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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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In Re Parentage of Patrick Michael McGlynn, Child

Kevin Columba McGlynn, Appellant,

v.

Klaudia Kataryna Batkiewicz, Respondent

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves the wrongful retention of the Appellant/Father's son by the Respondent/Mother in a foreign State (Poland) but centers on a dispute over the fora to determine custody and visitation.

In January of 2008, the Parties took their infant child to Poland to visit the Mother's family. (CP 81-112, Decl. of K. McGlynn at CP 81, ¶2)¹ The initial trip was with knowledge and consent of the Father. (CP 81-112, Decl. of K. McGlynn at CP 81 ¶3; *see also* CP 20-21, Decl. of K. Batkiewicz) However, the Mother not only overstayed the agreed upon trip duration, but chose not to return. (CP 81-112, Decl. of K. McGlynn at 82, ¶¶6-8) Since that time, she has withheld access from the Father and provided only limited, supervised visitation when under specific court orders. (CP 81-112, Decl. of K. McGlynn at CP 82-83 ¶14)

The Father sought to have his rights vindicated in Washington State, the home state of the child. However, on the Mother's motion, the trial court dismissed the Father's parentage action (CP 139-141 Order Declining Jurisdiction), deferring instead to the Polish courts without any assurance that the Father would be granted access to the courts (due process) or access to his child (constitutional right to parenting).

¹ The Declaration of Kevin McGlynn is found at Exhibit A to Response to Motion to Decline Jurisdiction CP 67-112 and hereinafter short cited as "CP 81-112, Decl. of K. McGlynn".

II. ASSIGNMENTS OF ERROR

No. 1 The trial court erred when it granted Respondent's Motion to Dismiss (Order dated June 24, 2011);

No. 2 The trial court erred when it denied Appellant's motion for reconsideration (by Order dated July 11, 2011), (CP 139-141 Order Declining Jurisdiction).

Issues Pertaining to Assignments of Error

No. 1 (Assignment of Error 1) The trial court improperly dismissed Appellant's Petition to Establish Parenting Plan and Child Support because:

(a) Washington is the child's home state and the Mother failed to show more than a mere inconvenience;

(b) Insubstantial evidence exists to support the trial court's findings under the UCCJEA statutory test and the trial court failed to make written findings on each factor;

(c) The public policy purpose of the UCCJEA and Washington law is to look after the child's best interests and to discourage forum shopping and deter abductions of children but the trial court's decision encourages those wrongs;

(d) It has not been shown that the Father has been or will be afforded due process rights similar to those guaranteed to him in the United States;

(e) At most, the trial court should have stayed the action in Washington pending assurances that the action is maintained in Poland and that the Father is afforded some semblance of due process and his rights to parentage.

No. 2 (Assignment of Error 2) The trial court incorrectly denied Appellants' Motion for Reconsideration when it failed to:

(a) Recognize the UCCJEA's provision that parents with unclean hands should not be rewarded for their conduct; and

(b) Hold an evidentiary hearing to ensure that the evidence supported the findings under the statutory test and stay the proceeding pending satisfaction to the trial court of assurance of the Father's rights.

III. STATEMENT OF THE CASE

Procedural History

While significant time has passed since the Father first filed the petition to establish parentage (which initiated this action), most of this time is due to an earlier appeal in this case (as well as the Hague Convention court proceedings). In the first appeal, the Mother had

successfully moved to dismiss the Father's case in the trial court for lack of jurisdiction – asserting that Washington was not the home state of the child. (See CP 3-14 McGlynn Appeal #1 at CP 5)² The first Order of Dismissal was dated April 3, 2009. (CP 3-14 McGlynn Appeal #1 at CP 6) However, Division One of the Court of Appeals reversed on January 25, 2010, holding that Washington was in fact the home state of PMM and Washington did have jurisdiction. (See CP 3-14 McGlynn Appeal #1 at CP 5).

Upon remand, the Mother again moved to dismiss, this time based upon dicta from the McGlynn Appeal #1 decision which indicated that while Washington was the home state, in some cases Washington would not be required to exercise its lawful jurisdiction.³ At the time of the Mother's second motion (the Motion to Decline Jurisdiction),⁴ the Superior Court entered an Order Staying the case until the contemporaneous Hague Court petition in the United States District Court was resolved. (CP 1, Order Staying State Court Proceedings)

² Court of Appeals, Division One, January 25, 2010 decision in Case No. 63272-8-1, "*In re Parentage of Patryk Michael McGlynn, Child, Kevin Columba McGlynn and Klaudia Katarzyna Batkiewicz*. (Hereinafter referred to as McGlynn Appeal #1)

³ *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005) was cited by this Court in McGlynn Appeal #1 in obiter dictum to note that Washington may not be required to exercise jurisdiction. (CP 13-14).

⁴ CP 25-66

After the stay was lifted and the state court action resumed, the Mother re-filed her motion to decline jurisdiction. (CP 25-31 Motion to Decline Jurisdiction) On June 24, 2011, the Court decided the Mother's motion without oral argument, granting the requested relief and dismissing the action. (CP 139-140) This appeal now follows.

Factual History

Patryk⁵ is the Parties' minor child. Patryk is a United States citizen, born in Seattle, Washington on September 20, 2007.⁶ Approximately 4 months after PMM's birth, in January 2008, the Mother and Father took a trip to Krakow, Poland. (CP 81-112, Decl. of K. McGlynn at CP 81, ¶2) The Father was only able to stay overseas for a week before returning to Seattle alone while PMM and the Mother continued to visit with her family. (CP 81-112, Decl. of K McGlynn, at CP 81 ¶3) The Father's shorter stay had been pre-agreed between the Parties. (CP 81-112, Decl. of K McGlynn at CP 81 ¶3)

Shortly thereafter, in February 2008, the Father paid for the Mother and child to fly to meet the Father in Barbados for a vacation of ten days. (CP 81-112, Decl. of K McGlynn at CP 81-82 ¶4, ¶6) From there, the Parties

⁵ Although the case is styled in the name of "Patrick" McGlynn, following the Court's earlier opinion in McGlynn Appeal #1 (and the legal name of the child), the spelling "Patryk" is used throughout the brief.

⁶ CP 81-112, Decl. of K. McGlynn at CP 81, ¶1.

were to return to Seattle, Washington. However, the Mother requested a slight change of plans – instead of returning to Seattle, she asked to return briefly to Poland with the child and then fly directly to Seattle from Poland. (CP 81-112, Decl. of K. McGlynn at CP 81 ¶5) The Father agreed, based on the Mother’s representations that she would only be in Poland for a short time before returning to Seattle. (CP 81-112, Decl. of K McGlynn at CP 81 ¶6)

However, after returning to Poland, the Mother continued to prolong her return to Seattle. (CP 81-112, Decl. of K McGlynn at CP 82 ¶7) The Father became more and more concerned and on April 19, 2008, he decided to travel to Poland to see if he learn firsthand why the Mother was not returning with their child. (CP 81-112, Decl. of K McGlynn, at CP 82 ¶7) This trip proved unsuccessful and the Father returned to Washington alone. (CP 81-112, Decl. of K McGlynn at CP 82, ¶7) The Father took a second trip to Poland one month later on May 21, 2008 to again try and convince the Mother to return home with Patryk. (CP 81-112, Decl. of K McGlynn at CP 82 ¶8) However, it became clear that the Mother was intent on not returning. (CP 81-112, Decl. of K McGlynn at CP 82 ¶8)

Left with no choice, and faced with the prospect of not having access to his child (whom was now being withheld by the Mother in a foreign country), in June 2008, the Father filed a Petition to establish Parenting

Plan and Child Support in Washington State. (CP 81-112, Decl. of K McGlynn at CP 82, ¶9) Thereafter, on February 4, 2009, the Father also filed a Petition under the “Hague Convention on the Civil Aspects of International Child Abduction”⁷ (“Hague Convention”) with a Polish Hague Convention court, seeking the Return of Patryk. (CP 81-112, Decl. of K McGlynn at CP 82 ¶10) Not to be outdone, the Mother filed her own family court proceeding in Poland (in October 2008 and thus after Appellant had filed in Washington). (CP 25-66 Respondent’s Motion to Decline Jurisdiction at CP 27, Lns 3-5; CP 81-112, Decl. of K. McGlynn at CP 82 ¶¶11-12).⁸

Back in Washington, the Mother moved to dismiss the Father’s case alleging that Washington was not the home state for the child since the child was now residing in Poland with her. (CP 3-14, McGlynn Appeal #1 at CP 6) On April 3, 2009, the Court granted that dismissal. (*Id.*) However, the Court of Appeals reversed on January 25, 2010, holding that

⁷ Congress implemented the Hague Convention as the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. §§ 11601, *et seq.* See generally *Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995) (discussing Congress’s adoption of the Hague Convention in the ICARA).

⁸ However, it cannot be disputed that the Washington, King County Superior Court case and the Polish (International Abduction) Hague Convention court cases generated the most activity (while the separate Polish family law case generated the least). (See CP 113-138 Reply of Mother, failing to dispute the assertion of this fact from the Father’s Responsive brief. CP 67, at CP 70, Lns. 4-6) This issue seems to have been confused by the Mother’s Reply brief which the Father did not have a chance to rebut and which appeared to combine activity in the Polish Hague case with the inactive Polish family law case.

Washington was in fact the home state of Patryk. (CP 3-14, McGlynn Appeal #1 at CP 6).

And finally, on March 3, 2011, after the Hague Court of first instance had initially ruled in favor of the Mother, the Hague Court of Appeals⁹ issued a final decision reversing the court of first instance and finding that Patryk had in fact been “wrongfully retained” by the Mother and was therefore in violation of the Hague Convention. (CP 48-66, Hague Court of Appeals decision at CP 57)¹⁰

⁹ The Appellant Father had filed a petition in the Regional Court in Nowy Targ, Poland under the Hague Convention for the return of his son. The appeal from the unfavorable Regional Court decision was made to a higher court – the District Court in Nowy Sacz, Poland. In an effort to simplify and because the decision is now final, we refer to the March 3, 2011 appellate decision (from the District Court in Nowy Sacz) as the “Hague Court of Appeals” decision.

¹⁰ Found at Exhibit C to Respondent’s Motion, CP 25-66 and short cited as “Hague Court of Appeals” CP 48-66. The Hague Court of Appeals wrote:

In relation to it – contrary to the standpoint of the Regional Court – it was necessary to assume that in the factual circumstances of this case, the premise of wrongful retention of the child provided in Art. 3 of the Convention has been fulfilled.

(CP 48-66 Hague Court of Appeals at CP 57)

The Hague Court of Appeals further found that the Mother overstayed any consent granted by the Father:

The standpoint of the Court of First Instance that the Applicant supposedly consented to his minor son’s stay with his mother in Poland is not supported in the evidence material of the case.

CP 48-66 at CP 57 (Pg 10, internal pagination)

There should be no debate that a finding of “wrongful retention” is a violation and akin to “child abduction” under the Hague Convention.¹¹ Nevertheless, the Hague Court of Appeals declined to order that PMM be returned because of the concern and finding (based on testimony from the Family Diagnostic and Consultation Centre in Zakopane, Poland) that Patryk’s emotional well being would be affected by a return to Washington State without his Mother. (CP 48-66, Hague Court of Appeals at CP 61)

After the finalization of the appeal in Washington, and the appeal in the Hague Court, the Mother then moved to dismiss the King County Superior Court action on forum non-conveniens grounds. The King County Superior Court granted that motion over the Father’s objections.

IV. ARGUMENT

This appeal is not about the “return” of the child (no matter how dearly the father yearns for that result), since the Hague Court of Appeals addressed that issue and that court’s decision must be respected by the Father.¹² Instead, this appeal is about the child’s home state exercising its rightful jurisdiction, fulfilling its statutory, equitable and public policy

¹¹ See Preamble and Article 3, Hague Convention 42 U.S.C. §§ 11601, *et seq.* This conduct would also appear to qualify as parental kidnapping under the International PKPA. See 18 U.S.C. §1204.

¹² Under the Hague Convention, a “court is empowered to determine the merits of an alleged abduction, but not the merits of the underlying custody claims or issues.” *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz 1991)

responsibilities and providing the non-abducting parent (the Father) with due process and some vindication of his constitutional right to access to his child.

A. Standard of Review

The standard of review in this case appears to be multi-faceted. First there is the proper interpretation of a statute which is a question of law, and which the appellate court reviews de novo. *In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 426, 237 P.3d 274 (2010). *See also Tostado v. Tostado*, 137 Wn.App. 136, 151 P.3d 1060 (2007). Next there are constitutional due process rights which are questions of law, subject to de novo review. *State v. Strode*, 167 Wash.2d 222, 225, 217 P.3d 310 (2009)

There are also factual findings that are reviewed under a substantial evidence standard. *Tostado v. Tostado*, 137 Wn.App. 136, 151 P.3d 1060 (2007); *Davis v. Dep't of Labor & Indus.*, 94 Wash.2d 119, 123-24, 615 P.2d 1279 (1980). Evidence is substantial if it is sufficient to persuade a fair-minded person. *Tostado*, 137 Wn.App. at 141, 151 P.3d 1060; *Holland v. Boeing Co.*, 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978)).

And the overall review of a dismissal based on inconvenient forum is based on an abuse of discretion standard. *Myers v. Boeing Co.*, 115 Wash.2d 123, 128, 794 P.2d 1272 (1990). A court abuses its discretion in

dismissing a case due to an inconvenient forum if the dismissal is "manifestly unfair, unreasonable[,] or untenable." *Myers*, 115 Wash.2d at 128, 794 P.2 1272

Finally, the review of a denial of a motion for reconsideration is based on an abuse of discretion standard. *Fishburn v. Pierce County Planning and Land Services Dept.*, 250 P.3d 146 (Wash.App. Div. 2 2011) An abuse of discretion exists only if no reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts. *Fishburn*, 250 P.3d at 157.

B. The Trial Court Improperly Dismissed Appellant's Petition to Establish Parenting Plan and Child Support (Assignment of Error 1)

1. The Inconvenient Truth (Forum)

After the Court of Appeals held (in McGlynn Appeal #1) that the King County Superior Court did in fact have subject matter jurisdiction over this action (because Patryk's home state is Washington),¹³ on remand, the Mother sought to have the trial court voluntarily decline to exercise its jurisdiction on the basis that the forum was inconvenient for the Mother. (CP 25-66, Motion to Decline Jurisdiction)

¹³ CP 3-14, at CP 5, Washington Court of Appeals, January 25, 2010, No. 63272-8-1)

Of course, the obvious truth is that when a court is faced with a custody battle between parents in two States (and worse, between two countries separated by thousands of miles) one of the forums is going to be inconvenient to the other Parent. And, for the Respondent Mother (who took the couple's son and wrongfully retained him in a foreign country) the inconvenient forum argument becomes the most convenient one she could make. It is convenient because it provides the Mother with the opportunity to be rewarded for her tactics – tactics which saw her take and retain Patryk in Poland – and pick a home court advantage to frustrate the Father's attempts at having access to his child.

However, weighing ever so strongly against the trial court's decision to dismiss are the UCCJEA's statutory factors (and insufficient evidence favoring dismissal), the lack of due process afforded the Father in Poland and the public policy and purposes of the UCCJEA – which are to deter abductions and discourage forum shopping. See *In re Marriage of Ieronimakis*, 66 Wn.App.83, 831 P.2d 172 (1992).¹⁴ The opposition to dismissal is especially poignant where, as here, there exists an explicit finding by the Polish Hague Court of Appeals that the Mother violated the Hague Convention when she “wrongfully retained” Patryk in Poland

¹⁴ See also, Washington Court of Appeals, January 25, 2010, No. 63272-8-I, McGlynn Appeal #1, at CP 11, FN 4)

without the Father's consent. (CP 48-66, at CP 57, Hague Court of Appeals; *see also* FN 10 *supra*.)

While it is understandable why the Mother brought her motion (to provide her a home court advantage while requiring the Father to fly to Poland to litigate in a foreign language), it is not understandable why the trial court chose to dismiss – especially without any procedural safeguards, oversight or assurances (and in derogation of the spirit and aim of the laws and policies against parental kidnapping).

2. The UCCJEA

After the Court of Appeals (in McGlynn #1) made clear that Washington is Patryk's home state, the King Superior Court retained lawful jurisdiction to make decisions regarding visitation and child support. However, the Mother requested that the trial court decline to make these decisions, and instead, dismiss the action to allow Poland to be the sole decision-maker regarding visitation and child support. The legal basis that the Mother relied upon in her motion to dismiss was RCW 26.27.261 (CP 25-66, Motion to Decline Jurisdiction, CP 29, Lns. 7-8). RCW 26.27.261 is but one provision of the broader Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") which was adopted by Washington in 2001.

a. Washington is Patryk's Home State and No Injustice or Prejudice Exists to Warrant Declination of Jurisdiction

In citing RCW 26.27.261, Respondent acknowledges that she was requesting a discretionary action by the court (i.e. that the court choose to decline its lawful jurisdiction). While the Father does not deny that the trial court has discretion to decline jurisdiction, the important consideration is that this discretion is not unfettered. In fact, RCW 26.27.261 provides criteria to guide the Court's consideration, that criteria is not exclusive, but the Court is required to consider the statutory factors – factors which amount to more than simple inconvenience. But inconvenience is the only ground that the Mother can assert.¹⁵

The Mother should be required to make a showing of more than a simple inconvenience, such as some “injustice” or some prejudice in order to support a dismissal under RCW 26.27.261. Otherwise, trial courts could dismiss actions, which are otherwise lawfully based on home-state jurisdiction, without any justification at all – much less a compelling one – without substantial evidence and without a hearing and without full examination of statutory factors. Dismissing instead simply because a

¹⁵ In support of her Motion to dismiss, the Mother submitted a declaration stating, in essence, that Poland is more convenient because the child has now lived there longer (and more recently) than his stay in the United States. (CP 19-24 Decl. of K. Batkiewicz) Thus, what the Mother did was “tag on” the time incurred due to the prosecution of the appeal, the Hague case, and the length of time from the date that the Parties' child was unlawfully held away from his Home State.

parent abducted and retained and a child in a foreign state and delayed long enough to build an argument premised on inconvenience. Without requiring a showing which is more than simple inconvenience, the unfettered discretion to decline jurisdiction threatens to flip RCW 26.27.261 on its head and make the dismissals themselves the true injustice.

b. Insubstantial Evidence Exists to Support the Trial Court's Findings Under the Statutory Test of RCW 26.27.261

In addition to the need for a showing of something more than simple inconvenience, pursuant to RCW 26.27.261 the Court must consider and weigh a number of significant and important factors before making a decision to decline jurisdiction. In considering these factors, and in order to promote the UCCJEA's public policy of discouraging abductions and preventing forum shopping, **these factors should be taken in light of and considered at the time of the Father's filing of the parentage action and not at the time of the Motion to Decline Jurisdiction** – which was filed approximately two years after the case was first initiated. (See CP 81-82, Decl. of Kevin McGlynn ¶9, filing date of June 2008 and compare CP 25-66 Motion to Decline Jurisdiction, filing date on or about 6/13/11). Thus, in all fairness to the Parties, other parents and the law of this State,

the Washington trial court should not be permitted to use time away as a basis for declining jurisdiction when it has been found that a parent has wrongfully retained the child and the time away is premised on that wrongful retention.¹⁶

With this background and context, this brief now turns to the language of RCW 26.27.261 (followed by the trial court's findings and statutory factors to be considered).

RCW 26.27.261(1) provides the court with discretion to choose to decline to exercise its lawful UCCJEA jurisdiction:

(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.

While the court's decision to decline to exercise jurisdiction is discretionary, RCW 26.27.261(2) limits that discretion by requiring consideration of certain factors:

(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:

¹⁶ In addition to the time away being premised upon the wrongful retention of the child, it was also caused by court proceedings themselves – both the appeal in McGlynn Appeal #1 and the Polish Hague Court proceedings – which together prevented the Washington Court from having the opportunity to have a hearing on visitation.

(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.

RCW 26.27.261(2) (emphasis added)

Thus, the court must consider whether it is appropriate for a court of another state to exercise jurisdiction. This consideration should have

involved contacting the foreign court, or at least reviewing court filings to determine the appropriateness of the Polish court's jurisdiction (*see* RCW 26.27.251) – especially here, where the Polish family law court has already acted unlawfully (i.e. without jurisdiction) in making an initial custody decision. (CP 19-24, Decl of K. Batkiewicz, at CP 21, ¶8: “On October 24, 2008, the court granted me exclusive care and custody of Patryk”) This is a custody decision that should not be recognized by Washington and jurisdiction that cannot stand absent evidence supporting those grounds for jurisdiction.

Finally, the trial court's consideration must involve written findings, analyzing each of the statutory factors. In the present case, the trial court made written findings on some, but not all points, and failed to adequately address each of the statutory factors since the evidence fails to support the findings made by the Court.¹⁷

Instead, the trial court, in its June 27, 2011 Order (CP 139-141), found that Washington was an inconvenient forum under RCW 26.27.261 because:

- the child (Patryk) had spent so much time away from Washington (and in Poland);

¹⁷ See CP 139-141, Order of Dismissal and Compare with RCW 26.27.261, *infra*.

- the number of witnesses that had accumulated in Poland due to the time that Patryk has spent in Poland;
- other undefined “evidence” regarding Patryk’s care is in Poland;
- that Poland has asserted jurisdiction over Patryk’s residential schedule; and
- that McGlynn has allegedly participated in the proceedings there.

These court findings are addressed in turn, taking the first two grounds together, since they are premised on the same foundation – “time away”.

- The child (Patryk) had spent so much time away from Washington (and in Poland)
- The number of witnesses that had accumulated in Poland due to the time that Patryk has spent in Poland.

It is undisputed that Patryk is a United States citizen (having been born in the US). (CP 81-112 Decl. of K. McGlynn at CP 82) It is also undisputed that Patryk’s home state is Washington (CP 3-14, McGlynn Appeal #1). It is further undisputed that the Mother wrongfully retained Patryk in Poland and violated the Hague Convention. (See CP 48-66 Hague Court of Appeals at CP 57) However, the findings by the trial court

reward the Mother for her unlawful conduct of wrongful retention (i.e. abduction) by allowing her to tack on time during which she had wrongfully retained the child, and during which she contested Washington's jurisdiction over the child, together with the time that it took the Hague Court of Appeals to enter a final decision.

This basis of a finding of "inconvenience" on a "stronger" connection to Poland is also a bitter pill since the connection to Poland arises solely from the wrongful conduct/intransigence of the Mother – i.e. her taking Patryk away from his connections to Washington (the child's only home state) and retaining him in Poland. Not only is this patently unfair but it makes the finding of the "home state" an entirely hollow one. If Patryk's home state is Washington and Patryk was wrongfully retained (i.e. essentially abducted by the other Parent) in another jurisdiction, doesn't Washington have a public policy interest in ensuring that its residents rights are protected (both the Father and the child's)? And, doesn't Washington also have a public policy interest in discouraging parents from taking and secreting children from this State by not rewarding their unlawful (kidnapping) conduct?

As it stands, the decision of the trial court rewards parents for holding (and wrongfully retaining) children in a foreign country and then delaying the proceedings for determining access to that child or their

ultimate return. The more contentious the litigation and longer the resulting delay, the more likely the foreign state will become more convenient, Washington less, and the courts of Washington will dismiss.

In order to further the public policies of this State (e.g. securing the best interests of a child of this State who is unable to have a voice of his own due to his age, while seeking to protect its residents from parents who kidnap children across state and international lines), the King County Superior Court should not consider the time that has been tacked on since the kidnapping (i.e. the “wrongful retention”).

When the wrongful retention time is subtracted from the trial court’s analysis, there is insubstantial evidence to support the court’s finding here.

But even if the Court did consider the length of time which followed the wrongful conduct, the more important fact (than simple “time away”) should have been a determination as to whether the Court was capable of making a decision on custody and visitation based on the information that could be provided to it. However, no argument was provided to the Court by the Mother that the same evidence that was to be provided in Poland (or located in Poland) couldn’t be provided to the Court in Washington – particularly since both the UCCJEA and local rules permit electronic and teleconference access to the courts.

- Other undefined “evidence” regarding Patryk’s care is in Poland

The Mother alleges that other “evidence” regarding Patryk’s care is in Poland. However, the Mother provided no such evidence to the Court. Where is this evidence, other than speculation? The Father on the other hand presented evidence as to Patryk’s medical condition and his care in the United States – care that the Father believes that the child is not getting in Poland and for which the Father has been provided no independent assurance or evidence of. (CP 81-112, Decl. of K. McGlynn, at 83, ¶15-16)

Washington has a vested interest in ensuring that Patryk is obtaining the medical care that he needs since the state has an interest in ensuring the best interests of the child.¹⁸ Thus, In *In re Marriage of Ieronimakis*, 66 Wn.App. at 87, 831 P.2d 172 (1992), the King County

¹⁸ See e.g. *Lundin v. Lundin*, 42 Wash.2d 186, 187, 254 P.2d 460 (1953) (“The court in the making of an award of custody of a minor child must do so in furtherance of its best welfare and necessarily is vested with a wide latitude of judicial discretion.”); *In re Application of Day*, 189 Wash. 368, 382, 65 P.2d 1049 (1937) (“The principle that the welfare of the child is the paramount consideration has been recognized and followed by this court in many cases.”); *In re Dependency of J.B.S.*, 123 Wash.2d 1, 10, 863 P.2d 1344 (1993) (“The goal of a dependency hearing is to determine the welfare of the child and his best interests.”); and RCW 13.34.020 the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter”).

Superior Court communicated with the Greek courts before declining jurisdiction to ensure that Greece was making a child custody determination based on the “best interests of the child.” This would help ensure that medical needs are being looked into.

The Court should not have considered the Mother’s speculative evidence and instead should have been concerned with the lack of evidence from the Mother as to Patryk’s well being, and at the very least, held an evidentiary hearing on this issue (as addressed in the Assignment of Error #2 portion of this brief) or stayed this action pending evidence of satisfactory medical attention being furnished to the court (as discussed below).

- Poland has asserted jurisdiction over Patryk’s residential schedule

Much appears to have been made of the assertion that Poland has exercised jurisdiction. This is problematic because the Polish court exercised jurisdiction and made an initial custody determination without jurisdiction and without permission from the Washington Court.

There should be no dispute that the King County Superior Court case was initiated first and was pending when the Polish family law court entered a custody order in favor of the Mother. There is also no dispute that Washington was the child’s home state. Thus, at that time, under

Washington law, the Polish court did not have jurisdiction (or the authority) to enter a custody order until Washington issued an order declining jurisdiction (or staying action) in the Home State in favor of Poland.¹⁹ But, the Polish family court nevertheless made an initial custody decision and thereby issued an unauthorized (and illegal) order (illegal based on the lack of jurisdiction to issue it in the first place).²⁰

A very similar fact pattern to the present case arose in *Bellew v. Larese*, 288 Ga. 495, 706 S.E.2d 78 (2011). There, the parties were married in Italy. The mother, Larese, was an Italian national while the father, Bellew, was American. The parties had a child, born in Italy with dual citizenship. They then moved to Georgia where they resided for approximately three years. *Bellew*, 288 Ga. at 495. In May of 2007, however, Larese left with the child on a planned summer trip to Italy to

¹⁹ Pursuant to the UCCJEA as codified at RCW 26.27. A court has jurisdiction to make an initial child custody determination only if is the home state of the child, the child's home state declines jurisdiction, or no home state exists or an emergency exists. See RCW 26.27.201. Under the UCCJEA, a foreign nation is treated in the same manner as a sister state, if that state has an expression of jurisdiction in substantial compliance with the UCCJEA. RCW 26.27.051; *See also Bellew v. Larese*, 288 Ga. 495, 706 S.E.2d 78 (2011) (finding that the Italian court's failed to apply any jurisdictional standard for making a custody determination failed to satisfy the UCCJEA's requirement of substantial conformity).

²⁰ Although this appears to be the only action taken in the Polish family law court, the Respondent's overlength reply brief in the trial court appears to assert that the Polish family court has had contested live proceedings with testimony. (CP 113-138 Reply at 115-116) (which the Father did not have an opportunity to rebut and which adds new documents) However, the alleged Polish court proceedings cited by Respondent were in the Hague Convention Court and not the Polish family law court and there is no evidence, other than argument by counsel that the Father had any other involvement (except the filing of a notice of appearance and motion to continue) or been given any rights in the Polish family court proceedings.

visit her family. The mother and child were scheduled to return on August 1, 2007, however, they did not, and the mother filed for divorce in Italy on August 1, 2007. *Bellew*, 288 Ga. at 495. The father then filed for divorce in Georgia on September 17, 2007. *Id.* The Italian court issued an order stating that it had jurisdiction over the child. *Id.* at 496. The Georgia trial court then communicated with the Italian court and dismissed the Georgia case under the UCCJEA in favor of Italy. *Id.* The Georgia Supreme Court reversed on the ground that the Italian court failed provide reasoning to exercise jurisdiction in substantial conformity with the UCCJEA. *Id.* at 499.

[While the mother] asserts that [our] analysis essentially requires not ‘substantial conformity’ on the part of the Italian court with the jurisdictional standards of the UCCJEA, but complete conformity. We do not agree. The failing that we find in the [Italian court’s] expression of jurisdiction is not simply that it applied a standard different from that of the UCCJEA to determine what was the proper forum for consideration of custody matters, but that it essentially applied no standard...

Bellew, 288 Ga. at 499. Appellant urges the Court of Appeals to follow the reasoning of the Georgia Supreme Court.

As it stands, the King County Superior Court’s decision to dismiss recognizes and gives effect to a wrongfully issued custody order. As a result, while the Washington court evidenced its attempt to play by the rules (the UCCJEA), the Polish court has disregarded those rules and

failed to respect to the province of the Washington King County Superior Court as Patryk's home state with respect to initial custody determinations. And, there is no evidence of any lawful basis from the Polish Court as to how it could have obtained lawful jurisdiction (nor has the Respondent provided any such evidence).

Furthermore, all the evidence Respondent cites as to "proceedings" in Poland are with respect to the Polish Hague Court case(s) and not the separate Polish family law case. (CP 25-66, Motion for Order Declining Jurisdiction at CP 27-28; and CP113-138, Reply at CP 117) At most, in terms of participation, the Respondent asserts that the Appellant Father "participated" in the Polish family court proceedings (after it had issued an initial custody order) by filing a notice of appearance (January 2009). (See CP 132-138 Decl. of Grzegorz Dlugi at CP 133, ¶4 and CP 137)

The Statutory Factors

Pursuant to the UCCJEA, under Washington law (RCW 26.27.261) the statutory factors that the Court were to consider, are 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;

No Advantage to either Party. There was no threat of domestic violence and no evidence of such. CP 81-112, Decl. of K McGlynn, at CP

83, ¶17) This fact was not disputed. (CP 113-138, Respondent's Reply at 122).

(b) The length of time the child has resided outside this state²¹

No Advantage to either Party. When this Petition was filed Patryk had been living outside of Washington for 5 months and it has now been some two years. Those 5 months (and now 2 years) are the result of three factors: 1) an unlawful retention; 2) the Mother's defense of the suit in Washington contesting jurisdiction (leading to the appeal in McGlynn #1); and 3) the delay in the Hague Court. This time should be disregarded on public policy grounds and therefore, for purposes of the trial court's findings, there is insubstantial (lawful) time outside of Washington. (*See In re Marriage of Ieronimakis, infra* (Decided on public policy grounds disfavoring abductions, and excluding the Mother's post abduction time with the child.)

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

Significant for both Parties, but Advantage Washington. The King County WA Superior Court will allow telephonic appearances (and depositions) under the UCCJEA (see RCW 26.27.111) and mandates electronic filings (so no filing disadvantage to either party if the case is

²¹ While the trial court did consider this factor, it did not do so within the right context, since it tagged on unlawful time.

held in Washington). No evidence was provided to the Court that the Poland court offered such convenience to the Parties.

(d) The relative financial circumstances of the parties

No Advantage. The Superior Court found that “[t]he financial resources of the parties are not largely disparate.” (CP 140, Order of Dismissal)

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

No Advantage, as no agreements exist. (See CP 123, Reply).

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;²²

Advantage Washington. At the time this Petition was filed majority of the evidence was in Washington. (CP 81-112, Decl. of K. McGlynn) Patryk was born prematurely and required significant medical attention. (Id, at CP 83, ¶15-16 and Attachment 2) As the child is too young to provide testimony, the key missing evidence is Patryk’s lack of medical care while in Poland, and the existence of extensive medical

²² The court considered this factor in the context of allowing the time to have been tagged on and the development of witnesses after abduction, both without any noted concern for the required medical attention necessary for Patryk or the medical care and specialists in Washington that had treated the child. This evidence was provided in the declaration of Kevin McGlynn (CP 81-112, at CP83 ¶15-16 Decl. of K.McGlynn) and would have been more properly discussed in an evidentiary hearing. Are there specialists in Poland that can care for the child? No such evidence was provided. The court also considered this factor, but found it in favor of Poland, finding that “all of the witnesses who have interacted significantly with Patryk, including his day care providers, doctors, relatives and his mother are in Poland.”

records in the United States and a history of medical care here. (CP 83, Decl of K. McGlynn, ¶¶15-16 and Attachment 2) Medical attention was an important factor in *Hamilton* where the child had no home state and the location of substantial evidence was used to determine jurisdiction. See *In re Marriage of Hamilton*, 120 Wn.App.147, 84 P.3d 259 (2004). Here, the Mother failed to document to the court that the child was receiving the specialized medical care that Patryk requires.

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

Advantage Washington. The Polish court has already demonstrated a disregard for Washington law (by making custody decisions despite the matter pending in Washington and without complying with the UCCJEA) and without providing procedural due process to the Father, such as a meaningful opportunity to be heard (CP 82, Decl. of K. McGlynn, ¶12: “no notice of hearing” of Polish family court order granting Respondent custody) Grzegorz Dlugi, the Mother’s attorney in Poland, stated in his declaration filed with this Court that Poland “asserted jurisdiction...to avoid the danger of [Patryk] being wrongfully removed from Poland.” (CP 132-135 Decl. of Grzegorz Dlugi at CP 133, ¶5). This is not in substantial conformity with the jurisdictional standards of the UCCJEA.

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

Advantage Washington. While both “states” may be familiar with the case, a tremendous amount of time, money and energy has been spent in Washington due to the Mother’s first challenge of Washington as the child’s home state and thus Washington is arguably more familiar (due to the appeal in McGlynn Appeal #1). Furthermore, no evidence was presented that the Polish family law court had any more familiarity with the case than Washington.

- c. The public policy purpose of the UCCJEA and Washington law is to discourage forum shopping and deter abductions of children but the trial court’s decision encourages those wrongs²³

Further countering the Mother’s argument that Washington should decline jurisdiction is the public policy of the UCCJEA itself, a policy

²³ Since there was no evidence provided by the Respondent that Poland has adopted the UCCJEA, RCW 26.27.261, or a similar provision of law, and because cases dealing with the UCCJEA’s predecessor (the UCCJA) are still instructive for issues of public policy, the Court should also consider additional Washington authority on the UCCJA and equitable conduct when considering this appeal. Since it has not been adopted in both forums, the UCCJEA should not be the exclusive basis for determining the appropriate forum for child custody matters. *See In Re Custody of A.C.*, 200 P.3d 689 (Wash. 2009) (“Both Montana and Washington have adopted the UCCJEA, making the act the exclusive basis to determine jurisdiction of this interstate child custody dispute.”)

The Court should consider the pre-UCCJEA case of *In re Marriage of Ieronimakis*, 66 Wash.App. 83, 92, 831 P.2d 172 (1992) which stands for the proposition that to prevent circumvention of the appropriate home state and custody/visitation determinations, the factors determining jurisdiction should be considered from the point in time when the petition was filed and not the tagged on time post-petition and post-abduction. *Id.* This is contrary to the trial court’s decision which is based on time spent in Poland after the parenting petition was filed, allowing the Mother to tack on time and her accumulation of contacts/witnesses (evidence) that she gained through her wrongful abduction and retention of Patryk. (CP 139-141). This is exactly what the *Ieronimakis* Court warned against and clearly violates our State’s and our country’s public policy of discouraging abductions and encouraging home-state jurisdiction.

which aimed at deterring parental abductions and forum shopping which the Mother was previously admonished for.

Batkiewicz's interpretation also encourages forum shopping based on selective filing dates, which conflicts with the purposes of the UCCJEA as set out in the comments to the Uniform Law. '[I]ts purposes...are to: (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being.' UCCJEA §101 cmt., 9U.L.A. 657 (1999). Furthermore, 'the UCCJEA was intended to make the determination of jurisdiction more straightforward' and '[d]iscourage the use of the interstate system for continuing controversies over child custody,' and to '[d]eter abductions of children.' *Powell v. Stover*, 165 S.W. 3d 322 (Tex. 2005) (citing UCCJEA §101 cmt., 9 U.L.A. 657 (1999)).

(CP 3-14, Court of Appeals Opinion, McGlynn Appeal #1 at CP 11, FN 4)

After McGlynn Appeal #1 was decided, the Mother was found by the Hague Court of Appeals to have wrongfully withheld (i.e abducted) the child (CP 48-66, Hague Court of Appeals Opinion at CP 57) Thus, not only did the Washington court find no favor with her forum shopping, but the Hague Court of Appeals found unlawful conduct under the Hague Convention. Thus, if there was ever a case and reason not to decline jurisdiction, this is it.

To deter future abductions in a case like the present, the court in the child's home state should not decline to exercise jurisdiction unless a real good reason exists, such as a bona fide emergency or a substantial injustice. Instead, and against the public policy of the UCCJEA, the trial

court's decision sets very bad precedent to other parents considering taking their children out of this state (particularly foreign states where it is easier to keep the child and where it is more likely that the Washington court will simply punt). In the present case, the precedent set is to:

- Reward the Mother for abducting the child (by now forcing the Father to litigate in her country, in a court for which no evidence of constitutional due process or the right to parent was presented);
- Encourage forum shopping;
- Not require any assurance of the well being of the child, not even a court order requiring that the Mother obtain (or would obtain) even the minimal medical attention that Patryk needs;
- Minimize any proof submitted by one parent that he has been denied visitation (here the Father submitted a declaration testifying to the denial of visitation by the Polish court (CP 81-112, Decl. of K McGlynn, at CP 82, ¶12))
- Reward foreign states and courts for making initial custody decisions even though they are not the home state of the child (where, here, the Mother admits that the Polish court assumed jurisdiction, not because it was initially proper, but because it wanted to prevent the Father from removing the child as the

Mother had done. (CP 132-135 Decl. of Grzegorz Dlugi at CP 133 and Ex. A – Translated Polish Court Order);

- Disregard the time and resources spent in Washington, and disregard the full and fair access and participation to this civil justice system (which is also Patryk’s home state); and
- Not require that the Mother demonstrate any prejudice by having Washington continue to exercise jurisdiction.

d. Case Law Analysis of RCW 26.27.261

Only four Washington cases directly cite RCW 26.27.261 in its present form: *In re Custody of A.C.*, 165 Wn.2d 568, 200 P.3d 689 (2009); *In re Parentage, Parenting, and Support of A.R.K.-K.*, 142 Wn.App. 297, 174 P.3d 160 (Div. 1 2007); *Tostado v. Tostado*, 137 Wn.App. 136, 151 P.3d 1060 (Div. 2 2007); and *In re Marriage of Hamilton*, 120 Wn.App. 147, 84 P.3d 259 (Div. 3 2004). Two of these cases are discussed below.²⁴

²⁴ The other two cases are not instructive. In *In Re Parentage, Parenting and Support of A.R.K.-K.*, 142 Wn.App. 297 174 P.3d 160 (Div 1 2007), the Mother had moved to Washington from Montana and attempted to open up new custody proceedings in Washington. However, Montana was the home state of the child and therefore it was Montana’s decision as to whether or not to decline to exercise jurisdiction in favor of Washington (as opposed to Washington’s unilateral ability to wrest jurisdiction away from Montana).

Tostado v. Tostado, 137 Wn.App. 136, 151 P.3d 1060 (Div 2 2007) involved a foreign custody decree (from Mexico) that the Washington trial court had refused to recognize. On appeal, Division two reversed because the UCCJEA amendments in 2001 made clear that unless human rights issues were of concern, Washington did not have jurisdiction to make a custody decision when a foreign jurisdiction (which was the home state) had already made such a decision. Thus, unfortunately, Tostado is also not helpful to our analysis, since again, Poland is not the home state.

In *In re Custody of A.C.*, 165 Wn.2d 568, 200 P.3d 689 (Wash. 2009) (the only Supreme Court case thus far addressing RCW 26.27.261), the Respondent Mother had moved to Washington with her minor child where she defended a non-parental custody action brought by A.C.'s former foster parents. After losing custody to the Montana foster parents (and the trial court and appellate court having upheld the denial of the motion to dismiss for lack of jurisdiction), the Respondent Mother appealed to the Washington Supreme Court. Our Supreme Court held that because Montana had been the home state and had made an initial custody decision under the UCCJEA, Montana had to decline jurisdiction in favor of Washington before Washington could then exercise its jurisdiction. Thus, the trial court's decision was reversed.

Pursuant to *In re Custody of A.C.*, and since Washington is the home state of Patryk, Poland had no authority to enter a custody decision (which it nevertheless did).

In re Custody of A.C. also discussed the public policy purposes of the UCCJEA, including the attempt to deal with the problem of forum shopping.

There were also two additional cases which applied former RCW 26.27.070 (now known as RCW 26.27.261), *Greenlaw v. Smith*, 123 Wn.2d 593 (1994) and *In re Marriage of Payne*, 79 Wn.App. 43 (1995), neither of which were helpful to the analysis here.

The UCCJEA arose out of a conference of states in an attempt to deal with the problems of competing jurisdictions entering conflicting interstate child custody orders, **forum shopping**, and the drawn out and complex child custody legal proceedings often encountered by parties where multiple states are involved. UCCJEA prefatory note, 9 pt. 1A U.L.A. at 651; UCCJEA § 101 cmt., 9 pt. 2A U.L.A. at 657.

In re Custody of A.C.. 165 Wn.2d at 574.

In the present case however, if the trial court's order is upheld, the Mother will have defeated this UCCJEA public policy objective and succeeded in forum shopping by having the home state defer to a foreign state where the child resides only because the Mother wrongfully retained the child there and then filed a custody action (and thus intentionally shopped that jurisdiction).

Next, in *In re Marriage of Hamilton*, 120 Wn.App. 147, 84 P.3d 259 (Wash.App. Div 3 2004), the Court considered a custody dispute between parents living in Texas and Washington State and a child with no home state. The court noted the then recent adoption of the UCCJEA.

The language of the UCCJEA is consistent with that of the PKPA, 28 U.S.C. § 1738A, which " prioritizes 'home state' jurisdiction by requiring that full faith and credit *cannot* be given to a child custody determination by a State that exercises initial jurisdiction as a 'significant connection state' when there is a 'home State.' " UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT 9 U.L.A. 650 (1999); *see also In re Marriage of Murphy*, 90 Wash.App. 488, 495, 500, 952 P.2d 624 (1998) (In adopting the PKPA, Congress prioritized home state jurisdiction.).

In re Marriage of Hamilton, 120 Wn.App. at 157 (emphasis in original)²⁵

Thus, under *In re Marriage of Hamilton*, it is clear that any custody decisions taken by the Polish family law court cannot be given full faith and credit because they are NOT in accordance with the UCCJEA and PKPA – since Washington is the home state of Patryk (until and unless Washington ultimately declines that jurisdiction). The trial court's dismissal, however, conflicts with *In re Marriage of Hamilton* and validates the Polish court's initial (but unlawful) custody decision – and, it did so without first ensuring the best interest of the child and without ensuring any procedural or Constitutional safeguards for the Father. The trial court's decision, in this case, under these facts is truly a miscarriage of justice.

Also significant from the *Hamilton* decision is the fact that the Washington Court is only to look at significant connections AFTER the home state has declined jurisdiction, not before.

Under the present statute, RCW 26.27.201(1)(b), 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, Casey had no home state because he had not resided in Washington for six months by the time Dena commenced this action and George waited more than six months after Casey left to file his action for

²⁵ Prioritizing the home state has been the lynch pin in other Washington cases determined after the enactment of RCW 26.27.261. *In Re Parentage, Parenting and Support of A.R.K.-K*, 174 P.3d 160 (Wash.App. Div 1 2007).

custody in Texas. The superior court appropriately considered contacts Casey generated in Washington after Dena removed him from Texas because Texas was no longer the home state. And, the court's consideration of Casey's Washington contacts did not circumvent the intent of the jurisdiction laws to prioritize home state jurisdiction.

In re Marriage of Hamilton, 120 Wn.App. at 155-156

While the *Hamilton* court distinguished its decision from *In re Marriage of Ieronimakis*, 66 Wash.App. 83, 831 P.2d 172 (1992) (a case decided prior to the enactment of the UCCJEA), the court did not disagree with the public policy premises of the case. As the *Hamilton* court discussed:

[In *Ieronimakis*] the Mother, an American citizen, left her home in Greece with her two children one day when the Father was at work. She flew with the children to her parents' home in Seattle, and brought an action for dissolution of her marriage within one week of her arrival. The Father then commenced a child custody proceeding in Greece. The Greek court awarded custody to the Father. Subsequently, the superior court in Washington awarded custody to the Mother, who testified that the children had by that point lived in the United States for two years and had no contact with their Father for the last seven or eight months.

...[s]ince Washington [was] clearly not the home state, jurisdiction [would have to] be found on [] alternative bases of jurisdiction set forth in [former] RCW 26.27.030.

In re Marriage of Hamilton, 120 Wn.App. at 156.

The *Hamilton* Court continued to quote from *Ieronimakis*:

To 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.

In re Marriage of Hamilton, 120 Wn.App. at 156 (emphasis added)²⁶ (citing *In re Marriage of Ieronimakis*, 66 Wash.App. at 92, 831 P.2d 172 (1992)).²⁷

Appellant would assert that so far as it recites the public policy of this state and does not seek to “undo” home state jurisdiction under the UCCJEA, that *In re Marriage of Ieronimakis*, 66 Wash.App. at 92 stands for the proposition that Washington trial courts (when considering “significant contacts with a state” under circumstances in which it may be appropriate to do so) cannot consider a child's post-removal contacts with a foreign State. In that case, *Ieronimakis* remains good law.

The same conclusion was reached in the Indiana Court of Appeals in *Ortman v. Ortman*, 670 N.E.2d 1317 (Ind. App. 1996) where the Mother had unilaterally removed the child from his home state of Indiana, and the court denied her motion to dismiss, holding that allowing a change

²⁶ Thus, *Hamilton* also made it clear that Washington courts cannot give full faith and credit to a Polish custody order issued in violation of the priority afforded Washington as the home state.

²⁷ The *Ieronimakis* court went on to discuss discretionary reasons for declining jurisdiction and emphasized their “strict policy to deter abductions and other self-help measures undertaken to obtain custody.” *Id.* at 96. To further support this public policy, the Court cited the Hague Convention as “a clear manifestation of this country’s national policy to discourage abductions and encourage home-state jurisdiction.” *Id.*

in child's home state after his abduction from the state would contravene the purposes of Indiana's version of UCCJA.

While the UCCJEA may have changed, Washington's public policy has not. If Washington declines to exercise rightful jurisdiction here, the jurisdiction and public policy laws will be circumvented and the Mother will have forum shopped in favor of a foreign state, Poland, which has already breached the UCCJEA by making a custody determination without any input from the Washington court, and in favor of a parent who has been found to have abducted the child.

3. Due Process of Law

Parental rights are considered "liberty" interests protected by the due process clause of the Fourteenth Amendment. See *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 29 A.L.R. 1446 (1923); and *In re Marriage of Ebbighausen*, 42 Wn.App. 99, 708 P.2d 1220 (Div. 3 1985) (quoting *In re Luscier's Welfare*, 84 Wash.2d 135, 524 P.2d 906 (1974)). While the Mother's motion provided no evidence of any guarantee of Due Process in Poland's family code or court process, Washington Courts do have such a guarantee.

Due process requires that [the respondent] be given notice and opportunity to be heard in accordance with the Uniform Child Custody Jurisdiction Act (UCCJA).

In re Marriage of Tsarbopoulos, 125 Wn.App. 273, 104 P.3d 692 (Div. 3 2004)

The Father also has a United States Constitutional right to parenting in Washington. *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 29 A.L.R. 1446 (1923); and, *In re Marriage of Ebbighausen*, 42 Wn.App. 99, 708 P.2d 1220 (Div. 3 1985)

But, there is no evidence of any such right in Poland. On the contrary, evidence was furnished by the Appellant that an initial custody determination had been made without any notice to him, and without an opportunity to be heard. (See CP 81-112, at CP 82, ¶12, K. McGlynn)²⁸ Even the Respondent's Reply cannot dispute this. Instead, her Polish lawyer cites that the Father hired a Polish attorney who filed a notice of appearance (after) the initial custody determination was made without notice to the Father. (CP 132-135 Decl. of Grzegorz Dlugi at CP 133, ¶4)

In addition, there is no evidence that Poland has (and thus could extend) any of the constitutional guarantees that the Father is afforded in the United States and Washington under both the United States and Washington constitutions. These guarantees include procedural and substantive due process.

²⁸ And the Court reversed the burden of the motion onto the non-moving party, the Appellant, by requiring that he make a showing that he lacked due process rights in Poland. (CP 139-140, Order of Dismissal)

The Fourteenth Amendment essentially provides that a state may not deprive persons of "life, liberty, or property" without providing them with "due process of law." U.S. Const. amend. XIV, § 1. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citing *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994)). . . . "When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation." *Id.* (citing *Mathews*, 424 U.S. at 334). "The opportunity to be heard must be ""at a meaningful time and in a meaningful manner, "" appropriate to the case." *Id.* (quoting *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965))). ""[D]ue process, " unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334 (alteration in original) (quoting *Cafeteria & Rest. Workers Union Local 473 v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)). ""[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Under the *Mathews* balancing test, cited above, a court must consider three factors in identifying the due process that a person is entitled to receive in a particular circumstance: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

Bellevue School District v. E.S., 83024-0 (June 9, 2011, WA)
(citation pending)

The Polish court did not provide the Father notice or an opportunity to be heard before it decided (Ex Parte) that it could make an

initial custody determination and award custody to the Mother. (CP 82, ¶12, Decl of K McGlynn) And no original service of that Polish suit had been made. (CP 82, Decl. of K McGlynn, ¶12-13) After granting the Mother custody without a hearing to the Father, the Father has been given very little access to this child over the past two years. (CP 82-83, Decl. of K. McGlynn, ¶14) Thus, by giving up Washington's jurisdiction to Poland, the King County Superior Court did more than simply transfer venue, it gave up the Father's Constitutional protections.

Whereas in Washington, a parent has a fundamental liberty interest in the care and custody of his children, *In re Dependency of J.H.*, 117 Wash.2d 460, 473, 815 P.2d 1380 (1991), based on the treatment of Appellant, the same is not so in Poland.

Based on the facts of this case, and what is known to the Court (that an initial custody decision was made in violation of the UCCJEA and that the Father was not provided notice or an opportunity to be heard and that the Father has had very little contact with his child despite his numerous trips to Poland) then very much unlike Washington, Poland does not appear to recognize the same constitutional guarantees such as the right of notice to a parent before making a custody determination and the right to visitation after a custody determination has been made.

4. At most, the trial court should have stayed the action in Washington pending assurances that the action is maintained in Poland and that the Father is afforded some semblance of due process and his rights to parenting

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.

RCW 26.27.261(3)

The Court did not stay the proceedings but instead chose to dismiss the action altogether without imposition of any condition to preserve the Father's due process rights and Constitutional rights to parent his child.²⁹

In addition to these factors weighing in the Father's favor (and against dismissal) the Mother's motion had failed to explain (or support)

²⁹It is also important to note that pursuant to RCW 26.27.261, this Court can revisit the issue of declining jurisdiction at any time:

- (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**...

Thus, were the trial court to deny the Mother's motion (and do so without prejudice), then the Superior Court could issue a temporary visitation order which the Father could register in the Polish court. If, thereafter, and based on new evidence or factors, the Court believed that it is no longer practical for the Washington court to exercise jurisdiction, or that the Father had otherwise been afforded due process and roughly equal parenting rights in Poland, the court could thereafter dismiss in favor of Poland. However, based on the lack of evidence and proof presented to the Washington court by the Mother it was premature for the Washington court to decline to exercise jurisdiction when there is no prejudice to the Mother and when there is no reason preventing the Washington Court from entering a visitation order involving the Father.

these statutory factors and how they related to the facts. The Mother simply did not carry her burden.

C. The Trial Court Erred When it Denied Appellant's Motion for Reconsideration (Assignment of Error #2)

The Motion for Reconsideration was brought pursuant to Civil Rules 59 (7-9) on the grounds that: 1) that an error in law had occurred and 2) substantial justice had not been done.

To be grounds for a reconsideration, the error of law complained of must be prejudicial. See *Dickerson v. Chadwell, Inc.*, 62 Wash.App. 426, 429, 814 P.2d 687 (1991). Here, the errors in law (the “time tagging”, the insubstantial evidence and lack of written findings on each statutory factor) were prejudicial as they result in the dismissal of the Appellant's petition. And, substantial justice has not been done when the public policy of the state is against forum shopping and parental abduction, but in favor of securing the best interest of the child and the due process rights of the child's parents, and yet those public policies were violated by the dismissal and failure to reconsider.

In addition to re-addressing the arguments made in the original response, the Appellant added a distinct argument regarding the unjustifiable conduct of the Mother, as well as a request for an evidentiary hearing. The Father also provided a supplemental declaration placing into

clear factual dispute the issue of whether he “participated” in the Polish proceedings (which had afforded him no due process). (See CP 155-156 Supp. Decl of K. McGlynn).

1. RCW Chapter 26.27 Should not be invoked where one parent engaged in “unjustifiable conduct”

The UCCJEA (RCW 26.27) provides a specific remedy at RCW 26.27.271(1) against invoking jurisdiction of another state at the request of a parent when a parent has engaged in “unjustifiable conduct”.³⁰

In this case, the Polish Hague Court of Appeals found just that, unjustifiable conduct due to the “wrongful retention” by the Mother. (CP

³⁰ Jurisdiction declined by reason of conduct.

(1) Except as otherwise provided in RCW 26.27.231 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) A court of the state otherwise having jurisdiction under RCW 26.27.201 through 26.27.221 determines that this state is a more appropriate forum under RCW 26.27.261; or

(c) No court of any other state would have jurisdiction under the criteria specified in RCW 26.27.201 through 26.27.221.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under RCW 26.27.201 through 26.27.221.

RCW 26.27.271

48-66) Therefore, RCW 26.27.271(1) provides the grounds against invoking the jurisdiction of Poland.

As superior courts of Washington sit in equity,³¹ an equitable decision by the Court would be to deny dismissal until and unless some undue prejudice was found to exist against the non-resident parent, or after the superior court had evidence that the non-custodial parent had been afforded due process, that his constitutional rights to parent had been granted, and that the child's best interest (here medical needs) were being attended to.³² In this case, the Superior Court had no evidence of this. Instead, it had evidence only of the Mother's wrongful removal and the time that she tacked on because of the wrongful removal.

The equities lie in favor of the Father who seeks to ensure that he and his child are afforded at least some fair play, due process and respect for parental rights, even if that means, at worst, participating in Poland but having the King County Superior Court keep an open dialogue with the Polish court. Such a role by this Court would go a long way to righting a

³¹ *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 228, 86 P. 632 (1906) (Washington trial courts are "court[s] of general equity jurisdiction" with "all the powers of the English chancery court") (citing CONST. art. IV, § 6).

³² RCW 26.27.271 provides the Court with this public policy tool (to decline jurisdiction or stay a proceeding) based on the wrongful conduct of one parent when that parent is seeking to invoke Washington jurisdiction. Why should the same public policy and equitable policies not apply when it is the innocent parent trying to continue jurisdiction in this state after it has been lawfully invoked and when the wrongful conduct of the other parent is the basis of the finding of inconvenience?

sinking ship that has thus far permitted a Mother to abduct a child, defeat home state jurisdiction, and deny a Father access to his child.

Also with the King County Superior Court's dismissal, the Mother can dismiss her action in Poland at any time without repercussion. And, whether she does or does not, the dismissal by the trial court here defeats the Home State finding by the Court of Appeals³³ and severs the time and connection with Washington and though it could not do so on its own, makes Poland the de facto home state of the child (notwithstanding the kidnapping).³⁴

2. Requirement of an Evidentiary Hearing

In addition to the Father's due process objections with respect to his current and future treatment in the Polish court, the UCCJEA (at RCW 26.27.101) also provides a due process mechanism guaranteeing the Father an opportunity to be heard before a decision is made transferring jurisdiction:

- (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.
- (2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the

³³ Washington Court of Appeals, January 25, 2010 (No. 63272-8-1)

³⁴ RCW 26.27.211 provides that if Washington makes an initial custody determination, it maintains continuing exclusive jurisdiction. What then is the effect of the dismissal of this action? Is it a determination under 26.27.211 that Washington no longer has jurisdiction?

communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

RCW 26.27.101(1)-(2)

While the Mother may argue that the Father was provided due process under this statutory provision because he was given an opportunity to file one responsive brief in response to a six day motion, the Mother filed an opening brief and a Reply brief (of 14 pages) and the Father was not given an opportunity for an oral evidentiary hearing to rebut the facts and additional evidence submitted in the Reply. Although he played within the rules, did not submit a sur-reply, and instead, moved for reconsideration to dispute the facts that the Mother had presented (after the Order granting the motion was entered) by that time, the damage was done and an Order of Dismissal was entered, making it very unlikely that the trial court would reverse itself.

Had an evidentiary hearing been granted, the Appellant/Father would have had a chance to testify and make clear that he was not provided notice of a custody decision made without authority/jurisdiction by a court separate from the Polish Hague Court, that there was no evidence of the necessary medical treatment being provided, and that he has repeatedly been denied access or meaningful visitation with his child

despite multiple trips to Poland. (CP 155-156, Supplemental Decl of K. McGlynn)

The potential loss of a significant and constitutionally protected liberty interest requires a meaningful hearing. This means, at a minimum, the opportunity to argue the strengths of one's own position and to attack the opposing party's position. *Harris ex rel. Ramseyer v. Blodgett*, 853 F.Supp. 1239, 1287 (W.D.Wash.1994), *aff'd*, 64 F.3d 1432 (1995); *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The denial of an evidentiary hearing, in this case, was a denial of due process.

D. CONCLUSION

If left to the present state of affairs (i.e. dismissal in favor of a foreign court), not only is the Father's access to his child denied, but he is also denied access to justice – justice that one would objectively believe would require the King County Superior Court, in the Home State of the child,³⁵ to want to look after the best interests of the child and its residents, to want to maintain an open action so it could attempt to ensure, at the very least, that the foreign state kept open the family law/custody determination action, actually considered the child's best interests (the touchstone consideration for family law cases in Washington) and granted

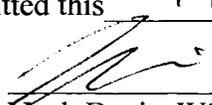
³⁵ Washington Court of Appeals, January 25, 2010 (No. 63272-8-1)

the Father some semblance of the constitutional protections that he is guaranteed in the child's Home State.

Because of the significance of the proceedings (and the Constitutional implications), the Washington trial court should have granted an evidentiary hearing on disputed issues of fact (before declining to exercise jurisdiction). After such a hearing, if the Court chose to decline jurisdiction, it must enter findings of fact analyzing each of the statutory factors.

And, even if the trial court chose to decline jurisdiction in favor of Poland after an evidentiary hearing, then pursuant to RCW 26.27.261, the court should have stayed the proceeding to ensure that custody and visitation determinations are made and that the custody determination was lawful. To dismiss the action here without ensuring that the Father has been afforded some dignity of due process in the foreign state (together with a custody and visitation determination) is itself a denial of the Father's right to due process and a failure of Washington public policy.

Respectfully submitted this 11/2 2011.


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COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

In re Parentage of: PMM (Minor Child)

KEVIN COLUMBA MCGLYNN,
Appellant,

v.

KLAUDIA KATARZYNA
BATKIEWICZ
Respondent.

CASE # 67533-8-I

**CERTIFICATE OF SERVICE
APPELLANT BRIEF**

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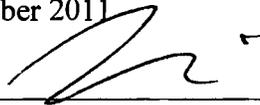
TO CLERK OF THE COURT OF APPEALS

AND TO: MATTHEW JOLLY
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BELLEVUE WA 98005-2452

I, Noah Davis, do hereby certify that a copy of the attached Appellant Brief was filed with the Washington State Court of Appeals, Division One and served by first class mail on Matthew Jolly at the above address on November 2, 2011.

DATED this 2nd day of November 2011

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