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No. 67533-8-I

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 for lack of subject matter jurisdiction. On appeal, the Court of Appeals reversed and held that Washington had jurisdiction because Washington was the child's home state under the UCCJEA but stated that the trial court could elect to decline that jurisdiction if it found that Poland was a more convenient forum.

The mother then requested that the trial court decline jurisdiction in favor of the Polish court where the parties have also been actively litigating. The father successfully stayed the trial court's decision for a period of one year. On June 24, 2011, the

trial court declined jurisdiction in favor of Poland, finding that Poland was a more convenient forum. Mr. McGlynn appeals.

II. STATEMENT OF ISSUES

Issue No. 1: Did the trial court appropriately exercise its discretion when it declined to exercise jurisdiction over child custody in favor of Poland given that the child has resided in Poland vastly longer than Washington, that there is already active litigation in Poland in which both parties participated, and that the majority of evidence concerning the child's care and welfare is located in Poland?

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 20. Patryk's father is Kevin Columba McGlynn, who is a dual citizen of Ireland and the United States. CP 34.

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 with Mr. McGlynn's knowledge and consent. CP 20. 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 20. Patryk is a citizen of Poland. CP 19.

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 20. Throughout her brief stay in the U.S., 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. CP 21.

On June 27, 2008, Mr. McGlynn filed a Petition for Establishment of Parenting Plan in King County Superior Court. Ms. Batkiewicz eventually 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 26.

Ms. Batkiewicz filed an action in the court in Poland and was granted exclusive care and custody of Patryk by the Polish court on October 24, 2008. CP 27. Mr. McGlynn subsequently filed a Petition in Poland under the Hague Convention seeking the immediate return of Patryk. CP 27.

On February 26, 2009, Ms. Batkiewicz filed a Motion to Dismiss for Lack of Jurisdiction in the King County Superior Court. On April 3, 2009, Judge Mariane Spearman granted Respondent's Motion and signed an Order Dismissing Petition to Establish Parenting Plan. CP 26. 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. CP 128-130.

On January 25, 2010, the Court of Appeals reversed, holding that Washington was in fact the home state of Patryk. CP 3-14.

The appellate decision went on to state, in relevant part:

This conclusion, however, does not mean that the trial court is required to exercise its jurisdiction. As Batkiewicz correctly urged in her appellate brief, the trial court can

decline to exercise its jurisdiction under RCW 26.27.261 if it determines that Washington is an inconvenient forum and Poland is a more appropriate forum. See In re Burk, 252 S.W.3d 736, 741 (Tex. 2008) (“Applying a physical-presence test to determine home-state jurisdiction, then allowing that court to consider [if] the forum’s relative convenience, creates jurisdictional certainty without diluting the significance of underlying facts and circumstances presented in an individual case.” (quoting Powell v. Stover, 165 S.W.3d 322, 327 (Tex. 2005) and citing Texas’s equivalent of RCW 26.27.261)). But the question of whether Poland is a more appropriate forum is a determination that must be made by the trial court.

On February 25, 2010, Ms. Batkiewicz requested that the trial court decline to exercise jurisdiction on the grounds that Poland was a more convenient forum. CP 54. While the motion was pending, Mr. McGlynn filed a second Hague Convention petition in United States District Court. He then filed a motion before the Superior Court to stay the state court proceedings. CP 57. At this time, there were four different legal actions in four different jurisdictions concerning Patryk. Three of those actions were initiated by Mr. McGlynn. CP 22.

On March 16, 2010, Judge Spearman entered an Order Staying State Court Proceedings pending resolution of the U.S. District Court action. CP 1. Because the proceedings were stayed, Judge Spearman did not rule upon Respondent’s Motion to Decline Jurisdiction.

On May 25, 2010, the Regional Court in Nowy Targ (Poland) dismissed Petitioner McGlynn's application under the Hague Convention for release of his son. CP 48-66. Simultaneously, the court settled residential contacts between Mr. McGlynn and Patryk. Mr. McGlynn appealed the Polish court's ruling. On March 3, 2011, the appellate court in Poland dismissed Mr. McGlynn's appeal ruling that "the appeal is groundless in spite of the fact that some of the charges in it should be taken into account." CP 48-66. In reaching this decision, the court referred to an expert evaluation and report completed in Poland, stating "the experts stated unanimously that release of minor Patryk to his father and the child's departure to the USA related to it would be a traumatic experience for the minor, i.e. constituting a grave risk of exposing the child to psychological harm and placing him in intolerable situation. This would be related to the feeling of loss of people well known and close to him, as well as the entire environment, which is tantamount to the feeling of bereavement. The total change of environment and people around the child, as well as the language barrier, surpass the adaptation skills of the minor, especially at this stage of development." CP 53.

After entry of the Polish decision, the United States District Court clerk dismissed Mr. McGlynn's federal court proceeding on May 4, 2011. CP 28. On Mr. McGlynn's motion, the Superior Court lifted the stay on proceedings on May 18, 2011. Ms. Batkiewicz then renewed her request that the trial court decline jurisdiction in favor of Poland. CP 25-66.

On June 24, 2011, Judge Jeffrey Ramsdell granted Ms. Batkiewicz's motion, finding:

Washington is an inconvenient forum for resolution of this matter as defined by RCW 26.27.261. The child has resided outside of the State of Washington for the majority of his life and has resided consistently in Poland since January 2008. The financial resources of the parties are not largely disparate and Mr. McGlynn has already demonstrated the ability to travel to Poland multiple times. Because Patryk has remained in Poland since January 2008, all of the evidence concerning his present circumstances and care is located in Poland. Other than Mr. McGlynn, all of the witnesses who have interacted significantly with Patryk, including his day care providers, doctors, relatives and his mother are located in Poland. Further, Poland has already asserted jurisdiction over Patryk's residential schedule and Mr. McGlynn has participated in those court proceedings. It is acknowledged that Poland is not a convenient forum for Mr. McGlynn. However, the potential inconvenience to Mr. McGlynn is far outweighed by the benefit of deciding this matter decided in Poland where the child, the mother, and substantial evidence concerning the child's welfare are located.

It is clear from the record provided to the Court that the Polish Court is familiar with the facts and issues in the case.

Petitioner has failed to provide persuasive evidence that he will be denied due process if the dispute is adjudicated in Poland. CP 139-141.

On July 7, 2011, Mr. McGlynn filed a Motion for Reconsideration of Judge Ramsdell's decision including a supporting declaration. CP 142-160. Without requesting a response from Ms. Batkiewicz, Judge Ramsdell denied the request for reconsideration on July 11, 2011. CP 163-165. In his written decision, Judge Ramsdell affirmed his analysis of the *forum non conveniens* ruling under RCW 26.27.261. Judge Ramsdell further ruled that Mr. McGlynn's request that Poland decline to exercise jurisdiction based upon alleged misconduct by Ms. Batkiewicz should be addressed to the court in Poland and not to the Washington court. CP 163-165.

IV. ARGUMENT

A. Standard of Review

The standard of review applicable to a decision to dismiss on *forum non conveniens* grounds is abuse of discretion. *Myers v. Boeing Co.*, 115 Wash.2d 123, 128, 794 P.2d 1272 (1990). Such a dismissal may only be reversed if it is "manifestly unfair, unreasonable or untenable." *Myers*, 115 Wash.2d at 128, 794 P.2d 1272.

B. The Trial Court Properly Applied RCW 26.27.261 when it declined to exercise jurisdiction in favor of Poland on the grounds that it was a more convenient forum.

The trial court may decline jurisdiction under RCW 26.27.261

which states 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.

1. Application of the Statutory Factors Favors Declining Jurisdiction in Favor of Poland

Pursuant to RCW 26.27.261(2), the factors the trial court was required to consider in evaluating whether Poland was the more convenient forum for this litigation were as follows:

(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;

This factor does not apply as neither party has alleged any acts of domestic violence.

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

Patryk was born in Washington on September 30, 2007 and left on January 12, 2008 after being present in Washington for less than four months. By the time that the Petition was filed in this matter, Patryk had already resided in Poland for nearly 6 months. After years of litigation, Patryk has now been residing in Poland for nearly 4 years. These facts weigh heavily in favor of a Polish venue for the litigation.

Appellant relies heavily upon the case of *In re Marriage of Ieronimakis*, 66 Wn. App. 83 (1992) for the proposition that this court may not consider the period of Patryk's residence in Poland post-filing and must instead apply the statutory factors as of the date of filing (June 2008). *Marriage of Ieronimakis* is inapplicable both because it is a jurisdiction case (not an inconvenient forum case) and because it was decided prior to the adoption of the UCCJEA. 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. However, the jurisdiction of this Court

is no longer in dispute in the present case. This Court has previously ruled that Washington is Patryk's home state and has subject matter jurisdiction. 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." Rather, the home state is voluntarily electing to decline jurisdiction in favor of the more convenient forum. By relying on *Ieronimakis*, Appellant is conflating the issues of jurisdiction and inconvenient forum.

Nothing in the language of the UCCJEA requires that the Inconvenient Forum factors of RCW 26.26.261(2) be applied as of the time of the commencement of the proceedings rather than the time the decision is being made. In contrast, the statute does require the court to look only to the circumstances at the time of the commencement of the proceedings when determining which jurisdiction is a child's home state. *RCW 26.27.201(a)*. However, no such limitation is placed on the court's discretion under the statute when evaluating whether Washington or another jurisdiction is a more convenient forum. Such a limitation would make little sense given the broad and equitable nature of the factors the court is directed to consider under the statute. Indeed, several of the

factors contemplate consideration of issues that may have developed or occurred after the commencement of the proceedings. For example, the court is directed to consider “the nature and location of the evidence required to resolve the pending litigation”, an issue that necessarily contemplates consideration of the present location of such information. RCW 26.27.261(2)(f). Similarly, the court is directed to review “the familiarity of each state with the facts and issues in the pending litigation” suggesting consideration of post-filing litigation and hearings that may have provided the court with an understanding of the facts and background of the family situation. RCW 26.27.261(2)(h). These factors combined with the absence of any temporal limitation on the courts review of the facts and circumstances of the parties undermine Appellant’s argument that post-filing facts should not be considered when evaluating which forum is more convenient.

Accordingly, the court may properly consider post-filing developments including such things as the simple passage of time when evaluating which jurisdiction is a more convenient forum. In the present case, Patryk has resided in Poland more than ten times the duration of his stay in Washington and application of this factor heavily favors declining jurisdiction in favor of Poland.

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

There is a substantial distance between the respective jurisdictions. While this distance would necessarily inconvenience whoever had to travel, litigating the matter in Washington would be far more inconvenient due to the need to present evidence located in Poland. Because Patryk has resided in Poland for nearly 4 years, the vast majority of the relevant witnesses and evidence are located in Poland including the expert family evaluation conducted in the Polish Hague Convention proceedings. Further, much of the written evidence is in Polish and most of the witnesses do not speak English. The burden created by the geographic distance between the jurisdictions would therefore be disproportionately burdensome on the mother if the matter was litigated in Washington and this factor again favors declining jurisdiction.

(d) The relative financial circumstances of the parties;

The superior court found that the financial resources of the parties are not largely disparate. However, the court further found that Mr. McGlynn has demonstrated an ability to afford frequent travel to Poland both for visits with his son and to appear in legal proceedings in that country. He was the one who paid for the

parties' travel to Washington and their subsequent travel to Barbados for vacation. Ms. Batkiewicz has not traveled to Washington since she left with her son in January 2008 and has no demonstrated capacity to afford such an expense. Even if the court assumes equal resources, the financial burden of litigating in Washington would disproportionately impact Ms. Batkiewicz because of the expense presenting Polish witnesses and evidence in Washington would be greater since the majority of the evidence concerning Patryk is located in Poland. Accordingly, this factor favors declining jurisdiction in favor of Poland.

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

All of the evidence concerning Patryk's present circumstances and care is located in Poland. Other than Mr. McGlynn, all of the witnesses who have interacted significantly with Patryk, including his day care providers, doctors, relatives and his mother are located in Poland. In addition, a parenting evaluation has already been completed in Poland and the experts involved in said evaluation are located in Poland. While the father points to medical evidence in Washington, the fact is that Patryk has not seen a medical provider in Washington since 2007 and all evidence

concerning his current medical care and condition is located in Poland. The witnesses, school records, medical records and other information concerning Patryk's current circumstances are all in Polish and translating this information would present a very substantial burden. This factor heavily favors declining jurisdiction in favor of the Polish court.

Appellant's argue that the court may only consider evidence that existed at the time he filed his Petition in June 2008 in evaluating this statutory factor. Appellant's argument is not supported by the plain language of the statute and does not make practical sense. The evidence that a court must consider in developing a parenting plan for a minor child is defined in RCW 26.09.187. That statute requires consideration of the child's present circumstances, needs, and interests. For example, the court must consider the developmental level of the child, his relationship with his physical surroundings, his school and activities, and the nature of his relationship with each parent, siblings and other important people in his life. RCW 26.09.187(3). All these factors require evidence of the child's present circumstances. It does not make sense for a court to evaluate the nature and location of necessary evidence as it existed 4 years ago

rather than as it exists presently as it is the present evidence which must be presented at a trial.

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

Both jurisdictions' courts have a demonstrated capacity to decide the issues expeditiously. However, it is Poland which has dealt with the practicalities of developing a residential schedule and developing evidence concerning Partyk's care including a court ordered parenting evaluation. Washington has not issued any decisions on the merits of this case due to the extensive litigation concerning jurisdiction, the father's successful bid to stay proceedings for a year, and the subsequent dismissal of the case by Judge Ramsdell. This factor therefore favors the Polish court.

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

As mentioned above, only the Polish courts have heard evidence and issued orders on the merits of the residential schedule in this matter. The Polish courts ordered completion of an expert parenting evaluation in connection with the Hague Convention proceedings. The Polish court is also better equipped to understand and evaluate evidence presented in the Polish

language. While Washington is intimately familiar with the jurisdictional facts of this case, the relevant facts concerning Patryk's care and circumstances have been more fully developed and addressed in Poland. This factor therefore favors this matter being heard in Poland.

Taken as a whole, nearly every one of the enumerated statutory factors favors declining jurisdiction. Further, the written decisions of Judge Ramsdell reflect a proper and thorough consideration of the statutory factors as well as the additional issues raised by the father. There is no evidence to suggest that he abused his discretion in finding that these factors led to the conclusion that this matter was best addressed in Poland.

2. Case Review

There are no Washington cases which discuss the inconvenient forum analysis under RCW 26.27.261. Both of the cases discussed by Appellant are cases discussing proper jurisdiction, not inconvenient forum. In *In re Custody of A.C.*, 165 Wn.2d 568, 200 P.3d 689 (Wash. 2009), a child and his mother moved to Washington from Montana. The child's foster parents initiated a non-parental custody action. The Supreme Court held that because the foster parents resided in Montana and sought to

modify a custody determination initially made by Montana, and because Montana had never declined jurisdiction, the Washington courts did not have jurisdiction to determine custody. Washington could only exercise jurisdiction if Montana declined to do so under the UCCJEA, an issue that was not before the Washington court and which would necessarily be addressed to the Montana court. *Custody of A.C.* is a case about exclusive continuing jurisdiction under the UCCJEA and does not provide any guidance in the present case. The public policy discussion by the court regarding forum shopping was in the context of seeking to avoid the proper exclusive continuing jurisdiction of Montana. There is no question about jurisdiction in the present case as that issue has already been previously settled by this court and thus *Custody of A.C.* is inapplicable.

Likewise, *In re Marriage of Hamilton*, 120 Wn.App. 147, 84 P.3d 259 (Wash.App. Div. 3 2004) is also a decision that addresses proper jurisdiction and not *forum non conveniens*. In *Hamilton*, the Court of Appeals ruled that Washington could assert jurisdiction in a dissolution petition filed by the wife. The court find that the child had no home state under the UCCJEA, the child and the mother had significant connections to Washington, and substantial

evidence concerning the child's care was in Washington.

Accordingly, under the UCCJEA Washington could properly assert jurisdiction rather than the father's home state of Texas. *Hamilton* is therefore a significant connections case on proper jurisdiction under the UCCJEA and is not an inconvenient forum case. It is therefore not applicable.

C. The mother has not engaged in unjustifiable conduct or abducted Patryk.

Mr. McGlynn seeks to relitigate his two separate Hague petitions by arguing that Ms. Batkiewicz kidnapped Patryk when she traveled with him to Poland. The facts of this case simply do not bear the weight of such an inflammatory allegation. Mr. McGlynn and Ms. Batkiewicz had a short term relationship and were not married. Ms. Batkiewicz is not a citizen of the United States and came to this country for a period of 3 months on a tourist visa. Throughout her stay in the U.S., she maintained her Polish residence, paid her utility and other bills in Poland, and otherwise evidenced an intent to return to her home country. In January 2008, she returned to Poland with both her son and Mr. McGlynn. She did so with his knowledge and consent -- indeed he traveled with her. While Mr. McGlynn may have hoped or even

expected that he and Ms. Batkiewicz would resume their relationship or that she and he would eventually live together in the U.S., there is no evidence that this was Ms. Batkiewicz's hope or expectation. Regardless of either party's expectations, the relationship failed. To expect Ms. Batkiewicz to reside anywhere other than her home, where her family resided and where she could easily obtain employment, is unreasonable.

Ms. Batkiewicz has not sought to keep Patryk from his father and has facilitated contact including in-person visits in Poland. She has hired counsel in the U.S. courts and respected its decisions, even when she disagreed with them. She has kept Mr. McGlynn apprised of her address and contact information and made no effort to conceal Patryk. It is untenable under these circumstances to characterize her behavior as "abduction" or "kidnapping."

Mr. McGlynn relies heavily on the findings of the District Court in Nowy Sacz in its April 5, 2011 decision. Mr. McGlynn was seeking to appeal the lower court's dismissal of his petition under the Hague Convention. On appeal, the district court denied his appeal and characterized it as "groundless." While Mr. McGlynn points to the court's finding that "the premise of wrongful retention of the child provided in Art. 3 of the Convention has been fulfilled,"

this finding was based solely on the fact that the child had resided in the U.S. for the first 3 months of his life and had contact with his father at that time. There were no findings that the mother had intended to reside in the U.S. at any time or that she had intended to deny Mr. McGlynn reasonable contact with his son. The court denied Mr. McGlynn's petition despite the "wrongful retention" finding and stated that his application would have been dismissed even if it had been filed immediately after Patryk came to Poland (In other words, its decision was not dependent on post-filing contacts with Poland as feared by Mr. McGlynn). The decision further discusses in significant detail the strength of Patryk's bond to his mother and his environment in Poland, relying on the findings of a family diagnostic evaluation ordered by the court. In short, the substance of the district court's decision reinforces that (1) Patryk is fully integrated into his environment in Poland and the evidence concerning his care is located in that country, (2) Mr. McGlynn has been provided due process in Poland including notice and the opportunity to be heard, and (3) the Polish courts have demonstrated their ability to consider the evidence and address Patryk's needs. All of these facts reinforce Judge Ramsdell's decision to decline jurisdiction in favor of the Polish courts.

D. Even if the mother's actions in returning to Poland with her son are deemed inappropriate or unjustifiable conduct, the father's remedy is properly addressed to the Polish court.

Mr. McGlynn argues that the mother has engaged in "unjustifiable conduct" which should prohibit this court from declining jurisdiction. RCW 26.27.271 prohibits a court from exercising jurisdiction if it finds that a parent has engaged in "unjustifiable conduct." There has been no finding by the Washington courts or any other court that the mother has engaged in "unjustifiable conduct" as contemplated by the UCCJEA. In making this argument, the father is conflating issues of jurisdiction, wrong retention under the Hague Convention, and the inconvenient forum doctrine embodied in RCW 26.27. 261. While UCCJEA does prohibit the Washington court from exercising jurisdiction based on a parent's unjustifiable conduct, the trial court in Washington was not seeking to do so and indeed, was declining to exercise home state jurisdiction. If Mr. McGlynn wishes to advance an argument that the Polish court should decline jurisdiction based on "unjustifiable conduct," he must advance such an argument to the Polish court under the plain terms of RCW 26.27.271. The argument is not properly made before the Washington court.

The list of statutory factors the court must consider in finding Washington an inconvenient forum does not include any references to “unjustifiable conduct.” However, the statutory factors are not exclusive and the trial court was certainly entitled to consider any other factors it considered relevant. RCW 26.27.261(2). Indeed, Mr. McGlynn argued his “unjustifiable conduct” claim to Judge Ramsdell who rejected it expressly on reconsideration, demonstrating that the argument was considered and weighed by the trial court. This is all the trial court is required to do under the terms of the statute and Judge Ramsdell can not be said to have abused his discretion in concluding either that Mr. McGlynn’s claims were meritless or that they were outweighed by the other factors favoring deferring to the Polish court.

E. The father’s request that the Washington action be stayed is unsupported by the express terms of RCW 26.27.261(3).

RCW 26.27.261(3) states:

(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.

By its plain terms, the statute only provides for a stay of proceedings until a child custody proceeding is promptly commenced in the designated state. In the present case, child custody proceedings had already been commenced in Poland by the time of Judge Ramsdell's decision. Therefore, a stay was neither required nor appropriate.

F. There is no requirement for an evidentiary hearing prior to declining jurisdiction under RCW 26.27.261.

The father cites RCW 26.27.101 in support of his request that this matter be remanded for an evidentiary hearing (presumably with live testimony). RCW 26.27.101 address issues of communication between courts in reviewing questions of jurisdiction. Again, the issue of jurisdiction is not before this court and the provision has no applicability to a question of inconvenient forum. Nothing in the cited provision requires an evidentiary hearing even in that context, merely that the parties be given an opportunity to present facts and legal argument – an opportunity Mr. McGlynn has clearly had in this case.

Mr. McGlynn had the right to request oral argument before Judge Ramsdell on this matter. KCLCR 7(b)(4)(C). He chose not to do so. Nor did he request an evidentiary hearing in either his

response to the motion or his request for reconsideration. He should not be heard to complain about the lack of such a hearing never having made the request. Further, all the same factors of distance, language, and unavailability of evidence in Washington make such a hearing extremely challenging and impractical.

G. The father has not been denied due process rights in Polish courts.

Petitioner's argument that he has been denied due process in Poland is without merit. As he himself acknowledges, he has been granted ample opportunity to be heard in both Polish court proceedings and has, in fact, appeared at said hearings and retained representation in Poland. He has further participated in court ordered mediation in Poland. The Declaration of Grzegorz Dlugi in Response to Emergency Motion for Stay Pending Review and for Accelerated Review confirms that Mr. McGlynn was given notice of the proceedings in Poland and that he has been represented by counsel in those proceedings. While Mr. McGlynn complains that he was not personally served with the Polish proceedings, his counsel of record was provided notice consistent with Polish law and there is no dispute but that Mr. McGlynn received actual notice.

The declaration from Mr. Dlugi further confirms that Mr. McGlynn has appeared and testified at hearings in Poland. The written decision of the Polish District Court demonstrates that Mr. McGlynn's claims have been thoroughly heard and considered. Further, the Polish custody proceedings were stayed pursuant to the Hague Convention *based on the father's request* while he litigated his Hague Convention petition. He should not be heard to complain that the Polish court has not heard the merits of his claims for more liberal contact with his son when he has chosen not to advance such claims in the Polish court and, indeed, has prevented that case from proceeding. Further, the stay of the Polish custody proceedings is further evidence that Mr. McGlynn has been granted due process throughout the proceedings in Poland as the stay was granted at his request to permit his pursuit of his Hague Convention claims.

Finally, Mr. McGlynn argues that it would be inappropriate to defer to Poland because, in his judgment, Poland improperly asserted jurisdiction when it entered a temporary custody order. To begin with, the validity of the Polish temporary custody order is not before this court as this court is not being asked to enforce or recognize that order. Moreover, Mr. McGlynn's argument ignores

the plain purpose of RCW 26.27.261. That statute provides a mechanism for permitting a court that might not otherwise have jurisdiction to exercise jurisdiction if the equities of the case make such an exercise appropriate. At the time the Polish court proceedings were commenced, Patryk had resided in Poland for more than 6 months and Poland was Patryk's home state. The Polish proceedings would therefore have been proper under the UCCJEA but for the fact that Mr. McGlynn had already filed an action in Washington. RCW 26.27.251. At the time Poland initially exercised its jurisdiction, Washington's jurisdiction was in dispute. Indeed, the case was subsequently dismissed for lack of jurisdiction by the trial court though that decision was reversed on appeal. Even assuming that the Polish court's jurisdiction would otherwise be defective under the UCCJEA due to Washington's first to file jurisdictional priority, Poland's jurisdiction can none the less be perfected under the UCCJEA if Washington determines that Poland is a more convenient forum for the litigation. RCW 26.27.251(1). Mr. McGlynn's argument amounts to a claim that this court can only decline jurisdiction in favor of another court that already has valid jurisdiction. This argument is contrary to the plain language of the statute which permits a court which otherwise might not have

jurisdiction to nonetheless take a case if the home state jurisdiction enters an order declining the case. Ms. Batkiewicz's decision to seek a ruling from the Washington court that Poland is the more convenient forum is exactly the process contemplated by the UCCJEA. RCW 26.27.251; .261. By doing so, the court solves the problem of competing orders from competing jurisdictions and fulfills the stated purposes of the UCCJEA. Judge Ramsdell's decision was therefore both a proper examination of the facts suggesting Poland was a more convenient forum and a proper execution of the jurisdictional provisions of the UCCJEA.

V. CONCLUSION

This Court should affirm the Superior Court's Order Declining Jurisdiction.

Respectfully Submitted this 1 day of December, 2011.



Matthew Jolly, WSBA #23167
Attorney for Respondent

No. 67533-8-I

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.

CERTIFICATE OF SERVICE

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I declare that I caused to be served on Petitioner/Appellant herein
the following documents:

1. Brief of Respondent
2. Certificate of Service

to be served on, counsel for Petitioner/Appellant, via email
and legal messenger, as follows:

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