was unable to work in the U.S. because she did not have a green card. *Id.*

From June 2011 to February 2012, the parties lived off of the sales of personal property and Mr. Kohen's veteran's benefits of \$716/month. Ms. Smith was pregnant with the parties' second child. Ms. Smith moved

back to Canada knowing that the parties' financial situation was not improving. The parties agreed that Ms. Smith would file Canadian immigration paperwork for Mr. Kohen and his son. Ms. Smith's mother paid for the plane tickets for Ms. Smith and Mr. Kohen's son to return to Canada. *Id.*

Ms. Smith arrived in Canada in February 2013 with Anya and Hezekiah. They lived with Ms. Smith's parents in Bristol, Quebec. Mr. Kohen lived with a friend in Seattle for a few weeks, then found a job in New Jersey. Ms. Smith had the parties' second child, Lydia-Maayan, on March 15, 2012 in Ottawa, Canada. Mr. Kohen was not present for her birth. Mr. Kohen visited the day after the birth, stayed for a week, then returned to New Jersey. Thereafter, Mr. Kohen came and went for two weeks at a time. *Id.*

In July 2012, Mr. Kohen quit his job in New Jersey and returned to Canada, having decided that the family should live together in Montreal. In October 2012, Ms. Smith started working at Starbucks and within a month was promoted to supervisor. Mr. Kohen stayed home with the children. He did not enroll his son in school. Mr. Kohen did not have permission to work or attend school in Canada. In February 2013, Ms. Smith applied for visitors' visas for Mr. Kohen and his son. A few months later they learned that they did not submit proper application fees. Mr. Kohen was allowed to

stay in Canada by immigration services. Also in February 2013, Mr. Kohen filed his 2012 U.S. income tax return and received a refund of approximately \$10,000. He then thought it was a good time for the family to move to the U.S. He convinced Ms. Smith to let him go with the children.

*Id.*

2. Mr. Kohen Abducted and Wrongfully Retained the Children.

Mr. Kohen left Canada on July 2, 2013 for Seattle, with Ms. Smith's consent based upon his scheduled return on October 2, 2013. Mr. Kohen failed to return to Canada with the children, thus wrongfully removing them from their home in Canada. *Id.*

In August 2013, Mr. Kohen suggested Ms. Smith file for separation. He alleged that Ms. Smith should not see her children because of "psychological problems." On September 12, 2013, Mr. Kohen denied Ms. Smith access to speak with Anya and Hezekiah on their birthdays. On September 15, 2013, Mr. Kohen informed Ms. Smith that he would not return to Canada with the children and would remain with them in Seattle. Had Ms. Smith known Mr. Kohen would do that, she would have never consented to his departure from Canada with the children. *Id.* Ms. Smith did not see her children for three months after they were abducted. Mr. Kohen refused to return the children. *Id.*

Ms. Smith filed an application with the U.S. State Department for

return of the children. The children were located in Snohomish County, Washington. Mr. Kohen filed a Petition for Legal Separation in Snohomish County, Washington, falsely stating that the state of Washington had jurisdiction over the children, indicating “the children have no home state elsewhere.” The children’s home was (and is) in Canada. *Id.*

3. The children were properly returned to Canada pursuant to the court order. Ms. Smith requested the court order the children be returned safely to Canada in the shortest time possible, pursuant to the Hague Convention. Ms. Smith requested the court order Mr. Kohen pay for all expenses incurred regarding return of the children, including their airfare and attorney’s fees and costs. The court granted Ms. Smith’s request and ordered the children be returned within 72 hours. The children were returned on November 14, 2013 and have been residing with Ms. Smith since.

4. Procedural History. Mr. Kohen filed a Petition for Legal Separation on September 27, 2013. Ms. Smith filed a Petition for Return of the Children pursuant to the Hague Convention on November 1, 2013. CP 195-200. The parties stipulated to stay Mr. Kohen’s action for Legal Separation and an Order to Stay was entered on November 13, 2013. CP 293-295. The trial court ordered the children be returned pursuant to the Hague Convention on November 13, 2013. Mr. Kohen filed this appeal on



November 13, 2013. CP 275-280.

#### IV. ARGUMENT

**THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT DID NOT ERR IN RETURNING THE MINOR CHILDREN TO THEIR "HABITUAL RESIDENCE" PURSUANT TO THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION; THUS, THE COURT OF APPEALS DECISION SHOULD BE UPHELD.**

RAP 13.4(b) states that a petition for review will be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division I Court of Appeals holding in this case is not in conflict with any decisions of the Washington Supreme Court or another division of the Court of Appeals.

**A. The Court of Appeals decision does not present a significant question of law under the Constitution of the State of Washington or of the United State.**

Mr. Kohen claims that his due process rights have been violated under the U.S. Constitution, amendment XIV, §1, the right to due process. 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. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The Court of Appeals reviews 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)

Mr. Kohen failed to identify the basic components of a due process claim or support this claim with argument or relevant authority. Therefore, the Court of Appeals correctly declined to address that issue.

Mr. Kohen also claims that the Court of Appeals decision violated his due process rights by failing to comply with the Hague Convention. The United States is a party to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 (hereinafter "Hague Convention"). In 1988, Congress implemented the provisions of the Hague Convention in the International Child Abduction Remedies Act ("ICARA"), 42 U. S. C. 11601 et seq., which set forth the following objects of the Convention:

Article 1 (a): To secure the prompt return of children wrongfully removed from or retained in any Contracting State; and

Article 1 (b): To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

This Court has jurisdiction pursuant to 42 U. S. C. 11603.

The Hague Convention is a treaty, and thus on par with the United States Constitution, superseding state law. The objects of the Convention are (a) to secure the prompt return of children wrongfully removed from or retained in any Contracting State (Article 1 (a)); and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States (Article 1 (b)). The Convention is enforced in the United States via ICARA. Original jurisdiction is concurrent in both state and federal courts. 42 USC 11601, Sec. 4 (a).

As the Court of Appeals correctly recognized, there was no misapplication of the Hague Convention and the court had jurisdiction in this matter. Because Mr. Kohen has not shown that the Court of Appeals decision presents a significant question of law under the U.S. Constitution, that his due process rights were violated, his petition should be denied.

**B. Mr. Kohen's petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.**

Mr. Kohen alleges that because the facts of this case involve International Child Abduction, there is a significant public interest that requires review by the Supreme Court. Mr. Kohen's assertion is legally and factually insufficient. He has not demonstrated how this case presents a

significant public interest, other than asserting that it involves International Child Abduction.

As argued above, the United States is a party to the Hague Convention. The objects of the Convention are (a) to secure the prompt return of children wrongfully removed from or retained in any Contracting State (Article 1 (a)); and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States (Article 1 (b)). The Convention is enforced in the United States via ICARA. Original jurisdiction is concurrent in both state and federal courts. 42 USC 11601, Sec. 4 (a). The Hague Convention on the Civil Aspects of International Child Abduction does not require states to recognize foreign judgments. 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).


The Hague Convention sets forth the objectives of the law and the application to public interest. Mr. Kohen has not shown a significant public interest that is not addressed by the Hague Convention. Therefore, his petition should be dismissed.

**V. CONCLUSION**

Mr. Kohen has not shown that any of the issues he presents meet the requirements of RAP 13.4. For the reasons above, Mr. Kohen's Petition for Review should be denied.

Respectfully submitted this 15<sup>th</sup> day of April, 2015.

THE LAW OFFICE OF STACY D. HEARD, PLLC

By:   
\_\_\_\_\_  
Stacy D. Heard, WSBA 28856  
Attorney for Respondent

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To Whom it May Concern:

Please see attached Respondent's Answer to Petition for Review for filing with the court.

The case name is Smith v. Kohen.

The case number is 91309-1

Sincerely,

Stacy D. Heard, WSBA #28856  
Attorney for Respondent

Stacy D. Heard  
The Law Office of Stacy D. Heard, PLLC  
520 Pike Tower  
520 Pike Street, Suite 2600  
Seattle, WA 98101  
Telephone (206) 447.8200  
Fax (206) 447.8203  
[stacy@heard-law.com](mailto:stacy@heard-law.com)  
<http://www.heard-law.com>

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