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No. 63272-8

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

In re Parentage: PATRICK MICHAEL MCGLYNN, minor child,

KEVIN COLUMBA McGYLNN,

Petitioner/Appellant,

And

KLAUDIA KATARZYNA BATKIEWICZ,

Respondent.

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BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent Klaudia Batkiewicz, a resident and citizen of Poland, is the natural mother of Patryk Michael McGlynn, a minor child. Ms. Batkiewicz traveled to the United States on a tourist visa and gave birth to Patryk on September 20, 2007 in Washington State. On January 12, 2008, when Patryk was less than four months old, Ms. Batkiewicz returned with Patryk to her native country where they both have continued to reside since that date. On June 27, 2008, Mr. McGlynn filed a Petition to Establish a Parenting Plan in the King County Superior Court. The Superior Court dismissed his Petition, holding that Washington does not have jurisdiction to establish a parenting plan for Patryk because Washington is not Patryk's home state, that Patryk does not have significant connection with Washington, and that there is not substantial evidence in Washington concerning Patryk's care, protection, training and personal relationships. Mr. McGlynn appeals.

II. STATEMENT OF ISSUES

Issue No. 1: Does the UCCJEA establish home state jurisdiction in Washington for a child over the age of 6 months at the time a custody proceeding is commenced, who had resided in Poland for

5 months prior to the commencement of the proceedings, and who had only been present in Washington for the 3 months immediately following his birth?

Issue No. 2: If Washington is not Patryk's home state and he had no home state elsewhere at the time this proceeding commenced, did the trial court correctly conclude that Patryk does not have significant connections with Washington and that there is not substantial evidence in Washington concerning Patryk's care, protection, training and personal relationships such that Washington does not have jurisdiction over Patryk?

Issue No. 3: If Washington does have jurisdiction to hear the Petition, should it decline to exercise jurisdiction in favor of Poland as the more convenient forum?

III. STATEMENT OF THE CASE

Klaudia Batkiewicz is a citizen of Poland and is not a resident or citizen of the United States. CP 19. Ms. Batkiewicz is the natural mother of Patryk Michael McGlynn, born on September 20, 2007. CP 19-20. Patryk's father is Kevin Columba McGlynn, who is a dual citizen of Ireland and the United States. CP 77.

At the time of Patryk's conception, Ms. Batkiewicz and Mr. McGlynn were living and traveling outside of the United States. CP

20. Ms. Batkiewicz traveled to the United States on June 4, 2007 on a tourist visa to give birth and Patryk was born on September 20, 2007 in the State of Washington. CP 20. Ms. Batkiewicz planned to return to Poland soon after Patryk's birth but her return was delayed due to medical complications and Patryk's youth. CP 20. Patryk and Ms. Batkiewicz left the United States and returned to Poland on January 12, 2008. CP 80. Patryk and Ms. Batkiewicz have remained in Poland since January 12, 2008 except for a short vacation to Barbados in February 2008 after which they returned to Poland. CP 79. Patryk is a citizen of Poland. CP 75, 87.

Ms. Batkiewicz never intended to establish a permanent residence in Washington and only came to Washington for the purpose of giving birth to Patryk. CP 76. Ms. Batkiewicz retained her Polish address, paid her mortgage on her Polish apartment, retained her automobile in Poland, paid her utility bills in Poland, maintained her Polish bank account, and continued to register her address in Poland throughout her stay in the United States. CP 80-81. While the couple were engaged and discussed many different options for a future residence together including Poland, Ireland and Washington, they never reached an agreement regarding

residency and the relationship ended before any consensus was reached. CP 76.

On June 27, 2008, Mr. McGlynn filed a Petition for Establishment of Parenting Plan in King County Superior Court. CP 1-6. While Ms. Batkiewicz initially filed a Response *pro se* that raised no objection to the jurisdiction of the Superior Court, she subsequently retained counsel and filed an amended Response to Petition on November 14, 2008 asserting that Washington lacked subject matter jurisdiction over the parenting plan. CP 16-18.

Ms. Batkiewicz filed an action in the court in Poland and was granted exclusive care and custody of Patryk on October 24, 2008. CP 21, 27. Mr. McGlynn subsequently filed a Petition in Poland under the Hague Convention seeking the immediate return of Patryk. CP 41. Both the Polish custody proceeding and Mr. McGlynn's proceeding under the Hague convention are still pending.

On February 26, 2009, Ms. Batkiewicz filed a Motion to Dismiss for Lack of Jurisdiction in the King County Superior Court arguing, just as she had in her Response filed in November 2008, that Washington lacked subject matter jurisdiction over the parenting plan. CP 29-35. On April 3, 2009, Judge Mariane

Spearman granted Respondent's Motion and signed an Order Dismissing Petition to Establish Parenting Plan. CP 104-106. The Superior Court ruled that Washington was not Patryk's home state under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), RCW 26.27, *et seq.* The court further ruled that Patryk did not have a significant connection to the State of Washington and that there was not substantial evidence in Washington concerning Patryk's care, protection, training and personal relationships. The order did not dismiss the child support proceedings which are currently suspended pending the outcome of this appeal.

IV. ARGUMENT

A. Standard of Review

The question of whether Washington may assert subject matter jurisdiction over Mr. McGlynn's Petition for Establishment of Parenting Plan is governed by the Uniform Child Custody and Jurisdiction Act (UCCJEA), RCW 26.27, *et seq.* The determination of subject matter jurisdiction is a question of law, reviewable *de novo*. *In re Marriage of Kastanas*, 78 Wn. App 193, 197 (1995).

- B. Washington does not have jurisdiction under the UCCJEA because it was not Patryk's "home state" as defined by the UCCJEA either at the time of filing or within 6 months prior to filing and, even though Patryk had no "home state" elsewhere at filing, Patryk has no substantial connection to Washington and there is not substantial evidence in this state concerning his care.**

Washington superior courts have general jurisdiction and lack subject matter jurisdiction only when expressly denied. *In re Marriage of Thurston*, 92 Wash. App. 494, 498 (1998). Subject matter jurisdiction is the court's authority to hear and determine cases within a particular class of actions. *Id.* at 497-98. Lack of subject matter jurisdiction renders the superior court powerless to pass on the merits of a case. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 556 (1998). Subject matter jurisdiction cannot be conferred by the consent of the parties. *Wampler v. Wampler*, 25 Wash.2d 258, 267 (1946); *In re Custody of R.*, 88 Wash.App. 746, 762 (1997). Although parties may waive their right to assert lack of personal jurisdiction, they may not waive subject matter jurisdiction. *Skagit*, 135 Wash.2d at 556. Any party may raise the issue of lack of subject matter jurisdiction at any time. *Id.*

The determination of subject matter jurisdiction to establish a parenting plan is governed by the Uniform Child Custody

Jurisdiction and Enforcement Act (UCCJEA), RCW 26.27, *et seq.*

RCW 26.27.201 states:

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

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

(b) A court of another state does not have jurisdiction under (a) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under RCW 26.27.261 or 26.27.271, and:

(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;

(c) All courts having jurisdiction under (a) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under RCW 26.27.261 or 26.27.271; or

(d) No court of any other state would have jurisdiction under the criteria specified in (a), (b), or (c) of this subsection.

(2) Subsection (1) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

Under the terms of this statute, this court must first determine whether Washington was Patryk's "home state" either (1) at the time the proceedings commenced or (2) within six months prior to the commencement of the proceeding if the child is absent from this state but a parent or person acting as a parent continues to live in this state. If so, then Washington may assert jurisdiction. If not, the court must determine whether there is another "home state" that has jurisdiction. If Patryk has no home state, the court must determine whether Washington is the jurisdiction with the most significant connections and available evidence for resolution of this matter.

1. Washington was not Patryk's home state at the time the proceedings commenced.

The UCCJEA at RCW 26.27.021(7) defines the child's "home state" as follows:

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case

of a child less than six months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a child, parent, or person acting as a parent is part of the period.

RCW 26.27.021(5) defines “commencement” as the “filing of the first pleading in the proceeding.” Mr. McGlynn filed his initial Petition in this matter on June 27, 2008. At that time, it is undisputed that Patryk was living in Poland and had been residing in Poland for the prior 5 months. Therefore, Patryk had not been residing in Washington (or any other state) “for at least six consecutive months immediately before the commencement of the custody proceeding” and Washington was not Patryk’s home state.

The statutory definition includes two exceptions to the basic rule requiring 6 consecutive months of residence where either (1) the child is less than 6 months of age or (2) the child is absent from the jurisdiction but that absence is only temporary. Neither exception applies. Patryk was 9 months old at the time of the commencement of the proceedings and the Superior Court was therefore not faced with the problem of determining home state jurisdiction for a child who was less than 6 months old.

Petitioner argues that Washington is the home state of Patryk because, even though he left the state when he was less

than 4 months old, his absence should be deemed only “temporary” and that the second statutory exception to the definition of “home state” should be applied to qualify Washington as Patryk’s home state. In fact, while it seems likely that the parents were in disagreement about their future residency, the evidence more clearly suggests that it was Patryk’s presence in Washington which was temporary rather than his absence. The mother clearly stated that she did not travel to Washington with the intent of permanently residing there. She only had a short term visa that required her to leave the U.S. in December 2007 (a visa she in fact overstayed because she did not leave until January 2008). Ms. Batkiewicz kept her address in Poland, continued to pay her mortgage and utilities, continued to own and pay for a vehicle in Poland, and insured that her son had Polish citizenship. In the end, Patryk only remained in Washington for 3 months and 21 days. During that time he spent some of his time at the hospital and was also moved between several different residences in Washington. He left Washington for Poland on January 12, 2008 and has never returned. By the time this action commenced, Patryk had already been in Poland for 5 months and has now resided in Poland for 19 months. He has a stable residence, child care, friends, family, and

daily routine in Poland such as he never had in Washington. Given these facts, his absence from Washington can not reasonably be described as temporary and the trial court correctly concluded that it was not a temporary absence.

2. Washington was not Patryk's home state at any time in the 6 months preceding the filing of the Petition.

RCW 26.27.201(1)(a) authorizes the assertion of jurisdiction over a child even if Washington was not the child's home state at the time the action commenced if Washington "was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent . . . continues to live in this state." During the six month period immediately prior to the commencement of the proceedings (December 27, 2008 to June 27, 2008), Patryk was physically present in Washington for only December 27, 2008 until January 12, 2008, a period of slightly over two weeks. Petitioner argues that because Patryk was present in Washington for some period (no matter how small during the 6 months previous to filing the Petition, Washington was therefore Patryk's home state within the previous six months and it can assert jurisdiction. However, the question is not whether Patryk was present in Washington within

that six month period. Mere physical presence in the state is not sufficient to confer jurisdiction. RCW 26.27.201(3). Rather, the question presented is whether Washington was Patryk's home state at any time within that six month period. It is on this distinction that Petitioner's argument fails because, while Patryk was present in Washington between December 27, 2007 and January 12, 2008, Washington was not his home state at any time during the 6 months prior to filing the petition.

As outlined above, the definition of home state is set forth in RCW 26.027.021(7) and contemplates that Patryk reside in Washington for 6 consecutive months. At no time did Patryk ever spend 6 consecutive months in Washington and had not done so during those weeks in January 2008. It is therefore clear that Washington never met the definition of home state set forth in the first sentence of RCW 26.27.021(7).

A more difficult question is whether the exception for a child under the age of 6 months could be read to apply to Patryk given that he was only 3 months old in January 2008 when his mother returned to Poland with Patryk. In order to resolve that question, the court must face an apparent inconsistency between the definition of "home state" contained in RCW 26.27.021(7) and the

jurisdictional pre-requisite language of RCW 26.27.201. The language of RCW 26.27.021(7) clearly contemplates resolving jurisdiction for a child who is under the age of 6 months at the time that the proceedings commence and therefore could not possibly have resided in Washington for 6 consecutive months. However, RCW 26.27.201 contemplates determining qualification of a state as a child's home state "within six months before commencement of the proceeding."

The rational and consistent way to read the statutory exception for children under the age of 6 months is that the exception applies only to a child who is under the age of 6 months at the time the proceeding commenced. Reading the exception to apply to any child who was less than 6 months old at any time in the 6 month period prior to the commencement of the action effectively extends the age limitation to 12 months of age, a result which makes little sense given the express language of the definition. Further, it leads to plainly absurd results such as the one urged by Petitioner in this matter. Under Petitioner's reading of the statute, a child who left Washington mere days after his birth would still deem Washington his home state so long as an action was brought within six months of the child's leaving Washington. Mere

birth in Washington becomes enough to assert that Washington is the child's home state.

While Respondent was not able to locate a prior Washington decision addressing the proper application of the statutory exception for children under the age of 6 months, other jurisdictions have addressed this question. In *Carter v. Carter*, 276 Neb. 840 (2008), the Nebraska court specifically addressed this question in reference to the identical provision of the UCCJEA adopted by the State of Nebraska:

Statutory language is to be given its plain and ordinary meaning. We first note that although Stuart emphasizes that portion of § 43-1227 which refers to children under 6 months of age, the statement that “[i]n the case of a child less than six months of age, [home state] means the state in which the child lived from birth” clearly refers back to the sentence preceding it and applies only to a child custody case involving a child under the age of 6 months age at the time of the commencement of the proceedings. In other words, this clause was meant to provide a home state for a child when a custody proceeding is commenced at a time when a child has not lived in a state for the requisite 6-month period--because the child has not been alive for that period of time. It is not meant to say that a child's state of birth is that child's home state. Carter at 847.

The court in *Carter* thus squarely addressed the exact question raised by this case and rejected Petitioner's argument.

The persuasive authority cited by Petitioner in support of his case is simply inapplicable. In the case of *Rose v. Celebrezze*, 883

N.E. 2nd (Ohio 2008), the children had resided 13 years in West Virginia and then resided 4 months in Ohio prior to filing. The court held that West Virginia was the children's home state because it was their home state within the prior 6 months based on well over 6 months of residency in West Virginia. The case did not involve a child who had resided less than 6 months in one state before relocating but was under 6 months of age at the time of the relocation and it is therefore factually distinguishable. Similarly, *In re Burk*, 252 S.W.3d 736 (Tex.App. 2008) involved a child who was 5 months old at the time the proceeding was commenced and therefore fell clearly within the exception for children under the age of 6 months when the action commenced. Neither of these cases is applicable to the current situation or even addresses the same legal question. These cases only stand for the proposition that if children had a prior home state within the past 6 months, based on 6 months of continuous residency in that prior state, then that prior state remains the children's home state. This is a legal point that is neither disputed nor relevant because Patryk never resided in Washington for 6 months and Washington was not Patryk's home state within 6 months prior to the filing of this action.

Even if the strained reading of the exception for children under 6 months old urged by Petitioner is accepted, however, Washington was still not Patryk's home state. While Patryk was present in Washington following his birth, the statute requires more than mere presence and Patryk did not establish residency in Washington. During his brief stay in Washington, he stayed at 3 different addresses in addition to the hospital of his birth. It is clear that the two parties never reached consensus on where they would live. While Washington was discussed, so was Poland and even Ireland. Patryk's mere physical presence in this state until he was old and healthy enough to travel to Poland is not sufficient to establish jurisdiction under the UCCJEA, rather the focus is on establishment of a "home state" as that term is defined by the UCCJEA. Washington was never Patryk's home.

3. **Given that Patryk did not have a home state at filing, Washington should not assert jurisdiction because Patryk does not have a significant connection to Washington and there is not significant evidence in Washington concerning Patryk's care, protection, training and personal relationships.**

In the absence of a home state for Patryk, Washington may only assert jurisdiction under the UCCJEA if (1) 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 (2) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships. RCW 26.27.201(1)(b). Here, Patryk has almost no connection with the State of Washington other than the fact that he was born here. He was present in Washington for less than 4 months. Poland is now Patryk's permanent home. He has resided there consistently for over a year. He is a Polish citizen. He has a stable address, stable care providers, and extended family members all present in Poland. His care providers, doctors, and all evidence concerning his current care are located in Poland. By any reasonable measure, Patryk lacks a significant connection with this state. Nor is there substantial evidence available in this state concerning Patryk's care, protection, training, and personal relationships. Accordingly, there is no basis for Washington to assert jurisdiction under RCW 26.27.201(1)(b).

The case of *In re Marriage of Ieronimakis*, 66 Wn. App. 83 (1992), relied upon by Appellant is inapplicable. In *Ieronimakis*, a mother fled her home country of Greece with a 7 and 8 year old child. Id. at 85. Seven days after arriving, she filed an action for

divorce in Washington. *Id.* On appeal, the court concluded that Greece was the children's "home state" under the UCCJA (the predecessor to the UCCJEA) and that Washington could only assert jurisdiction if it found that the children have a significant connection to Washington and there was substantial evidence here. In this context, the court stated that "[t]o allow Washington courts to assert jurisdiction because [the mother] generated significant contacts with the state is in effect telling any abducting parent that if you can stay away from the home state long enough to generate new considerations and new evidence, that is a sufficient reason for the new state to assert a right to adjudicate the issue. Such a holding circumvents the intent of the jurisdiction laws." *Id.*

Ieronimakis was decided under the UCCJA, predecessor to the current UCCJEA. The language of the UCCJEA bases jurisdiction primarily on which state is the "home state" of the child. In contrast, the UCCJA, which was in place at the time *Ieronimakis* was decided, allowed the court to look at "significant connections" with Washington even if another state was the home state of the child, as the court in *Ieronimakis* determined that Greece was.

Ieronimakis, 66 Wn. App. at 90 n. 7; former RCW 26.27.030 (1979).

It was this provision that the court in *Ieronimakis* viewed from the

perspective of public policy. It held that a parent could not escape the jurisdiction of a home state by abducting the child and keeping the child in another state long enough to generate significant contacts. Under the present statute, however, the court looks at "significant connections" with Washington only if the child has no home state or the home state has declined jurisdiction on the ground that Washington is the more appropriate forum. Here, Patryk has no home state and the "significant connections" standard is therefore appropriately applied as outlined above. The public policy concerns of the *Ieronimakis* court are inapplicable because the "significant connections" analysis is not being used to circumvent the proper jurisdiction of a child's "home state."

Instead, the court should look to the holding of *In re Marriage of Hamilton*, 120 Wn. App. 147 (2004) as it addresses this same question but does so after the adoption of the UCCJEA. In *Hamilton*, the mother relocated with her children from Texas without notifying the father and filed an action for dissolution less than 6 months later. The Court of Appeals held that the children had no home state because they had not resided for 6 months in either Washington or Texas within the 6 month period prior to filing. The court then concluded that the trial court correctly applied the

significant connections analysis of 26.27.201(1)(b) to conclude that Washington had jurisdiction since the state it had significant connection with the children. In reaching this conclusion, the Court specifically considered and rejected the reasoning of *Ieronimakis*, pointing out it had been decided prior to the adoption of the UCCJEA. Similarly here, Patryk had no home state at the time the Washington action was commenced and the trial court correctly applied the significant connections analysis and concluded that Patryk had no significant connections with this state and that substantial evidence concerning his care existed in Poland, not Washington.

C. Even if this court concludes it could exercise jurisdiction, it should decline to exercise jurisdiction in favor of Poland which is the more appropriate forum.

Even if Washington could exercise jurisdiction consistent with the requirements of the UCCJEA, the facts and circumstances of this case suggest that the Court should decline to do so and defer to the pending proceedings in Poland. RCW 26.27.261 provides as follows:

(1) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the

circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings

upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for dissolution or another proceeding while still retaining jurisdiction over the dissolution or other proceeding.

Patryk has lived in Poland with his mother for 19 months. All of the evidence concerning his care and present needs are in Poland. The majority of the witnesses including his doctors and care providers are located in Poland. While it is no doubt inconvenient to Mr. McGlynn to litigate this matter in Poland, it would be even more inconvenient for Ms. Batkiewicz to bring all of the evidence and witnesses located in Poland to Washington and Mr. McGlynn is in a substantially better position to bear the additional financial burdens. Accordingly, even if this court concludes that Washington could assert jurisdiction over the parenting plan in this matter, it should decline to do so in favor of the ongoing Polish proceedings or, in the alternative, remand the case to the trial court for determination of whether Washington is an inconvenient forum.

VI. CONCLUSION

This Court should affirm the Superior Court's dismissal of
Mr. McGlynn's Petition to Establish Parenting Plan.

Respectfully Submitted this 6 day of August 2009.



Matthew Jolly, WSBA #23167
Attorney for Respondent

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CERTIFICATE OF SERVICE

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I certify that on this date, I caused true and correct copies of the following documents:

1. Brief of Respondent; and
2. Certificate of Service

to be served on Petitioner herein via hand delivery by legal messenger as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of August 2009 at Bellevue, Washington.

Kathleen Dela Cruz
Legal Assistant