

No. 96173-5

Court of Appeals No. 77630-4 I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

IN RE MARRIAGE OF:

MICHELANGELO BORRELLO,

Petitioner,

v.

CHANDRA LONG,

Respondent.

MOTION TO LIFT
STAY

I. Designation of Moving Party & Relief Requested

Chandra Long (Petitioner at the trial court, but Respondent in this Court) respectfully requests that this Court lift the stay of trial court proceedings put in place by the Court of Appeals Commissioner's December 4, 2017 ruling.

II. Parts of Record Relied Upon

The Court of Appeals Commissioner's December 4, 2017 ruling granting a Stay of trial court proceedings (attached hereto as Exhibit 1); the Petitioner's Motion and Reply for a Stay; the

Respondent's Opposition to Stay; the Court of Appeals' July 9, 2018 Opinion affirming the trial court and confirming Washington State has jurisdiction over the children (attached hereto as Exhibit 2); as well as the parties' briefing at the Court of Appeals and all other files, clerk's papers, and transcripts that are part of the record herein.

III. Statement of Facts Relevant to Motion

Respondent Michelangelo Borrello appealed the trial court's decision on temporary orders entering a temporary parenting plan that required the parties' nine-year-old daughter to return from Italy to her home state of Washington. He sought and received a stay of trial court proceedings via the Commissioner's December 4, 2017 ruling.

From Ms. Long's point of view, Mr. Borrello has now delayed for years the return of the parties' daughter to her home state by repeatedly casting aspersions on Ms. Long. He has, in his Motion for Stay of trial court proceedings, in his Motion for Discretionary Review, and in all of his other briefing, attempted to muddy the waters as to what the Italian courts ruled. The Court of Appeals, in its July 9, 2018 Opinion, rejected Mr. Borrello's arguments and held (consistent

with the Supreme Court of Italy) that Italy had no jurisdiction over the parties' child, thereby affirming the trial court.

The school year is about to start, and Ms. Long would like to have the parties' daughter return home and enroll in school here in Washington for this coming year. As such, and in light of the Court of Appeals' July 9, 2018 Opinion affirming the trial court, we ask that this Court lift the stay entered on December 4, 2017 pending the decision whether to accept review.

IV. Argument

When the Commissioner of the Court of Appeals granted a stay of trial court proceedings, the Commissioner analyzed the issue under RAP 8.1(b)(3), which provides that this Court must: (1) "consider whether the moving party can demonstrate that debatable issues are presented on appeal," and (2) "compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." Id.

Although the Commissioner at the time concluded there were debatable issues, the questions raised by Mr. Borrello have now been

resolved by the Court of Appeals in its opinion affirming the trial court. Both the Court of Appeals and the Supreme Court of Italy have now held Italy has no jurisdiction of the child, and that instead, proper jurisdiction lies with the Snohomish County Superior Court. See Clerk's Papers at 552-58 (translation of Italian Supreme Court ruling) and Slip. Op. at 13.

Likewise, the harm to the child and to Ms. Long continues to grow each day they are wrongfully kept apart. As Ms. Long argued in her Response to Mr. Borrello's Motion to Stay, Mr. Borrello has used all of his efforts to preclude Ms. Long from having visitation with their child for the last year and a half, and has abusively used the legal process in two countries against Ms. Long at every opportunity – including filing serial trial court actions in multiple municipalities in Italy (all of which have been rejected) despite the fact the Italian Supreme Court held Italy had no jurisdiction over the child. At this point, it has been a year-and-a-half since February 7, 2017, when the Italian Supreme Court held Italy had no jurisdiction. This is far too long to keep the parties' child from returning to her home state, and this Court should lift the stay.

V. Conclusion

For the reasons stated herein, Ms. Long respectfully requests the Court lift the stay of trial court proceedings entered by the Court of Appeals Commissioner in the December 4, 2017 ruling. Again, both the Court of Appeals and the Italian Supreme Court have held Italy does not have jurisdiction and that instead, Washington does. The school year is about to start, and the parties' daughter should be able to return home and enroll in school here in Washington for this coming year. We ask that the Court lift the stay entered on December 4, 2017.

RESPECTFULLY SUBMITTED this 31st day of August, 2018.

MCKINLEY IRVIN, PLLC

A handwritten signature in black ink, appearing to read "Matt Taylor", written over a horizontal line.

Matthew D. Taylor, WSBA # 31938
Counsel for Chandra Long

CERTIFICATE OF SERVICE

I certify that I caused to be served a true and correct copy of the above MOTION TO LIFT STAY on the 31st day of August 2018, as follows:

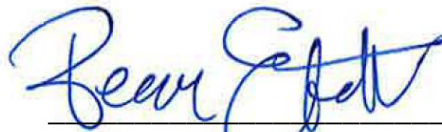
Shelby R. Frost Lemmel
MASTERS LAW GROUP, PLLC
241 Madison Ave N
Bainbridge Island, WA 98110
shelby@appeal-law.com

US Mail
 US Certified Mail
 Electronic Service
 Email

Lisa Micheli
ATTORNEY AT LAW
1604 Hewitt Avenue, Suite 516
Everett, WA 98201
lisa@michelilaw.com

US Mail
 US Certified Mail
 Electronic Service
 Email

DATED this 31st day of August, 2018.



BECCA EBERT
PARALEGAL



McKINLEY IRVIN

EXHIBIT 1

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

December 4, 2017

Matthew D Taylor
McKinley Irvin
1501 Fourth Avenue, Suite 1750
Seattle, WA 98012
mtaylor@mckinleyirvin.com

Vicki L Oslund
McKinley Irvin
2825 Colby Ave Ste 306
Everett, WA 98201
voslund@mckinleyirvin.com

Kenneth Wendell Masters
Masters Law Group PLLC
241 Madison Ave N
Bainbridge Island, WA 98110-1811
ken@appeal-law.com

Lisa Marie Micheli
Attorney at Law
1604 Hewitt Ave Ste 516
Everett, WA 98201-3536
Lisa@michelilaw.com

Shelby R Frost Lemmel
Masters Law Group PLLC
241 Madison Ave N
Bainbridge Island, WA 98110-1811
shelby@appeal-law.com

CASE #: 77630-4-I

Michelangelo Borrello, Petitioner v. Chandra Long, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on December 4, 2017:

This matter involves a parenting plan dispute that involves two jurisdictions issuing conflicting orders, Snohomish County superior court, and the Italian Supreme Court and Court of Rome/Court of Milan. Michael Borrello and Chandra Long are the parents of a seven year old daughter, A. Mr. Borrello lives in Italy, and Ms. Long lives in Everett, Washington. A. has been living in Italy with Mr. Borrello since June 2016. Recently, Snohomish County superior court issued orders that, among other things, required Mr. Borello to immediately transport A. to Everett, Washington. This order is in conflict with Italian court orders.

Mr. Borello seeks discretionary review of the Snohomish County orders and has filed an emergency motion seeking a stay of the Snohomish County proceedings pending this court's decision on his motion for discretionary review. Ms. Long opposes a stay. The parties have filed briefing addressing the stay criteria, and I heard oral argument on December 1, 2017. A prompt decision on the motion is warranted.

The timeline of events is set out in Mr. Borrello's reply to the motion for stay at 3-5 and need not be repeated. The standard for a stay pending appeal is well established. In "other civil cases" not involving money judgments or decisions affecting property, except where prohibited by statute, an appellate court has authority, before or after acceptance of review, to stay enforcement of the trial court decision upon such terms as are just. RAP 8.1(b)(3). In evaluating whether to stay enforcement of such a decision, the court will consider (i) whether the moving party can demonstrate that debatable issues are presented on appeal, and (ii) compare the injury that would be suffered by the moving party if a stay were not granted with the injury that would be suffered by the nonmoving party if a stay were imposed. RAP 8.1(b)(3). Similarly, under RAP 8.3, unless prohibited by statute, an appellate court has authority to issue orders, before or after acceptance of review, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. In this setting RAP 8.3 involves similar considerations as RAP 8.1(b)(3). Purser v. Rahm, 104 Wn.2d 159, 177, 702 P.2d 1196 (1986) (court considers whether the appeal presents debatable issues, whether a stay is necessary to preserve the fruits of a successful appeal, and the equities of the situation).

Mr. Borrello has raised debatable issues regarding jurisdiction under the Hague Convention and the UCCJEA. Comparing the harm with and without a stay, both parents have the right to actively parent their daughter. The parties dispute circumstances surrounding whether Ms. Long has attempted to visit A. in Italy and whether Mr. Borrello has put up roadblocks. But it is undisputed that under the Italian court orders, Ms. Long has the right to visit A. in Italy "when she desires to do so, after prior notification to the [father] and compatibly with [A.'s] needs." July 26, 2017 Court of Rome Order, Appendix to Long's Answer to Motion for Stay at 106. There is evidence that Ms. Long and A. have frequent phone visits. Given the parents' current residences, A. cannot be in both places at once. At this point, A.'s interests must also weigh in the balance. She has been living in Italy for the last seventeen months and for at least the first 12 or so months, she was there by the parents' agreement. She continues to be enrolled in school. A temporary stay of the Snohomish County proceedings is warranted at least until this court rules on the pending motion for discretionary review.

Mr. Borrello filed his motion for discretionary review on Friday, December 1, 2017. Ms. Long plans to file her answer on December 11, 2017. Any reply will be due December 15, 2017. If the parties' request it, I am open to minor adjustments.

I am available to hear oral argument on December 22, 2017 at 9:30 a.m., January 5, 2018 at 1:30 p.m., or January 19, 2018 at 9:30 a.m. I ask that the parties confer, attempt to agree on one of these dates/times, and inform the case manager of their choice. Telephone argument on additional dates/times is also an option. I am not available January 11-15, 2018.

Page 3 of 3
December 4, 2017
CASE #: 77630-4-I

Therefore, it is

ORDERED that a stay of the proceedings in Snohomish County superior court is granted until further order of this court.

Sincerely,

A handwritten signature in black ink, appearing to read "R.D. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

lls

cc: Hon. Ellen Fair



McKINLEY IRVIN

EXHIBIT 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of)	
)	No. 77630-4-I
CHANDRA LONG,)	
)	DIVISION ONE
Respondent,)	
)	PUBLISHED OPINION
and)	
)	
MICHELANGELO BORRELLO,)	
)	FILED: July 9, 2018
Petitioner.)	
_____)	

2018 JUL -9 AM 9:25

COURT OF APPEALS DIV I
STATE OF WASHINGTON

LEACH, J. — Michelangelo Borrello appeals the trial court’s decisions requiring the relocation of the parties’ nine-year-old daughter, A., from Italy to Washington state before a permanent parenting plan has become final. His challenge requires resolution of the relationship between an emergency order entered by the Court of Rome under article 11 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Convention),¹ article 5 of this treaty, Washington’s Uniform Child

¹ Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391, <https://assets/hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>.

Custody Jurisdiction and Enforcement Act (UCCJEA)², and a later order entered by a Washington court asserting jurisdiction under the UCCJEA.

The trial court properly exercised jurisdiction under the UCCJEA. Because its order temporarily relocating A. addressed “the measures required by the situation,” it satisfied the requirements of the 1996 Hague Convention, and the Court of Rome’s emergency order lapsed. The order did not violate the doctrine of comity or RCW 26.09.197. We affirm.

FACTS

Borrello is an Italian citizen, and Chandra Long is a United States citizen who grew up in Everett, Washington. They married in the United States in 2008 but later moved to Italy. A., their only child, was born in Italy in March 2009. In March 2011, Long brought A. to Washington. Borrello petitioned a Washington court under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (1980 Hague Convention)³ for A.’s return to Italy. In August 2011, the Washington court granted Borrello’s request and ordered that A. return to Italy.

² Ch. 26.27 RCW.

³ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 49, <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>.

In December 2012, the Court of Rome approved the parties' "non-consensual separation" agreement. The agreement stated that Borrello and Long would have shared custody of A. but A. would be placed with Long. It also permitted Long to transfer A.'s residence to Washington state and specified Borrello's visitation rights and child support obligations. Long and A. moved from Italy to Everett, Washington, in September 2013. In April 2015, Borrello asked the Court of Rome to modify the agreement, claiming that Long prevented him from contacting and forming a relationship with A. The Court of Rome exercised jurisdiction in October 2015.

In November 2015, Long filed a petition for dissolution in Washington. In December, she appealed the Court of Rome's decision to Italy's highest court, the Court of Cassation, challenging its jurisdiction. In February 2016, Long asked the Washington court to move forward with the dissolution proceedings, and Borrello asked the court to dismiss them. The Washington court stayed both requests pending the outcome of the Italian proceedings.

In June 2016, A. returned to Italy for her summer visitation with Borrello. The Court of Rome then awarded Borrello temporary sole custody of A. to allow A. to live in Italy for the 2016-2017 school year pending the outcome of the Court of Cassation's ruling. In February 2017, the Court of Cassation held that Italy

lacked jurisdiction over Borrello's request to modify the parties' separation agreement. Borrello later asked the Court of Rome to exercise emergency jurisdiction under article 11 of the 1996 Hague Convention.

In June 2017, the Court of Rome closed the pending proceedings based on the Court of Cassation's decision that it lacked jurisdiction but granted Borrello's request that it take urgent measures. It held that it was "absolutely necessary for [A.'s] interest" that she remain in Italy and continue her schooling based on a number of factors, including Long's behavior suggesting that she was trying to make it difficult for Borrello to develop a relationship with A. It ordered that A. remain in Italy until "such time when the American court will be able to evaluate the array of elements indicated so far [and] may make any final decision attributable to it alone."

In July 2017, Long asked the Washington trial court to order A.'s return to Washington, to lift the stay on the dissolution proceedings, and to convert the parties' 2012 separation agreement to a decree of dissolution, permanent parenting plan, and order of child support. Long alleged that the court had jurisdiction under the UCCJEA. Borrello disagreed. He also petitioned the Civil Court of Milan to confirm A.'s sole custody with him and her continued residence in Italy.

In September 2017, a Washington state superior court commissioner found that Washington had jurisdiction to decide parenting issues involving A. under the UCCJEA, lifted the stay on the dissolution proceedings, denied Borrello's motion to dismiss, and refused to order A.'s return to Washington. In October, the superior court granted Long's request to revise the commissioner's decision and ordered A.'s return to Washington state within two weeks. In November, the court denied Borrello's motion for reconsideration.

Borrello asked this court for interlocutory review of the trial court decisions finding jurisdiction under the UCCJEA and ordering the return of A. The trial court denied his motion to stay the trial court proceedings pending appellate review. In December, this court stayed all trial court proceedings. In January 2018, we granted discretionary review and extended the stay. Borrello appeals.

STANDARD OF REVIEW

An appellate court reviews de novo questions of law, including jurisdictional issues.⁴ It reviews temporary parenting plans for an abuse of discretion.⁵ "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds."⁶

⁴ In re Marriage of Tostado, 137 Wn. App. 136, 144, 151 P.3d 1060 (2007).

⁵ In re Parentage of Jannot, 149 Wn.2d 123, 128, 65 P.3d 664 (2003).

⁶ Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

ANALYSIS

The Trial Court's Order Was Not in Conflict with the 1996 Hague Convention

Borrello asserts that the trial court lacked jurisdiction to order A.'s return from Italy until it entered a final parenting plan and the parties had exhausted their right to appellate review of it. He claims that article 11 and article 5 of the 1996 Hague Convention require this result. We disagree.

Both Italy and the United States are contracting states to the Hague Conference.⁷ Article 5 of the 1996 Hague Convention generally describes the authority of contracting states to make child custody decisions. It gives the "Contracting State"⁸ of the child's "habitual residence" jurisdiction to take protective measures: "(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property."

⁷ Hague Conference Members, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/states/hcch-members> (last visited June 29, 2018).

⁸ "**Contracting State**" refers to a state which has consented to be bound by a convention, **whether or not that Convention has entered into force for that State.**" FAQ: What Is the Difference between Member, State Party and Contracting State?, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/specialized-sections/apostille/faq1> (last visited June 29, 2018).

But article 11 provides that any contracting state where the child is located has jurisdiction to take protective measures “[i]n all cases of urgency”: “(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.”

Article 11 also limits the duration of urgent protective measures taken under it: “(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.”

In February 2017, the Court of Cassation held that the Italian courts did not have jurisdiction under article 5 to modify the parties’ parenting agreement: “[T]he fact that [A.] has been habitually residing in the US since 2013 is clearly reflected in the court records, therefore the Italian courts lack of jurisdiction is confirmed.”

Borrello then asked the Court of Rome to exercise its authority under article 11 to impose urgent protective measures and prevent Long from returning A. to the United States. The Court of Rome granted Borrello’s request. It ordered that A. remain in Italy until “such time when the American court will be

able to evaluate the array of elements indicated so far” and “may make any final decision attributable to it alone.” Borrello claims that this provision limited the trial court’s authority under article 5 to decide for itself when it had “taken the measures required by the situation” as article 11 requires. Borrello misinterprets the Court of Rome’s authority under article 11.

Under article 11(2), a contracting state’s emergency measures “shall lapse as soon as the authorities which have jurisdiction under articles 5 to 10 have taken the measures required by the situation.” Both the Court of Cassation and the Court of Rome acknowledged that the United States is A.’s habitual residence and that the United States has jurisdiction under article 5. As discussed below, the Washington superior court determined that it had jurisdiction under the UCCJEA. Thus, under article 11(2), when the trial court exercised its article 5 authority and issued its temporary order, the Court of Rome’s order lapsed.

Borrello misinterprets the scope of article 11 authority when he claims that “the Court of Rome identified the ‘measures required by the situation’ that the Article 5 court must take.” Article 11 states that a court exercising emergency jurisdiction may take “any necessary measures of protection,” which lapse when an article 5 court has “taken the measures required by the situation.”⁹ Article 11

⁹ 1996 Hague Convention art. 11(1)-(2).

does not grant to that court the authority to define what measures taken by an article 5 court are those “required by the situation.” Borello cites no authority interpreting the 1996 Hague Convention to provide a court exercising emergency jurisdiction under article 11 to so limit the authority of a court exercising jurisdiction under article 5. He offers no persuasive reason why this court should interpret the 1996 Hague Convention this way.

Article 5 gave Washington state, as the habitual residence of A., the authority to decide and take “the measures required by the situation,” including the authority to enter a temporary parenting plan. Article 11 did not limit this authority nor could the Court of Rome’s order. The trial court’s temporary parenting plan and associated orders did not contravene the 1996 Hague Convention.

Washington State Has Jurisdiction over A. under the UCCJEA

Borrello claims that the UCCJEA did not provide the trial court with authority to enter a temporary parenting plan. In July 2017, when Long asked the Snohomish County Superior Court to order a temporary parenting plan and require A.’s return to Washington, the trial court exercised jurisdiction over A. under the UCCJEA. Borrello asserts that the trial court should not have looked to the UCCJEA to determine whether it had jurisdiction to enter temporary orders.

He claims that because Italy and the United States are both contracting states to the 1996 Hague Convention, article 5 of the 1996 Hague Convention determines jurisdiction, not the UCCJEA. Relatedly, he asserts that the trial court should have determined A. habitually resides in Italy within the meaning of article 5, so Washington does not have article 5 jurisdiction. We address each of his arguments in turn.

Article 5 of the 1996 Hague Convention resolves the general authority of two contracting states, the United States and Italy, to decide the parenting dispute between Long and Borrello. The Court of Cassation decided that the courts of the United States, and not Italy, had jurisdiction to decide this dispute because A. habitually resided in the United States. So Borrello's claim that the trial court should have looked to article 5 instead of to the UCCJEA makes little sense. The same is true for his claim that A. habitually resided in Italy. But this does not resolve the authority of the courts of Washington state to resolve the custody issue. Borrello provides no authority to support the proposition that the 1996 Hague Convention, rather than the UCCJEA, determines Washington State's jurisdiction. Neither Washington case law nor the UCCJEA supports his position.

Washington courts look to the UCCJEA to determine their authority to decide a child custody dispute.¹⁰ This includes making an initial custody determination, modifying a custody determination, or issuing a temporary emergency custody order. The petitioner has the burden to establish jurisdiction.¹¹ Apart from his failed argument about the relationship of articles 5 and 11, Borrello does not identify any legal authority questioning the UCCJEA as the legal authority for determining the trial court's authority to act in this case.

Borrello also contends that Long did not establish jurisdiction under the UCCJEA. But Long met her burden to establish jurisdiction in Washington.

The UCCJEA defines an "initial determination" as "the first child custody determination concerning a particular child."¹² Here, the Court of Rome made the initial determination in 2012 when it approved the parties' "non-consensual separation" agreement. The trial court's order requiring A.'s temporary return to Washington state is therefore a modification of the original determination. A Washington state court has jurisdiction to modify a child custody determination made by a court of another state or foreign country¹³ if (1) it has jurisdiction to

¹⁰ In re Marriage of Ieronimakis, 66 Wn. App. 83, 90, 831 P.2d 172 (1992) (referring to the Uniform Child Custody Jurisdiction Act, the previous iteration of the UCCJEA); see ch. 26.27 RCW.

¹¹ Ieronimakis, 66 Wn. App. at 90.

¹² RCW 26.27.021(8).

¹³ "A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying Articles 1 and 2." RCW 26.27.051.

make an “initial custody determination” and (2) the court of the other state “determines it no longer has exclusive continuing jurisdiction . . . or a court of this state would be a more convenient forum.”¹⁴

(1) [A Washington state court] has jurisdiction to make an initial child custody determination only if:

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

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

(i) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships;

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

(d) No court of any other state would have jurisdiction under the criteria specified in (a), (b), or (c) of this subsection.^[15]

“Home state’ means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.”¹⁶ Here, Long started modification proceedings when she filed a petition for dissolution in Washington

¹⁴ RCW 26.27.221.

¹⁵ RCW 26.27.201.

¹⁶ RCW 26.27.021(7).

state in November 2015. A. lived continuously with Long in Washington from September 2013 until June 2016. Then A. went to Italy for her scheduled summer visitation with Borrello. The Court of Rome then ordered A. to remain in Italy with Borrello until the Court of Cassation issued its decision on whether the Italian courts had jurisdiction to modify the parties' parenting plan. So A. remained in Italy until the trial court ordered that she return to Long's care in Washington by October 24, 2017. Because A. continuously lived with Long in Washington for more than two years before Long started the dissolution proceedings in 2015, Washington is A.'s "home state" under the UCCJEA.

Further, no other state is A.'s home state. The Court of Cassation held that Italy lacked jurisdiction based on its finding that A. had habitually resided in the United States since 2013. In addition, both A. and Long have a significant connection with Washington. A. lived in Everett, Washington, from September 2013 until June 2016. Long was raised in Everett and has lived there since 2013. In her motion to establish jurisdiction under the UCCJEA, Long identified substantial evidence of the care and protection A. receives in Washington: before October 2016 when the Court of Rome ordered that A. stay in Italy for the school year, A. had a number of friends at her elementary school where she attended kindergarten and first grade, she participated in weekly activities such

as art class, her maternal grandparents lived four blocks away, and her pediatrician and dentist were located in Everett. Finally, no court of any other state could satisfy the UCCJEA requirements and exercise jurisdiction to make an initial child custody determination. The trial court thus properly exercised jurisdiction under the UCCJEA.

The Trial Court's Order Does Not Contravene the Doctrine of Comity or
RCW 26.09.197

A. *The Doctrine of Comity*

Borrello claims that the trial court's order temporarily relocating A. violates the doctrine of comity because it does not respect the Court of Rome's order requiring that A. remain in Italy until an American court makes a final decision. This doctrine provides that "a court has discretion to 'give effect to laws [and resulting judicial orders] of another jurisdiction out of deference and respect, considering the interests of each [jurisdiction].'"¹⁷ "Orders 'will be recognized and given force if it be found that they do not conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state.'"¹⁸

¹⁷ MacKenzie v. Barthol, 142 Wn. App. 235, 240, 173 P.3d 980 (2007) (alterations in original) (quoting Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 160-61, 744 P.2d 1032, 750 P.2d 254 (1987)).

¹⁸ MacKenzie, 142 Wn. App. at 240 (internal quotation marks omitted) (quoting Reynolds v. Day, 79 Wash. 499, 506, 140 P. 681 (1914)).

The doctrine of comity does not apply here because the trial court was not recognizing or enforcing the Court of Rome's order. In its original order, the trial court did "confirm[] registration" of the Court of Cassation and the Court of Rome's orders. But because the trial court had jurisdiction over A. under the UCCJEA and its orders were independent of the Court of Rome's temporary order under article 11 of the 1996 Hague Convention and caused the Court of Rome's order to lapse, it had no obligation to address the Court of Rome's order and did not fail to respect it. The trial court did not abuse its discretion by entering temporary orders.

B. RCW 26.09.197

Finally, Borrello relies on In re Marriage of Kovacs,¹⁹ in which our Supreme Court examined a previous version of RCW 26.09.197²⁰ to support his claim that the trial court's order ignores the considerations listed in this statute,

The first factor in the former version of the statute interpreted in Kovacs required a trial court awarding temporary custody to consider "[w]hich parent has taken greater responsibility during the last twelve months for performing parenting functions relating to the daily needs of the child."²¹ Borrello claims that because A. lived with him for more than 12 months leading up to the trial court's

¹⁹ 121 Wn.2d 795, 808-09, 854 P.2d 629 (1993).

²⁰ Former RCW 26.09.197 (1987).

²¹ Former RCW 26.09.197; Kovacs, 121 Wn.2d at 808.

order temporarily relocating A. to Washington state, the trial court did not adequately consider the first factor and erred in issuing its orders. Borrello's argument does not take into consideration the legislature's substantial amendment of RCW 26.09.197 in 2007. The amended statute states as follows:

After considering the affidavit required by RCW 26.09.194(1) and other relevant evidence presented, the court shall make a temporary parenting plan that is in the best interest of the child. In making this determination, the court shall give particular consideration to:

(1) The relative strength, nature, and stability of the child's relationship with each parent; and

(2) Which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending.

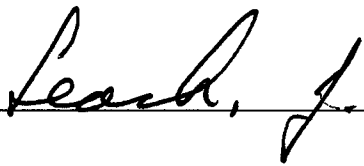
The court shall also consider the factors used to determine residential provisions in the permanent parenting plan.

The trial court's orders are consistent with the current version of the statute. The UCCJEA and the parties' 2012 separation agreement state that A. has a stronger relationship with Long in Washington than with Borrello in Italy. Before living with Borrello during the 2016-2017 school year, A. lived with Long in Washington for almost three years. Washington is A.'s "home state" as defined by the UCCJEA, and Borrello's and Long's 2012 separation agreement stated that A. would be placed with Long. The trial court modeled the temporary parenting plan after the parties' 2012 separation agreement and thus designated Long as A.'s custodian. The trial court's decision that A. live in her "home state"

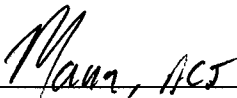
with her custodial parent is not contrary to the statute and is not an abuse of discretion.


CONCLUSION

The trial court's temporary orders do not contravene the 1996 Hague Convention, the rule of comity, or RCW 29.09.197. The trial court has jurisdiction under the UCCJEA. We affirm.



WE CONCUR:





MCKINLEY IRVIN, PLLC

August 31, 2018 - 3:07 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96173-5
Appellate Court Case Title: Michelangelo Borrello v. Chandra Long
Superior Court Case Number: 15-3-02848-2

The following documents have been uploaded:

- 961735_Motion_20180831150329SC057752_6882.pdf
This File Contains:
Motion 1 - Other
The Original File Name was Long Motion to Lift Stay Supreme Court.PDF

A copy of the uploaded files will be sent to:

- Jchaffee@mckinleyirvin.com
- Lisa@michelilaw.com
- bebert@mckinleyirvin.com
- ken@appeal-law.com
- paralegal@appeal-law.com
- shelby@appeal-law.com
- voslund@mckinleyirvin.com

Comments:

Sender Name: Becca Ebert - Email: bebert@mckinleyirvin.com

Filing on Behalf of: Matthew D Taylor - Email: mtaylor@mckinleyirvin.com (Alternate Email:)

Address:
1201 Pacific Avenue, Suite 2000
Tacoma, WA, 98402
Phone: (253) 952-4290

Note: The Filing Id is 20180831150329SC057752