No. 96173-5

Court of Appeals No. 77630-4-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

CHANDRA LONG,

Respondent,

v.

MICHELANGELO BORRELLO,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Table of International Treaties

Table of Statutes

A. IDENTITY OF PARTY & RELIEF REQUESTED

Respondent Chandra Long, for the reasons described herein, asks this Court to reject appellant Michelangelo Borrello's Petition for Review and to affirm the Court of Appeals' July 9, 2018 opinion.

B. COURT OF APPEALS DECISION

On July 9, 2018, the Court of Appeals, Division I, affirmed trial court orders on jurisdiction and temporary orders.

C. ISSUES PRESENTED FOR REVIEW

Whether this Court should deny review of an unpublished Court of Appeals decision affirming summary judgment where:

- the decision of the Court of Appeals does not conflict with any decision of the Supreme Court or with a decision of another division of the Court of Appeals; and
- the decision of the Court of Appeals does not raise any significant question of law or public interest.

D. FACTS RELEVANT TO PETITION

Background. Mr. Borrello is an Italian citizen, and Ms. Long is a United States citizen who grew up in Everett, Washington. In re Marriage of Long, 4 Wn. App. 231, 235, 421 P.3d 989 (2018) (Court

of Appeals Opinion). They married in the United States in 2008 but later moved to Italy. Id. Their daughter was born in Italy in March 2009. In March 2011, Long moved back to Washington state with the parties' daughter. Id. Mr. Borrello petitioned a Washington court for their daughter's return, and the court granted his request. Id. at 235-36.

By December 2012, the parties had agreed that their daughter would be placed primarily with Ms. Long and that Ms. Long could return to Washington state with their daughter. The Court of Rome approved this arrangement as a separation agreement, and Ms. Long moved back to Washington state in September 2013. Id. at 236. This is where Ms. Long and the parties' daughter lived until June 2016. Id. None of these facts are disputed.

Court of Rome and Snohomish Co. Sup. Ct. cases. In April 2015, Mr. Borrello asked the Court of Rome to modify their separation agreement and made various accusations about Ms. Long, all of which she disputes. The Court of Rome exercised jurisdiction in October 2015. Id.

In November 2015, Ms. Long filed a Petition for Dissolution. In December 2015, she appealed the decision of the Court of Rome to exercise jurisdiction to the Court of Cassation, which is Italy's highest court. Id. In February 2016, Ms. Long filed in the Washington case a Motion to Establish Jurisdiction, and Mr. Borrello asked the Washington court to dismiss. The Washington court stayed the case pending the outcome of the Italian proceedings. Id.

In June 2016, the parties' daughter travelled to Italy for scheduled summer visitation with Mr. Borrello. At that point, the Court of Rome awarded him temporary custody, ordering she attend school for the 2016-2017 school year pending the outcome of the Cassation Court ruling. Id.

Cassation Court Ruling. On February 7, 2017, the Cassation Court held that the Court of Rome lacked jurisdiction over the child and could not modify the parties' agreement because their daughter had been living in Washington since 2013, and as such, Washington courts had jurisdiction. Id. (citing Cassation Court ruling).

Court of Rome's exercise of temporary emergency jurisdiction on remand. Although the Cassation Court issued its opinion on

February 7, 2017, the parties did not receive the translation until July 23, 2017. Mr. Borrello immediately sought ex-parte relief in the Court of Rome, and three days after the Cassation Court opinion was issued, the Court of Rome exercised what all parties have conceded amounts to temporary emergency jurisdiction.

Snohomish County Superior Court case. In July 2017, Ms. Long renewed her previously-stayed Motion to Establish Jurisdiction in Washington on the basis of the Cassation Court opinion, and she moved for temporary orders, including asking for a temporary parenting plan that returned the child to Washington. Id. at 237. The Superior Court commissioner found that Washington had jurisdiction, denied Mr. Borrello's motion to dismiss, but declined to order the parties' daughter to return to Washington. Id. On revision, the trial court judge ordered the child's return. Id.

Court of Appeals case. Mr. Borrello moved for discretionary review, which was granted. Additionally, the Court of Appeals commissioner stayed the trial court case pending appeal. On July 9, 2018, the Court of Appeals affirmed the trial court.

Mr. Borrello now seeks review with this Court.

E. REASONS THIS COURT SHOULD NOT ACCEPT REVIEW

1. Criteria for Supreme Court review

Rule 13.4(b) of the Rules of Appellate Procedure provides that a petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the State Constitution or of the United States Constitution is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Here, Petitioner claims review is warranted under RAP 13.4(b)(1), (b)(2), & (b)(4). For the reasons described herein, the Court should conclude none of the criteria enumerated in RAP 13.4(b) apply and should deny review.

2. The Court of Appeals decision in this case does not conflict with any decision of the Supreme Court or another division of the Court of Appeals.

Petitioner claims the decision here conflicts with the Hague Convention, as well as "numerous cases from this Court and the

appellate courts," as well as with RCW 26.09.197. See Petition at 9. The Court should reject these arguments.

a. The Court of Appeals decision does not conflict with any cases applying the doctrine of comity.

The Court of Appeals decision affirming the trial court is consistent with Washington and other case law regarding the doctrine of comity, which provides that courts in one jurisdiction may give effect to the laws of another jurisdiction out of deference. In support of this argument, Mr. Borrello cites MacKenzie v. Barthol, 142, Wn. App. 235, 240, 173 P.3d 980 (2007); Haberman v. Washing. Pub. Power Supply Sys., 109 Wn.2d 107, 160-61, 744 P.2d 1032 (1987); and Reynolds v. Day, 79 Wash. 499, 506, 140 P.681 (1914) for this proposition.

The problem with Mr. Borrello's argument is it built on the faulty premise that the trial court's orders actually do indeed conflict with the rulings of Italian courts. But they only conflict if one adopts Mr. Borrello's tortured interpretation of the Court of Rome's emergency temporary order. Mr. Borrello would have this Court ignore the portion of the Court of Rome ruling where the Court

specifies its emergency jurisdiction under Article 11 of the Hague convention was only temporary. Indeed, the Court of Rome made it clear the temporary measures were to last only until the Washington court addressed Mr. Borrello's allegations:

> Until such time when the American court will be able to evaluate the array of elements indicated so far, it is deemed absolutely necessary for the minor's interest that she remain in Italy and that she continue her schooling here.

Id.

As the Court of Appeals pointed out, after the lower Italian court entered this temporary ruling, the Snohomish County Superior Court commissioner held a hearing, considered all of the arguments of the parties and counsel, and took jurisdiction per the Italian Supreme Court ruling. See CP 422-24 (Commissioner's September 19, 2017 Ruling); CP 931-46 (Petitioner's Motion to Establish Jurisdiction under UCCJEA, filed 2/26/2016, but stayed until after Italian appeal); CP 437-486 (expert declarations);[1] CP 411-421 (Motion for Revision); CP 356-57 (Order on Revision); CP 253-330

[1] Mr. Borrello claims in his footnote 5 that his expert opinion was "uncontested". See Petition at 14. This is false. The trial court had testimony from experts on Italian law from both parties.

(Memorandum of Law and Declaration of Counsel); CP 40-42 (Borrello Memorandum of Authorities); CP 223-24 (Order on Reconsideration).

Mr. Borrello ignores all of this and has asked the appellate courts to adopt an interpretation of the lower Italian court's temporary order that would prohibit the Superior Court from ever entering a temporary parenting plan, even though it has jurisdiction over the child. The bottom line is that Mr. Borrello is pretending the trial court did not address the issues identified in the Court of Rome's July 2017 order when it did. From there, he pretends the Court of Appeals is ignoring the Court of Rome order. From these faulty premises, he contends the doctrine of comity is violated. The Court should reject his arguments and deny the Petition for Review.

b. The Court of Appeals decision does not conflict with RCW 26.09.197.

Mr. Borrello further argues the trial court's temporary orders and the Court of Appeals decision conflict with RCW 26.09.197, which requires trial courts to give consideration to "which parent has taken greater responsibility during the last 12 months for performing parenting functions relating to the daily needs of the child" and which

arrangements will cause the least disruption to the child. See Petition at 12.

Mr. Borrello claims because the child has been in Italy during the pendency of the appeal to the Cassation Court (which again, held that Washington was the child's home state), the trial court and the Court of Appeals should presumably have fashioned a parenting plan where he was the primary parent. This argument makes no sense, is borderline offensive, and there clearly is no conflict with any case law here. Again, Mr. Borrello completely ignores the fact the only reason the child has been with him so long is because of the appellate process in Italy, the result of which is that jurisdiction was never proper in Italy, and instead the child's habitual residence was with her mother in Washington. Mr. Borrello would have the Superior Court and this Court interpret RCW 26.09.197 to reward people who keep children for a long period of time during litigation, even if there was never jurisdiction in that location.

Notably, Mr. Borrello does not cite any cases that hold his interpretation of RCW 26.09.197 as accurate. This is likely because his argument ignores the facts of this case, and because it is contrary

to the Hague Convention. First, as is described above, the Italian Supreme Court specifically stated in its February 7, 2017 opinion that the fact the parties' daughter went to stay temporarily with Mr. Borrello in July 2016 was not a basis on which jurisdiction could be based:

> One cannot attribute importance to the subsequent agreement, which was temporary in nature, as it may be surmised from the minutes of the October 11, 2016 hearing, with which the parents agreed on "pending jurisdiction regulation" and, until any due decision, on the temporary custody of the child to the father.

See CP 556.

Second, this interpretation comports with the law regarding The Hague Convention. The preamble to the 1980 Convention (a predecessor to the 1996 Convention) describes the signatories as "[d]esiring to protect children internationally from the harmful effects of their wrongful removal." See Hague Convention, Oct. 25, 1980, preamble, 19 I.L.M. 1501, 1501. These harmful effects may occur either through the removal of a child from its habitual environment, or by a refusal to restore a child to its own environment after a stay abroad. Mozes v. Mozes, 239 F.3d 1067, 1070 (9th Cir.2001). The Convention seeks to deter parental abductions by depriving the

abductor's actions of any "practical or juridical consequences," and thus eliminating the "primary motivation" for the abduction - to obtain an advantage in custody proceedings by commencing them in another country. Mozes, 239 F.3d at 1070.

This is exactly what Mr. Borrello is arguing. He acknowledges jurisdiction was proper in Snohomish County at the time he filed his Modification action in April 2015, but he claims that by keeping his daughter with him in Italy during the time the appeal was being heard, he has now established he should be the primary parent under RCW 26.09.197. He is asking the Court to allow him "to obtain an advantage in custody proceedings by commencing them in another country[.]", id., and the Court should reject his request.

This argument regarding RCW 26.09.197 is very similar to another argument Mr. Borrello makes in his Petition and at the Court of Appeals: namely, that by keeping their daughter in Italy during the appeal, he established jurisdiction in Italy under Article 5 of the Hague Convention. But as to this argument, Mr. Borrello is ignoring the law regarding when habitual residence under Article 5 is to be determined, *i.e.*, by reference to customary residence prior to removal.

See Friedrich v. Friedrich, 983 F.2d 1396, 1401-02 (6th Cir.1993) (habitual residence to be determined by reference to customary residence prior to removal and requires a change in geography and passage of time). Here, there is no dispute: the Italian Supreme Court held the child's habitual residence was in Washington State.

These fundamental principles underlying The Hague Convention are reflected in the UCCJEA, which likewise prohibits generating jurisdiction via wrongfully keeping the child. In the Ieronimakis case, this Court specifically rejected such an analysis:

> This analysis is unpersuasive because the facts which the trial court relied on in determining the jurisdiction question came into existence after the dissolution petition was filed. At the time the petition was filed all the relevant information was in Greece … The fact that there was substantial evidence concerning the children's care, protection, training, and personal relationships at the time of trial does not justify the Washington court taking jurisdiction.
>
> 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 Ieronimakis, 66 Wn. App. 83, 92, 831 P.2d 172 (1992).

All of this is very straightforward. There are no cases anywhere that indicate RCW 26.09.197 requires a court to keep a child in a country which undisputedly has no jurisdiction over the child simply because the appellate process was lengthy. Indeed, all of the case law makes it clear this is repugnant and would provide an incentive for parents to ignore Hague Convention and UCCJEA orders. As such, the trial court and the Court of Appeals decisions do not conflict with any case law, and review should be denied.

3. The Court of Appeals decision does not raise an issue of substantial public interest under RAP 13.4(b)(4).

Mr. Borrello claims there is "tension" between the UCCJEA and the Hague Convention that creates an issue of substantial public interest warranting review. See Petition at 17. The Court should reject this argument because it requires the Court to ignore everything the Cassation Court wrote, and instead adopt a set of alternative facts that do not exist.

Mr. Borrello claims the Court of Appeals is wrong in that the Cassation Court did not address jurisdiction under Article 5 of the

Hague Convention. See Petition at 17. It is difficult to know how to respond to this argument. This is the primary holding of the Italian Court: that Italy does not have Article 5 jurisdiction, and that instead Washington does because it is the child's habitual residence:

> Given these circumstances, the fact that the minor child has been habitually residing in the US since 2013 is clearly reflected in the court records, therefor the Italian courts' lack of jurisdiction is confirmed.

See CP 557.

Mr. Borrello appears to make the argument he made to the Court of Appeals, i.e., that yes, although Italy did not have Article 5 jurisdiction originally, it obtained Article 5 jurisdiction because he kept the child during the appeal to the Italian Supreme Court.[2] Thus Mr. Borrello's position is that the Hague Convention would condone a parent kidnapping or improperly keeping a child in a country without jurisdiction so long as the appeal process took long enough.

[2] Mr. Borrello also claims he "petitioned the Court of Milan to take Article 5 jurisdiction" over the child, and that the "Court of Milan recently determined it has Article 5 jurisdiction" over the child. See Petition at 17. The Court should strike this reference. Not only was this information not in the record before the Court of Appeals, it is also false. Ever since the high court of Italy held there was no jurisdiction in Italy, Mr. Borrello has been forum shopping, attempting to get multiple trial courts in multiple jurisdictions to enter different custody orders that might prevent the return of the child to her habitual residence. Ms. Long was at the recent hearing in Milan, and the Court looked poorly upon Mr. Borrello's attempt at forum shopping and ruled wholly in Ms. Long's favor.

Not only is this the opposite of the intent of the Hague Convention, it also ignores case law regarding when habitual residence under Article 5 is to be determined, *i.e.*, by reference to customary residence prior to removal. See Friedrich v. Friedrich, 983 F.2d 1396, 1401-02 (6th Cir.1993) (habitual residence to be determined by reference to customary residence prior to removal and requires a change in geography and passage of time).

In other words, Mr. Borrello attempts to create an issue of public importance for review by insisting the Court adopt his tortured interpretation of the Cassation Court's ruling, his faulty understanding of Article 5, and by asking the Court to ignore case law regarding Article 5. There is no issue of public import under RAP 13.(b)(4), and as such the Court should deny review.

F. CONCLUSION

For the reasons stated herein, Ms. Long respectfully asks the Court to reject appellant Michelangelo Borrello's Petition for Review and to affirm the Court of Appeals' July 9, 2018 ruling.

RESPECTFULLY SUBMITTED this 17th day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that on September 17, 2018, I caused to be served a true and correct copy of the foregoing ANSWER TO PETITION FOR REVIEW to The Supreme Court of Washington on the following parties via electronic service:

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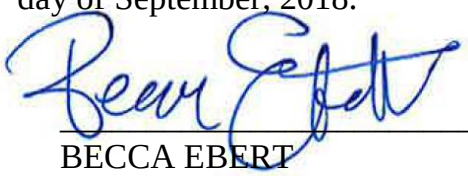

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