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NO. 63272-8-I

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

In re Parentage: PATRYK MICHAEL McGLYNN, Minor child,

KEVIN COLUMBA McGLYNN,

Petitioner/Appellant,

and

KLAUDIA KATARZYNA BATKIEWICZ,

Respondent.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Kevin McGlynn, a Washington State resident, is the natural father of Patryk Michael McGlynn, a minor child born in Washington State. When Patryk was approximately four months old, he left Washington for Poland, his mother's native country, and he has remained there since over Mr. McGlynn's objections. 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 did not have jurisdiction over matters concerning Patryk's care and custody under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), RCW 26.27, *et seq.*, because Washington was not Patryk's home state. Mr. McGlynn appeals.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

Assignments of Error

Assignment of Error No. 1: The Superior Court erred in holding that Washington was not Patryk's "home state" under the UCCJEA, RCW 26.27, *et seq.* (FOF 3).

Assignment of Error No. 2: The Superior Court applied the wrong standard to evaluate whether Patryk's absence from Washington was temporary and incorrectly concluded that Patryk's absence from

Washington precluded it from exercising jurisdiction over Mr. McGlynn's custody Petition. (FOF 5).

Assignment of Error No. 3: In evaluating the nature and extent of Patryk's connections to Washington, the Superior Court erred in looking exclusively at the state of those connections at the time it ruled on Mr. Glynn's custody Petition without considering Patryk's connections to Washington before he left the jurisdiction. (FOF 5)

Assignment of Error No. 4: The Superior Court erred in dismissing Mr. McGlynn's Petition to Establish a Parenting Plan for lack of jurisdiction.

Statement of Issues

Issue No. 1: Does the UCCJEA establish home state jurisdiction in Washington over custody matters concerning a child over the age of six months who is absent from Washington at the time a custody proceeding is commenced, but who had resided in Washington within the six months immediately preceding the commencement the custody proceeding and who has one parent residing in this state? (Assignments of Error No. 1 and 4).

Issue No. 2: Must a child's absence from Washington be considered temporary under the UCCJEA where one of the child's parents continues to reside in Washington and the resident parent has not consented to the child's permanent absence from Washington? (Assignments of Error No. 2 and 4).

Issue No. 3: Where a child is absent from Washington over the objection of a resident parent, must the Superior Court consider the extent and

nature of the child's past connections to Washington in resolving jurisdictional questions under the UCCJEA, not just the state of the absent child's connections to Washington at the time of the custody proceeding? (Assignment of Error No. 3).

III. STATEMENT OF THE CASE

The pertinent facts necessary to resolve Mr. McGlynn's appeal are not disputed. Kevin McGlynn is the Petitioner in the underlying action, *In re the Parenting and Support of Patryk McGlynn*, King County Superior Court, No. 08-05170-0 SEA. CP 3-6. Respondent Klaudia Batkiewicz is Patryk's natural mother. CP 3. Mr. McGlynn is a United States citizen and a resident of Washington State. At the time of Patryk's birth, Mr. McGlynn was engaged to Ms. Batkiewicz. CP 37. Ms. Batkiewicz is a Polish citizen and currently resides in Poland. CP 19.

Patryk was born in Washington State on September 20, 2007 and has been a United States citizen since birth. CP 36, 45. In January 2008, when Patryk was approximately four months old, Mr. McGlynn, Ms. Batkiewicz, and Patryk traveled from Washington State to Poland. CP 37-39.¹ In February 2008, Ms. Batkiewicz and Patryk traveled to the

¹ This citation is to a declaration filed by Mr. McGlynn below. In it he states that Patryk was five months old when the family traveled to Poland. Patryk, who was born in September 2007, was closer to four months old when the family traveled to Poland in January 2008, but was approximately five months old when the family traveled to the Caribbean in February 2008.

Caribbean from Poland, via London, where they met Mr. McGlynn for a vacation. *Id.* Following the family vacation in the Caribbean, Ms. Batkiewicz and Patryk returned to Poland for what Mr. McGlynn believed would be a temporary stay, and Mr. McGlynn returned to Washington State. CP 37-39. In June 2008, Ms. Batkiewicz first informed Mr. McGlynn that she did not intend to return to the United States with Patryk and, unbeknownst to Mr. McGlynn, she secured a Polish passport for Patryk. CP 39. Ms. Batkiewicz and Patryk have remained in Poland since February 2008, and Ms. Batkiewicz has refused to return Patryk to Washington State over Mr. McGlynn's objection. CP 39. Since Patryk has been in Poland, Mr. McGlynn has only been able to see his son by traveling to Poland at his own expense, and visiting with him there on Ms. Batkiewicz's terms.

On June 27, 2008, after Ms. Batkiewicz informed Mr. McGlynn that she did not intend to return to the United States with Patryk, Mr. McGlynn filed a Petition for Establishment of Parenting Plan in King County Superior Court, seeking an order establishing custody, visitation, and child support.² CP 1-6. Ms. Batkiewicz filed a Response to the

² The request to establish child support was initiated by Mr. McGlynn when he filed his custody Petition. Mr. McGlynn has voluntarily provided child support for Patryk since his birth and has never disputed his obligation to do so – by filing a Petition to establish child support he sought to have a Washington court determine and order an appropriate and fair amount of child support under Washington law.

Petition on September 22, 2008. CP 9-15. She did not contest the jurisdiction of the King County Superior Court in her Response. On the contrary, she asked the King County Superior Court to enter a child support order in the amount of \$3,000 per month. CP 10. Ms. Batkiewicz filed a second Response on November 14, 2008, contesting jurisdiction for the first time. CP 16-18.

In October 2008, while Mr. McGlynn's Washington State action was pending, Ms. Batkiewicz filed a custody petition in Poland and, on October 24, 2008, the Polish court entered a temporary order granting Ms. Batkiewicz "exclusive care and custody" of Patryk. CP 27-28. Mr. McGlynn became aware of the Polish custody petition through the course of the Washington litigation. CP 40-41. Mr. McGlynn has not agreed or consented to the Polish court's jurisdiction over the matters concerning Patryk's custody and welfare. *Id.*

In light of Ms. Batkiewicz's refusal to return Patryk to Washington State and her effort to circumvent the Washington proceeding by filing a competing and subsequent custody petition in Poland, on February 4, 2009 Mr. McGlynn filed a Petition in Poland under the Hague Convention on the Civil Aspects of International Child Abductions. CP 41; *see also* Hague Convention on the Civil Aspects of International Child Abductions, Oct. 25, 1980, T.I.A.S. No. 11670, 1988 WL 411501. Mr. McGlynn's

Hague Convention proceeding is distinct from the Polish custody proceeding initiated by Ms. Batkiewicz. In his Hague Convention proceeding, Mr. McGlynn seeks Patryk's return to Washington in order to have matters concerning his custody and welfare adjudicated in the Washington courts.³

The Polish court with jurisdiction over Mr. McGlynn's Hague Convention Petition held a hearing on that Petition on March 16, 2009. CP 79-80. Mr. McGlynn's Hague Convention Petition remains unresolved as of the filing of this brief. On March 2, 2009, after Mr. McGlynn filed his Hague Convention Petition, but before the March 16, 2009 hearing on that Petition, Ms. Batkiewicz filed a Motion to Dismiss Mr. McGlynn's pending Washington custody Petition. CP 29-35. She argued, for the first time, that Washington did not have subject matter jurisdiction over matters concerning Patryk's custody and visitation.

On April 3, 2009, Judge Mariane Spearman of the King County Superior Court⁴ dismissed Mr. McGlynn's Petition for lack of subject

³ The Hague Convention provides for the prompt return of children who have been wrongfully removed or retained from their state of habitual residence. Hague Convention, Art. 1. A court's role in adjudicating a petition under the Hague Convention is to determine whether a child has been wrongfully removed or retained from his or her place of residence. Hague Convention, Art. 19. It is not to make a custody determination on the merits. *Id.*

⁴ Page one of the Order incorrectly identifies Judge Patricia Clark as the judge issuing the Order.

matter jurisdiction. 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.*, at the time Mr. McGlynn filed his Petition because Patryk had not resided in Washington for the six months immediately preceding the filing of the Petition. *Id.* (FOF 5). It held that Poland was not Patryk's home state either. *Id.* (FOF 4). Although the Superior Court found that Patryk had no home state, it declined to invoke a provision of the UCCJEA allowing a Washington court to exercise jurisdiction if another state does not have home state jurisdiction if certain factors are met, RCW 26.27.201(1)(b), finding that, at the time of the hearing on Mr. McGlynn's Petition, Patryk did not have a significant connection with Washington and there was not substantial evidence in this state concerning his welfare. *Id.* (FOF 5). Although the Superior Court dismissed Mr. McGlynn's Petition to Establish a Parenting Plan with respect to matters concerning Patryk's custody, it held that it would retain jurisdiction over the portion of Mr. McGlynn's Petition seeking an order establishing child support for his son. CP 106.

The Superior Court stayed its April 3, 2009 Order for 14 days to allow Mr. McGlynn time to seek review and a stay of the order of dismissal from this Court. CP 106. Mr. McGlynn filed a timely Notice of

Appeal and sought an emergency stay of the Order and expedited disposition of his appeal from this Court. CP 114. This Court denied the stay and instructed Mr. McGlynn to provide clarification regarding the appealability of the April 3, 2009 Order. *See* Court of Appeals May 13, 2009 Notation Ruling.

On Mr. McGlynn's motion, the Superior Court entered a second order on June 2, 2009 setting forth Findings of Fact and Conclusions of Law, and indicating that its April 3, 2009 Order was intended to be a final judgment as to Mr. McGlynn's Petition to Establish a Parenting Plan. *Id.* CP 107-13. It also stayed issues concerning child support pending the resolution of this appeal. *Id.* Mr. McGlynn immediately filed a second Notice of Appeal (CP 110-13), and renewed his motion with this Court for expedited review. This Court consolidated Mr. McGlynn's appeals, confirmed that both Superior Court Orders are appealable as a matter of right, and set this matter for expedited consideration. *See* Court of Appeals June 19, 2009 Notation Ruling.

IV. ARGUMENT

A. Standard of Review

The authority of the Washington Courts to exercise jurisdiction over Mr. McGlynn's custody Petition is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), RCW 26.27, *et*

seq. The threshold determination of whether a court can exercise jurisdiction over a child custody determination under the UCCJEA is a question of law reviewed de novo. *In re Marriage of Kastanas*, 78 Wn. App. 193, 197 (1995).

B. Washington was Patryk’s home state at the time Mr. McGlynn filed his Petition and the Superior Court erred in dismissing Mr. McGlynn’s Petition for lack of jurisdiction under the UCCJEA.

1. The Superior Court erred as a matter of law in concluding that the UCCJEA only provides for home state jurisdiction where a child has lived in a state consecutively for six months prior to the commencement of a custody action.

Under RCW 26.27.201, a Washington court only has jurisdiction to make an initial child custody determination if: (1) Washington is the child’s home state at the time the proceeding is initiated, or, if the child is absent from Washington and at least one parent lives in the state, Washington was the child’s home state within six months before the commencement of the proceeding; (2) no other court has asserted home state jurisdiction, the child and at least one parent or person acting as a parent have a significant connection to Washington, and substantial evidence concerning the child’s wellbeing is available here; (3) any courts having home state jurisdiction have declined jurisdiction on the ground that Washington is a more appropriate forum; or (4) no court has jurisdiction on any of the three foregoing grounds:

(1) Except as otherwise provided in RCW 26.27.231,⁵ 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.

⁵ RCW 26.27.231 provides for temporary emergency jurisdiction. That statute is not at issue in this appeal.

RCW 26.27.201.

Thus, RCW 26.27.201(1)(a) provides two bases for establishing that Washington is a child's home state: (1) if Washington is his home state on the date of the commencement of the proceeding, or (2) if Washington was his home state "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." Section .021 of the UCCJEA defines several terms used in Section 201(1)(a). RCW 26.27.021(5) defines "commencement" as the "filing of the first pleading in a proceeding." And RCW 26.27.021(7) defines "home state" as "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." Section 7 further provides that "[i]n 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."

As set forth above, the UCCJEA jurisdictional provision addresses two possible situations in which home state jurisdiction can arise in Washington – the first where the child is physically present in Washington, and the second where the child is absent from Washington, but one parent continues to live here. The Superior Court concluded that Washington was not Patryk's home state under RCW 26.27.201(1)(a) when Mr. McGlynn filed his Petition on June 27, 2008 because "Patrick

[sic⁶], who was over the age of 6 months, had not resided in the State of Washington for the 6 months immediately preceding the filing of the Petition.” CP 105.⁷ RCW 26.27.201(1)(a), however, as noted, provides for two means to establish home state jurisdiction – including one where a child is physically absent from a state on the date a custody proceeding is commenced, but at least one parent continues to live in this state, as was the case here. Thus, it is not enough to ask, as the Superior Court did, merely whether a child has resided in Washington for the entire six month period immediately preceding the start of a custody action. Rather, in the case of an absent child with a resident parent, the trial court must also ask whether Washington was the child’s home state at any point *within* the preceding six months. *See* RCW 26.27.201(1)(a)(providing, in the second, disjunctive, clause that jurisdiction is also proper 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.*” (Emphasis added)).

Had the Superior Court evaluated home state jurisdiction under the absent child/resident parent provision, it would have been compelled to

⁶ The Order incorrectly spells the child’s name as “Patrick;” the correct spelling is “Ptryk.” *See* CP 45 (copy of Ptryk’s United States passport).

⁷ It is undisputed that Ptryk left Washington State in January 2008 when he was approximately four months old and that he has not returned to Washington since. It is also undisputed that Mr. McGlynn filed his Petition on June 27, 2008, and that this is the “commencement” date of the Washington proceeding under RCW 26.27.021(5). Thus, it is undisputed that Ptryk was not present in Washington on the date Mr. McGlynn’s child custody proceeding commenced.

conclude that Washington was Patryk's home state on the date Mr. McGlynn filed his custody Petition. The plain language of the UCCJEA provides for home state jurisdiction in Washington if: (1) 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, and (2) a parent continues to live in this state. It is undisputed that both requirements are met here. It is undisputed that Patryk lived continuously in Washington from the time of his birth until January 2008, a date that falls within six months of the filing date of Mr. McGlynn's Petition, and that Patryk's father, Mr. McGlynn, continues to live in Washington. The Superior Court, therefore, erred as a matter of law in failing to exercise jurisdiction over Mr. McGlynn's Petition under the absent child/resident parent provision of RCW 26.27.201(1)(a) and in dismissing Mr. McGlynn's Petition for lack of home state jurisdiction.

There is no support in the UCCJEA or caselaw to interpret RCW 26.27.201 to require six months continuous residency by a child as the exclusive means to establish home state jurisdiction, as the Superior Court did. Indeed, such a reading makes little sense in the case of an absent child since, by definition, an absent child is no longer in the jurisdiction and cannot, therefore, meet a continuous residency requirement. Not surprisingly, given the plain language of the absent child/resident parent provision, no other courts appear to have interpreted the UCCJEA's home state provision as the Superior Court did here. On the contrary, as

discussed below, courts addressing this issue have reached the opposite conclusion.

Counsel did not find any Washington case law directly on point addressing whether UCCJEA home state jurisdiction arises only where a child has lived in a jurisdiction consecutively for six months prior to the commencement of a custody proceeding, as the Superior Court held, or whether home state jurisdiction can also be established in the case of an absent child where the child lived in the jurisdiction *within* the six months prior to the commencement of the proceeding and the child has at least one parent living in Washington. Courts in other jurisdictions, however, have concluded that the definition of home state jurisdiction is not determined solely by reference to the date of the commencement of the custody proceeding, but, rather, that the “applicable time period to determine ‘home state’ in such circumstances should be ‘within 6 months before the commencement of the [child custody] proceeding.’” *Rosen v. Celebrezze*, 883 N.E. 2d (Ohio 2008) (citing cases); *see also Christine L. v. Jason L.*, 874 N.Y.S. 2d 794 (N.Y. Fam. 2009) (“Home state,” for purposes of initial custody determinations, is not limited to the commencement date of the action, but rather includes situations where a state qualified as the “home state” at any time during the six months before commencement); *In re Burk*, 252 S.W.3d 736 (Tex. App. 2008) (Texas was 5-month-old child's “home state” within six months before Texas child custody proceeding commenced, and thus Texas court had jurisdiction to make an initial child custody determination, where child

lived in Texas for first three months of life, child moved with mother to Colorado two and a half months before father filed Texas proceeding, and father continued to live in Texas).

Indeed, to read the statute as the Superior Court did necessarily obviates the absent child/resident parent provision that specifically provides for home state jurisdiction if a state has been a child's home state *within* six months of the commencement of a custody proceeding. This reading also undermines the UCCJEA by allowing parents to circumvent home state jurisdiction by removing or withholding a child from a state over a resident parent's objection prior to the filing of a custody proceeding and then claiming that the state is no longer the absent child's home state because the child had not lived there continuously for six months prior to the filing of the petition. This Court should reverse the Superior Court's dismissal of Mr. McGlynn's custody Petition and remand with instructions to exercise home state jurisdiction over matters concerning Patryk's custody.

2. The Superior Court applied the wrong standard to evaluate whether Patryk's absence from Washington was temporary.

As noted above, RCW 26.27.021(7), defines a child's "home state" as "the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." Section (7) further provides that "[a] period of temporary absence of a child, parent, or person acting as a parent is part of [the six month] period" for purposes of

establishing home state jurisdiction. Thus, if a person identified in the statute is only temporarily absent from a jurisdiction, the period in which that person is absent is included in calculating the six month period. The Superior Court concluded that Patryk's absence from Washington was not temporary based entirely on the fact that that Ms. Batkiewicz and Patryk had left Washington for Poland in January 2008 and not returned. *See* CP 105.

As a threshold matter, notwithstanding the Superior Court's conclusion that Patryk's absence from Washington was not temporary (which was in error), the definitional provision, Section (7), appears irrelevant to a determination under the absent child/resident parent provision of RCW 26.27.201(1)(a), the specific jurisdictional provision at issue here. That is because Section (7) defines "home state" as the state where a child lived for at least six months (including any temporary absences), while RCW 26.27.201(1)(a) specifically provides that home state jurisdiction, in the case of an absent child with a resident parent, can also be established where a child has resided in a state with a parent at some point *within* six months prior to the commencement of a custody proceeding. As discussed above, the absent child/resident parent provision, by definition, therefore, does not require continuous residence in the state for six months prior to the commencement of a custody proceeding, just residence with a parent in the state at some point within that six month period.

Logically, the definitional provision in Section (7) of RCW 26.27.021 and the absent child/resident parent provision of RCW 26.27.201(1)(a) cannot both be met if one requires continuous residence in Washington for the six months prior to commencement of a custody proceeding to establish home state jurisdiction, and one provides for home state jurisdiction in the case of an absent child as long as a child has lived in Washington within six months prior to commencement of a custody proceeding and one parent continues to reside there, regardless of the nature of the absence. Thus, the question of whether a child's absence is temporary appears to bear only on the question of establishing a child's home state under the first provision of RCW 26.26.201(1)(a) (i.e. where the child is physically present in Washington on the date of the commencement of the custody proceeding), not the absent child/resident parent provision that applies to Mr. McGlynn's Petition.

Even assuming, however, that the question of whether a child's absence from a state is temporary is relevant to Mr. McGlynn's Petition, the Superior Court erred as a matter of law in holding that Patryk's absence from Washington is not temporary. The only ground provided by the Superior Court for holding that Patryk's absence is not temporary was its finding that Patryk and his mother left Washington in January 2008 and have not returned to Washington. CP 105. This is insufficient to support the Superior Court's holding.

The mere fact that a parent has not returned a child to a jurisdiction does not, standing alone, establish that the child's absence is permanent.

Rather, the question of the parties' intent and other factors are also relevant to this inquiry. *See In re Parentage, Parenting, and Support of A.R.K.-K.*, 142 Wn. App. 297 (2007) (a party's intent is relevant in determining whether an absence from a state is temporary or permanent, for purposes of determining the party's home state under the UCCJEA); *see also Chick v. Chick*, 596 S.E.2d 303, 308 (N.C. App. 2004) (noting that jurisdictions have adopted certain tests for determining whether an absence from a state was a temporary absence, including (1) looking at the duration of absence, (2) examining whether the parties intended the absence to be permanent or temporary, and (3) adopting a totality of the circumstances approach to determine whether the absence was merely a temporary absence) (citing *T.H. v. A.S.*, 938 S.W.2d 910 (Mo. App. 1997)).

There is no indication that the Superior Court considered any other factors in holding that Patryk's absence from Washington was not temporary besides the fact that he had not returned to Washington since January 2008. It did not, for example, consider the parents' intent regarding Patryk's permanent residence, or the fact that Patryk has remained away from Washington over Mr. McGlynn's objection. *See, e.g.* CP 36-41 (Decl. of K. McGlynn in Response to Motion to Dismiss). If this Court concludes that the temporary absence provision of RCW 26.27.021 is pertinent to issues concerning Patryk's custody, it should hold that the fact that one parent has managed to keep a child out of a jurisdiction for a significant amount of time over the other parent's

objection is insufficient, as a matter of law, to support a holding that the child's absence from the jurisdiction is not temporary. *See Lutes v. Alexander*, 14 Va. App. 1075, 421 S.E.2d 857 (1992) (Virginia did not lose home-state jurisdiction because father took children out of country for several years while litigation was pending).

C. The Superior Court erred in dismissing Mr. McGlynn's Petition based on Patryk's purported lack of post-removal connections with Washington, without consideration of all the circumstances of his absence from Washington and his pre-removal connections with Washington.

Even where a Washington court concludes that it does not have home state jurisdiction over matters concerning a child's custody, it may nonetheless exercise jurisdiction over those matters if: (1) no other state has home state jurisdiction, or the child's home state had declined jurisdiction because Washington is the more appropriate forum, and (2) the child and at least one parent have a significant connection with Washington and substantial evidence concerning the child's welfare is available in Washington. *See* RCW 26.27.201(1)(b). An evaluation of the nature and extent of a child's connections to a jurisdiction is a secondary question that only comes into play if the child does not have a home state (as the Superior Court found here), or if a court with home state jurisdiction is asked to decline jurisdiction in favor of another forum. An evaluation of the extent and nature of a child's connections to Washington, therefore, is not relevant to the threshold determination of whether Washington has home statute jurisdiction over custody matters concerning the child.

The Superior Court found that neither Washington nor Poland was Patryk's home state. But it did not exercise permissive jurisdiction over matters concerning Patryk's custody under Section (1)(b) even though it found Patryk had no home state. Pertinent to this question, the Superior Court held that, at the time it entered its order, Patryk did not have a significant connection with Washington and there was not substantial evidence in Washington concerning his welfare:

The mother and child went to Poland in January 2008. Because they have not since returned, their absence cannot be deemed temporary. *At this time*, Patrick [sic] does not have a significant connection with the State of Washington and there is not substantial evidence available in this state concerning the child's care, protection, training, and personal relationships.

CP 105 (FOF 5; emphasis added). This conclusion was in error because the Superior Court incorrectly limited its evaluation of Patryk's connections to Washington to the time it made its decision on the custody Petition. Absent from the Superior Court's analysis is any consideration of Patryk's connections to Washington before he left the state.

As discussed above, the Superior Court erred as a matter of law in holding that Washington was not Patryk's home state on the date Mr. McGlynn filed his custody Petition – under the absent child/resident parent provision, Washington courts clearly have home state jurisdiction over this matter and the Superior Court should be reversed and this matter remanded on that basis. And, if this Court reverses the Superior Court's dismissal of Mr. McGlynn's Petition on this basis, it does not necessarily need to address whether the Court looked to the wrong point in time to

evaluate Patryk’s connections to Washington since that inquiry does not arise where a court is exercising home state jurisdiction. Mr. McGlynn, however, requests that the Court address the issue of how Patryk’s connections to Washington should be evaluated if the Court reverses the Superior Court as it is an issue that is likely to arise on remand in the event Respondent asks the Superior Court to decline to exercise home state jurisdiction. *See* RCW 26.27.261 (“For [the] purposes [of determining whether a Washington is an inconvenient forum] the court shall . . . consider all relevant factors, including . . . [t]he nature and location of the evidence required to resolve the pending litigation[.]”). If the Court reaches this issue, it should hold that the Superior Court erred in evaluating RCW 26.27.201(1)(b)’s “significant connection” and “substantial evidence” factors by only considering Patryk’s situation at the time of the hearing on Mr. McGlynn’s Petition. Should this issue arise on remand, the Superior Court should instead be instructed to consider all the circumstances relevant to Patryk’s situation, including evidence of his and Mr. McGlynn’s connections to Washington at the time Patryk left the state, and the circumstances surrounding Patryk’s continued absence from Washington. *See* CP 40-41 (Decl. of K. McGlynn indentifying Washington connections).

The question of what temporal reference the Superior Court is required to use in evaluating the “significant connection” and “substantial evidence” factors under Section (1)(b) has been addressed by two Divisions of this Court, with slightly different, but not necessarily

conflicting, outcomes. In *In re Marriage of Ieronimakis*, 66 Wn. App. 83 (1992), this Division considered whether, under Washington’s predecessor statute to RCW 26.27.201, RCW 26.27.020,⁸ a trial court could properly consider connections developed in Washington after the children at issue were removed from another jurisdiction to Washington in determining whether Washington should exercise jurisdiction over custody proceedings concerning the children.

In *Ireonimakis*, a mother who fled Greece with her children petitioned for child custody in Washington. The Superior Court granted the mother custody, finding that she and the children had a significant connection with Washington and that there was substantial evidence here concerning the children’s welfare. 66 Wn. App. at 92. This Division held that a Washington Court could not properly exercise jurisdiction under the “significant connections” jurisdiction provision of the former custody statute in reliance on post-removal connections, holding that “[t]he fact that there was substantial evidence concerning the children’s care, protection, training, and personal relationships at the time of trial does not justify the Washington court taking jurisdiction.” *Id.* at 92.

⁸ Washington’s previous custody statute, the Uniform Child Custody Jurisdiction Act (UCCJA) was repealed in 2001 and the UCCJEA was enacted in its place. The UCCJEA represented a significant change in child custody law in that it prioritized home state jurisdiction over “significant connections” jurisdiction. *See In re Marriage of Murphy*, 90 Wn. App. 488 (1998). Under the former statute, Washington courts could exercise jurisdiction if it found a child had “significant connections” to the state, even if another state was the child’s home state. In contrast, under the current statute, a trial court can only look at “significant connections” if the child has no home state or the child’s home state has declined to exercise jurisdiction because Washington is a more appropriate forum. *See In re Marriage of Hamilton*, 120 Wn. App. 147, 157-58 (2004).

This Division's holding in *Ieronimakis* rested on policy considerations – it opined that allowing a Washington court to assert jurisdiction where a parent brings a child to Washington and begins generating significant contacts with Washington would permit parents to circumvent home state priority by simply staying away from the home state long enough to create new connections in another jurisdiction:

To allow Washington court 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.

66 Wn. App. at 92 (citing the Parental Kidnapping Prevention Act of 1980, “PKPA,” 28 U.S.C. § 1738(c)(2)(B)). This Division's observations in *Ieronimakis* are equally applicable here – if the Superior Court is permitted to rest a jurisdictional holding entirely on a lack of evidence of strong connections to Washington at the time of the court's hearing which, in this case, occurred long after the child had left Washington and after the other parent had stayed in another country long enough to generate connections there, it effectively encourages parents to keep children away from their home state long enough to generate significant contacts elsewhere and argue for jurisdiction in a different forum on the ground that the child no longer has significant connections with the home state.

Ieronimakis, however, is not the Court's only opinion on this point. Subsequent to this Division's *Ieronimakis* holding, in *In re Hamilton*,

120 Wn. App. 147 (2004), Division Three addressed whether a trial court could consider a child’s post-removal connections with Washington in evaluating whether to exercise jurisdiction over custody matters involving a child with no home state. Unlike *Ieronimakis*, however, the issue in *Hamilton* arose under Washington’s current custody child statute, the UCCJEA, not its predecessor. *Id.* at 155.

In *Hamilton*, one of the parents, relying on *Ireonimakis*, challenged the trial court’s reliance of evidence of the child’s post-removal contacts with Washington in exercising jurisdiction under Section (1)(b) (the “significant connections” provision that may be invoked to exercise jurisdiction where no state has home state jurisdiction). Division Three, distinguishing *Ireonimakis*, held that the trial court properly relied on evidence of post-removal contacts in that case. *Id.* at 157. According to Division Three, *Ireonimakis* was distinguishable because that case involved the application of the “significant connections” provision to defeat the home state jurisdiction of another state (which was permissible under the UCCJA), whereas the case before it involved no home state and, therefore, no effort to defeat home state jurisdiction through the creation of post-removal connections. *Id.*

Division Three’s analysis in *Hamilton* does not undermine Mr. McGlynn’s argument that a trial court errs in evaluating the connections of a child who has been removed or withheld from his home state by looking solely at the state of those connections at the time of a custody hearing. Notwithstanding the *Hamilton* court’s analysis of *Ireonimakis*, the basis on

which Division Three relied to determine whether post-removal evidence is properly considered in evaluating “significant connections” to Washington – i.e. that the UCCJEA, unlike the UCCJA, prioritizes home state jurisdiction – is arguably a distinction without a difference and should not control the outcome in this case for a number of reasons.

First, the result reached in *Ireonimakis* is entirely consistent with the home state prioritization eventually adopted by Washington under the UCCJEA. Indeed the *Ireonimakis* court relied on the federal PKPA, which explicitly provides for home state prioritization, in support of its analysis. 66 Wn. App. at 92. Thus, the fact that Washington law has changed in this regard has no bearing on the issue of how post-removal contacts are to be considered in evaluating an absent child’s connections to Washington.

Second, although the UCCJEA requires courts to first evaluate home state jurisdiction and defer to the home state if one exists, both the UCCJEA and the UCCJA include a “significant connections” provision. Thus, it would seem that the issue of how to interpret or evaluate evidence of a child’s connections to a jurisdiction is the same once home state jurisdiction issues have been resolved, notwithstanding the prioritization of home state jurisdiction under the UCCJEA.

Finally, the policy issues the *Hamilton* court pointed to in distinguishing *Ireonimakis* – a parent’s ability to enhance his or her jurisdictional position by removing a child from his home state over the other parent’s objection and creation of new, more recent connections with

another state, are equally present regardless of whether a parent was seeking to supplant home state jurisdiction under the UCCJA's "significant connections" provision (as was the case in *Ireonimakis*) or arguing that one non-home state should be given preference over another non-home state under the UCCJEA's "significant connections" provision (as was the case in *Hamilton*).

Given that the policy issues identified by the Court in both cases are the same as those presented here, the outcome in this case should be determined by reference to those policy issues. Here, by considering only the state of Patryk's connections to Washington at the time it dismissed Mr. McGlynn's custody Petition, rather than considering the state of his connections at the time he was removed from Washington, the Superior Court did precisely what the UCCJEA and the cases discussed above sought to avoid – it provided an avenue to defeat home state jurisdiction by keeping a child away from a state long enough to create significant connections to another state and weaken his connections to his home state. This Court should instruct the Superior Court on remand to consider and give proper weight to evidence of pre-removal connections to Washington in evaluating any jurisdictional issues in this case.

V. CONCLUSION

This Court should reverse the Superior Court's dismissal of Mr. McGlynn's Petition to Establish Parenting Plan, and remand with instructions to reinstate the Petition and exercise home state jurisdiction over matters concerning Patryk's custody. Because this case concerns the

custody and welfare of a very young child and the necessity of an appeal has occasioned considerable delay in resolving Mr. McGlynn's custody Petition, the Court should order the Superior Court to resolve this matter on an expedited basis on remand.

Dated this 10th day of July, 2009.

Respectfully submitted,

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

In re Parentage: PATRYK MICHAEL McGLYNN, Minor child

KEVIN COLUMBA McGLYNN,

Petitioner/Appellant,

and

KLAUDIA KATARZYNA BATKIEWICZ,

Respondent.

CERTIFICATE OF SERVICE

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ORIGINAL

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

1. Opening Brief of Appellant; and
2. Certificate of Service

to be served on Respondent herein as follows:

Matthew Jolly
Law Offices
9 Lake Bellevue Drive, Suite 218
Bellevue, WA 98005

- Via Email
- Via Facsimile
- Via U.S. Mail
- Via Hand Delivery

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

Dated: July 10, 2009 at Seattle, Washington.



Sue Stephens, Legal Assistant