

67533-8

67533-8

No. 67533-8-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

In Re Parentage of Patrick Michael McGlynn, Child

Kevin Columba McGlynn, Appellant,

v.

Klaudia Kataryna Batkiewicz, Respondent

REPLY BRIEF OF APPELLANT

NOAH DAVIS, WSBA #30939
Attorney for Kevin McGlynn,
Appellant
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
nd@inpacta.com
www.inpacta.com

Table of Contents

I.	Statement of the Case (Revisited)	1-4
II.	Issues Pertaining to Assignments of Error.....	4-5
	A. Assignment of Error #1	4
	B. Assignment of Error #2.....	5
III.	Standard of Review (Revisited)	5-6
IV.	Argument.....	6-25
	A. The Trial Court Improperly Dismissed Appellant’s Petition to Establish Parenting Plan and Child Support (Assignment of Error #1).....	6-23
	1. The UCCJEA.....	7-19
	a. The public policy purpose of the UCCJEA is to discourage forum shopping and deter abductions of children.....	7-8
	b. Washington is Patryk’s Home State and No Injustice or Prejudice Exists to Warrant Declination of Jurisdiction.....	8-10
	c. Insubstantial Evidence Exists to Support Findings Under the Statutory Test of RCW 26.27.261.....	10-19
	2. Case Law Analysis of RCW 26.27.261.....	19-21
	3. Due Process of Law.....	21-23
	B. The Trial Court Erred When it Denied Appellant’s Motion for Reconsideration (Assignment of Error #2).....	23-25
	1. RCW Chapter 26.27 Should not be invoked where one parent engaged in “unjustifiable conduct”.....	23-24
	2. Requirement of an Evidentiary Hearing.....	24-25

Table of Authorities

A. Table of Cases

Washington Cases

<i>Bellevue School District v. E.S.</i> , 171 Wn.2d 695, 257 P.3d 570 (2011).....	22, 24
<i>Conner v. Universal Utils.</i> , 105 Wash.2d 168, 712 P.2d 849 (1986).....	5
<i>Health Ins. Pool v. Health Care Authority</i> , 129 Wn.2d 504, 919 P.2d 62 (1996).....	5
<i>In re Application of Day</i> , 189 Wash. 368, 65 P.2d 1049 (1937).....	15
<i>In re Custody of A.C.</i> , 165 Wn.2d 568, 200 P.3d 689 (Wash. 2009).....	19-20
<i>In re the Dependency of J.H.</i> , 117 Wash.2d 460, 815 P.2d 1380 (1991).....	22
<i>In re the Marriage of Ebbighausen</i> , 42 Wn.App. 99, 708 P.2d 1220 (Div. 3 1985).....	22
<i>In re Marriage of Ieronimakis</i> , 66 Wn.App.83, 831 P.2d 172 (1992).....	11, 13, 19-21
<i>In re the Marriage of Tsarbopoulos</i> , 96 P.3d 1008 (Wash.App. Div. 3 2004).....	22
<i>In re the Marriage of Hamilton</i> , 120 Wn.App.147, 84 P.3d 259 (Wash. App. Div 3 2004).....	14, 19-21
<i>In re Pers. Restraint of Cruze</i> , 169 Wn.2d 422, 237 P.3d 274 (2010).....	5
<i>Myers v. Boeing Co.</i> , 115 Wash.2d 123, 794 P.2d 1272 (1990).....	5
<i>State ex rel. Burrows v. Superior Court</i> , 43 Wash. 225, 86 P. 632 (1906).....	24

<i>State v. Strode</i> , 167 Wash.2d 222, 217 P.3d 310 (2009).....	6
<i>Tostado v. Tostado</i> , 137 Wn.App. 136, 151 P.3d 1060 (Div. 2 2007).....	6
Other Cases	
<i>Bellew v. Larese</i> , 288 Ga. 495, 706 S.E.2d 78 (2011).....	17
<i>In re McNamara and Spotanski</i> , 257 P.3d 201 (Colo 2011).....	25
<i>Meredith v. Meredith</i> , 759 F. Supp. 1432 (D. Ariz 1991).....	19
<i>Powell v. Stover</i> , 165 S.W.3d 322 (Tex.2005).....	7
<i>Watson v. Watson</i> , 272 Neb 647, 724 N.W.2d 24 (Neb 2006).....	25

B. United States Constitutional Provisions

U.S. Const. Art. IV, § 6	24
U.S. Const. Amend. XIV.....	21

C. Washington Statutes

RCW 26.27.111.....	13
RCW 26.27.201.....	16
RCW 26.27.261.....	5, 7, 9-11, 19, 21, 23-24
RCW 26.27.271.....	23

D. Other Authorities

42 U.S.C. §11601.....	1
UCCJEA 9 U.L.A.	7

I. STATEMENT OF THE CASE (Revisited)

Although the Respondent/Mother chose to write her factual section, she fails to describe what facts (if any) she disagrees with. Thus this Reply attempts to identify those disagreements as well as the facts which are material to this appeal.¹ To begin, there should be no dispute that a crucial underlying element of the present appeal involves the wrongful retention of the Appellant/Father's son by the Respondent/Mother in a foreign State. This element exists because the Polish Hague Court of Appeals made that specific finding.² That finding was left unchallenged by the Mother.³

There should be no debating that a finding of "wrongful retention" is a violation and akin to "child abduction" under the Hague Convention.⁴

¹ The Mother's version of the facts appear to be aimed at challenging the earlier home state finding of the Court. (See Resp's Br., Pg. 2) These facts are irrelevant to any determination by this Court on appeal. The Mother also raises facts in the introductory section and throughout her brief without a citation to the record. The Father would ask that the Court not consider any facts without proper citation to the record.

² On March 3, 2011, the Hague Court of Appeals issued a final decision, finding that Patryk had in fact been "wrongfully retained" by the Mother and thus the Mother was in violation of the Hague Convention. (CP 48-66, Hague Court of Appeals at CP 57)

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) (emphasis added). The Hague Court of Appeals 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 (at Pg 10 for internal pagination) (emphasis added)

³ Instead of acknowledging her wrongful conduct, at Page 6 of her Brief, the Mother cites to extraneous parts of the Hague Appellate Court's opinion to try steer away from the adverse finding that the court made (i.e. wrongfully retention).

⁴ See Preamble and Article 3, Hague Convention 42 U.S.C. §§ 11601, *et seq.*

Although the Hague Court of Appeals found wrongful conduct by the Mother, it declined to order that Patryk be returned because of the concern that Patryk's emotional well-being would be affected by a forced return to Washington without his Mother. (CP 48-66, Hague Ct. of Appeals, CP 61)

As for additional facts that should not be in dispute: Patryk was born in Washington; Washington State is Patryk's home state;⁵ and the Father was the first parent to initiate a custody related action.⁶ Procedurally, there can also be no dispute that the Washington and the Polish family law courts have not corresponded with one another and that the Washington Court did not hold an evidentiary (or in-person) hearing.

There is a dispute, however, over whether or not the Father has been or will be afforded any due process rights in Poland (such as notice of a hearing and respect for his parental rights as the Father). However, what cannot be disputed (but what the trial court did not recognize) is the fact that on October 24, 2008 the Mother filed an action in the Polish family court – while an action was pending in the Washington King County Superior Court in which she was participating. (See Resp's Br. Pg. 4) The

⁵ See Court of Appeals, Division One, Case No. 63272-8-1, "*In re Parentage of Patryk Michael McGlynn, Child, Kevin Columba McGlynn and Klaudia Katarzyna Batkiewicz*." January 25, 2010 (CP 3-14, hereinafter also referred to as "McGlynn Appeal #1")

⁶ (See Resp's Brief, Pg 3, see also McGlynn #1, CP 3-14 McGlynn Appeal #1 at CP 5) The Mother raises an issue with her original lack of intent to establish residency in the United States. (See Resp's Br. Pg 2) However, such a factual determination (i.e. "intent to establish residency") before the wrongful retention occurred was not made.

Polish family law court, without any notice to the Father, granted to the Mother the “exclusive care and custody of Patryk”. (See Resp’s Br. Pg. 4)

Aside from the Polish Family Law Court’s Order granting the Mother the exclusive custody and care, there had been only minimal activity in the Polish family law court. (CP 81-112, at CP 82, ¶12) Instead, the only activity had been in the separate Polish Hague Court.⁷ This is an important theme that permeates both Parties’ argument to this Court.

As for the Parties’ characterizations regarding the amount of time that has passed since the date Patryk was wrongfully withheld in Poland (which also roughly corresponds to the time that the Petition to Establish Parentage was filed in Washington (CP 81-82, ¶9), the Parties agree that much of this time is due to the Mother’s success in having the case originally dismissed (which necessitated the first appeal in this case).⁸

⁷ (CP 142-160, Mot. For Reconsid – Supp Decl. of K. McGlynn at CP ¶2) The Mother states that the Parties have been actively litigating in the Polish court (Resp’s Brief at Pg 27-28). The Father vigorously disputes that allegation and asserts that this was misleading to the trial court as well since the Father has litigated in the Hague court (as required by a United States Treaty) which also happens to be in Poland. However, the Parties have not actively litigated the case in the separate and distinct Polish family law court (Supp Decl. of K. McGlynn at CP ¶2) The only party litigating in the Polish family law court is the Mother who obtained an ex parte custody and visitation order. (*Id.*)

⁸ The first order of dismissal was dated April 3, 2009. The Court of Appeals reversed on January 25, 2010, holding that Washington was in fact the home state of Patryk. (McGlynn Appeal #1 at CP 5-6). Following the reversal, the Mother again moved to dismiss. However, before the court ruled on the Mother’s second motion to dismiss, 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) After the Polish Hague Court handed down its final decision, the Father voluntarily dismissed his U.S. District Court case and then moved to lift the state court stay. (CP 15 Order Lifting Stay)

After the state court stay was lifted, the Father moved for entry of a temporary parenting plan. (CP 67-112, Resp. to Mot to Dismiss, at CP 73, FN 6) In response, the Mother re-filed her motion to dismiss. (CP 25-31) The Father's motion for temporary orders was re-set to permit the court to first rule on the Mother's motion. (CP 73, FN 6) On June 24, 2011, the trial court decided the Mother's motion without oral argument and dismissed the action. (CP 139-140) That ruling gave way to this Appeal.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Although the Mother's Brief attempts to restate the issues before the Court, the actual assignments of error are as follows:

A. Assignment of Error #1:

The trial court improperly dismissed Appellant's Petition to Establish Parenting Plan and Child Support because:

- (1) Washington is the child's home state and the Mother failed to show more than a mere inconvenience justifying dismissal;
- (2) 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;
- (3) 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;
- (4) 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;
- (5) 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 rights to parentage.

B. Assignment of Error #2:

The trial court incorrectly denied Appellants' Motion for Reconsideration when it failed to:

- (1) Recognize the UCCJEA's provision that parents with unclean hands should not be rewarded for their conduct; and
- (2) Hold an evidentiary hearing to ensure that the evidence supported the findings under the statutory test⁹ and stay the proceeding pending satisfaction to the trial court of assurance of the Father's rights.

III. STANDARD OF REVIEW (REVISITED)

While the Respondent lists only one standard of review – abuse of discretion (pertaining to the dismissal on forum non-conveniens grounds)¹⁰— we believe that this case involves multiple standards of review. First, we believe that the interpretation of a statute is present – RCW Chapter 26.27 and RCW 26.27.261. Interpretation of a statute is a question of law and is reviewed de novo. *In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 426, 237 P.3d 274 (2010). We also believe that

⁹ Constitutional due process challenges may be raised for the first time on appeal. *Health Ins. Pool v. Health Care Authority*, 129 Wn.2d 504, 919 P.2d 62 (1996); *Conner v. Universal Utils.*, 105 Wash.2d 168, 712 P.2d 849 (1986) (or as late as during a motion for reconsideration from a Court of Appeals decision). Thus, the request for an evidentiary hearing as part as the assignment of error is just that, a constitutional due process challenge providing the Father with an opportunity to rebut unsupported and new facts raised in the Mother's reply which the Father did not have an opportunity to address. The evidentiary hearing is, in this case, a constitutional necessity to resolve disputed issues of fact concerning participation in Polish courts, due process concerns in Poland and the medical attention/best interest of Patryk.

¹⁰ The abuse of discretion standard was set forth in the Parties' briefing, with both parties citing to *Myers v. Boeing Co.*, 115 Wash.2d 123, 128, 794 P.2d 1272 (1990).

constitutional due process rights are at issue. Such issues are also subject to de novo review. *State v. Strode*, 167 Wash.2d 222, 225, 217 P.3d 310 (2009) Finally, we believe factual findings are at issue. Factual findings are reviewed under a substantial evidence standard. *Tostado v. Tostado*, 137 Wn.App. 136, 151 P.3d 1060 (2007). Therefore, we would respectfully request that the Court consider these separate standards of review as they apply to the different issues presented on appeal.

IV. ARGUMENT

Since the Hague Court of Appeals addressed the child abduction (wrongful retention) issues, this Appeal does not seek the “return” of Patryk to the Father. By the same token, this Appeal is also not about re-litigating the Home State of Patryk (which is what the Mother’s brief attempts to assert). Instead, this Appeal is about the child’s lawful “home state” (Washington) exercising its rightful jurisdiction, fulfilling its statutory, equitable and public policy responsibilities and providing the non-abducting parent (the Father) with due process and some vindication of his constitutional right to access to his child in a forum that will fairly consider visitation and parental rights.

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

The Mother's Brief begins by citing to RCW 26.27.261 of the UCCJEA. (Resp's Br. Pg. 9) However, RCW 26.27.261 is not the only authority but one subsection of the larger UCCJEA found at RCW Chapter 26.27. While both Parties' analyze the statutory factors under RCW 26.27.261(2), not surprisingly, the Parties reach different conclusions regarding the ultimate result (dismissal or denial of the motion to dismiss).

1. The UCCJEA

- a. The public policy purpose of the UCCJEA is to discourage forum shopping and deter abductions of children

Weighing against the Mother's argument that Washington should decline jurisdiction on convenience grounds is the clear public policy of the UCCJEA, as captured by this Court in the first appeal of this case:

'[T]he 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, McGlynn Appeal #1 at CP 11, FN 4) (emphasis added)

After McGlynn Appeal #1 was decided, the Mother was found by the Hague Court of Appeals to have wrongfully retained (i.e abducted) Patryk in Poland. (CP 48-66, Hague Court of Appeals, at CP 57) And yet, by having the case dismissed from the King County Superior Court, the result is to reward the Mother despite violations of both public policy prongs.

And this brings us to the overarching public policy concerns and the far reaching implications that this case will have (as precedent in Washington). If there was ever a clear case and reason not to decline jurisdiction, this is it. To dismiss the Father's action in Washington only serves to encourage abductions by proving to the abducting parent that it is permissible to keep and retain the child in a foreign country (and away from the other parent). And the longer that that parent keeps the child out of this State, the more likely Washington will decline jurisdiction in favor of the abducting parent's state – making it more difficult if not impossible for the non-abducting parent to gain access to his/her child. Thus, the decision to dismiss from Washington stands the UCCJEA on its head.

To deter future abductions (and serve the public policy of the UCCJEA), the court in the child's home state should not decline to exercise jurisdiction unless good cause exists, such as a bona fide emergency or a substantial injustice – none of which exist in this case.

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

There is no dispute that Patryk's Home State is Washington. And while the Father does not deny that the trial court has discretion to decline to exercise jurisdiction, that discretion is not unfettered – it simply cannot be. If it were, then the UCCJEA's policy provisions against wrongful

removal are rendered meaningless (and the same can be said of the “home state” designation in this case).

Instead, and in order to harmonize the public policy provisions of the UCCJEA which seek to deter forum shopping and parental abductions, not only must the criteria set forth in RCW 26.27.261 be carefully considered, but the court must take into consideration all other relevant information¹¹ including the public policy of the UCCJEA and the child’s best interest. As a result, the party moving to dismiss must show more than a simple inconvenience – which, in this case, is the only ground that the Mother argued in her motion to the trial court.¹²

The Mother should be required to make a showing of a real injustice, or else, good cause why the case should be dismissed under RCW 26.27.261 (such that the reason for the dismissal outweighs the public policy concern of the UCCJEA). Otherwise, RCW 26.27.261’s inconvenience provision will (as it did here) be permitted to negate the more important public policy of the UCCJEA – aimed at discouraging forum shopping and abductions.

¹¹ 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 (the statutory factors set forth in 2(a-h). RCW 26.27.261(2) (emphasis added)

¹² In support of her Motion to dismiss, the Mother submitted a declaration stating, in essence, that Poland is more convenient because Patryk has now lived there longer (and more recently) than his stay in the United States. (CP 19-24 Decl. of K. Batkiewicz)

In addition, when considering the statutory factors under RCW 26.27.261, 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.¹³ The Washington trial court should not be permitted to use time away (which it did) as the (or the most prominent) 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.

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

In the present case, the trial court made written findings on some, but not all points, and failed to clearly address each of the statutory factors since the evidence fails to support the findings made by the Court.¹⁴ The RCW 26.27.261 factors are addressed again below.

(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;

¹³ See CP 81-82, ¶9, (June 2008) and compare CP 25-66: Filing date on or about 6/13/11.

¹⁴ See CP 139-141, Order of Dismissal and Compare with RCW 26.27.261, *infra*.

No Advantage to either Party. The Parties agree that 26.27.261(2)(a) (domestic violence) is a non-factor. (Resp's Brief, Pg 10)

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

Should Be No Advantage to either Party. However, the trial court found in favor of the Mother on this prong (2)(b), writing:

The child has resided outside of the State of Washington for the majority of his life and has resided consistently in Poland since January 2008. (CP 140, Order of Dismissal)

However, the trial court "tacked" on the time that the child has been wrongfully retained in making its findings in favor of the Mother (and against the Father). As discussed in the Father's opening brief (and in Footnote 18 below), it is inequitable and against the public policy of Washington for the trial court to tack on the time that the child has been wrongfully retained out of state.¹⁵ Otherwise, in every, or *nearly every*, case the abducting parent will have this finding in his/her favor and the longer the abducting parent keeps the child away from Washington, the better his or her chances to get a clean sweep (both the child and the residential case dismissed from the reaches of the state's courts).

¹⁵ The Court should adopt the public policy considerations of the pre-UCCJEA case of *In re Marriage of Ieronimakis*, 66 Wash.App. 83, 831 P.2d 172 (1992) which discussed the importance of not using the tagged on time post-petition and post-abduction so as to guard against circumvention of the appropriate home state and visitation determinations.

Here, where Washington is the home state,¹⁶ and where the Mother wrongfully retained the child in Poland and violated the Hague Convention (CP 57), the trial court should not use the unlawful/wrongful time away as a basis for denying the innocent and lawful party his or her access to the court of the Child's home State. The Father asks that the Court adopt this reasoning as precedent in order to give effect to the UCCJEA's public policy: when a parent has been found to have violated the Hague Convention or otherwise engaged in unlawful or wrongful conduct, the Court shall not tack on the (wrongful) time away unless extraordinary circumstances are present (such as domestic violence).

In taking all factors into consideration, including the reality that the mother has used the wrongful retention time in Poland to solidify her and the Parties' child's relationship with Poland (and gain witnesses and evidence) the court must take into consideration the legal fact that the child was wrongfully retained and that the contacts in Poland are the result of the fruit of the poisonous tree – which prevented those same relationships from being developed in Washington State.

When this Petition was filed, Patryk had been living outside of Washington for approximately the same time as he had lived in Washington (approximately five months versus four months) (CP 81-112,

¹⁶ CP 81-112 Decl. of K. McGlynn at CP 82; CP 3-14, McGlynn Appeal #1

Decl. of K. McGlynn at CP 81, ¶2) Of this five months away, at least one month was due to the wrongful retention. (*Id* at CP 81, ¶2) But even if the Court used the date of filing as the starting point, the time in Washington and the time away were roughly equal.

If the “tacked on” time away (from the poisonous tree – the wrongful retention) is not used,¹⁷ then for purposes of the trial court’s findings, there is insubstantial evidence to support a finding against the Father.¹⁸

(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 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 held in Washington). No evidence was provided to the Court that the Poland court offered such convenience to the Parties. And the trial court made no findings regarding this prong.

(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)

¹⁷ See *In Re Marriage of Ieronimakis, infra* (Decided on public policy grounds disfavoring abductions and excluding the a party’s post abduction time with the child. See FN 17.

¹⁸ And, even if the trial court considered the time away (after wrongful retention) it should still be required to consider that the time away was due to a wrongful retention and therefore give less strength to this statutory factor.

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

No Advantage, as no agreements exist. (CP 113-138, at 123).

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

Advantage Washington. At the time this Petition was filed, the majority of the medical 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) The key evidence is Patryk's lack of medical care during the time he has been in Poland and a history of medical care in the United States. (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.¹⁹ Here, the Mother failed to provide competent evidence to the court that the child was receiving the specialized medical care that he requires.

But despite this, the Court apparently found against the Father after allowing the unlawfully retained time to have been tagged on in recognizing the development of witnesses and ties to Poland after the abduction:

¹⁹ See *In re the Marriage of Hamilton*, 120 Wn.App.147, 84 P.3d 259 (2004)

- Because Patryk has remained in Poland since January 2008, all of the evidence concerning his present circumstances and care is located in Poland
- Other than Mr. McGlynn all of the witnesses who have interacted significantly with Patryk, including his day care providers, doctors, relatives and his mother are in Poland.

The Mother alleges that “evidence” regarding Patryk’s care is in Poland, she also makes the allegation that “all of the evidence concerning Patryk’s present circumstances and care is located in Poland.” However, the Mother provided no such evidence to the Court. And, to the contrary, the Father presented evidence as to Patryk’s special medical condition (which is relevant to Patryk’s current condition – thus negating the allegation that *all* evidence regarding Patryk is in Poland). (CP 81-112, Decl. of K. McGlynn at CP 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.²⁰ Furthermore, there was no showing that the unproduced “evidence” in Poland couldn’t also be provided to the Court in Washington telephonically or in writing (translated if necessary).²¹

²⁰ *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.”)

²¹ In fact, there was evidence presented by the Father that the Mother had kept evidence from the Father regarding the child’s well-being. (CP 83, ¶ 15 Decl. of K. McGlynn) The

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

Advantage Washington. The Polish court has already demonstrated a disregard for Washington law (by making a custody decision 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).²² Grzegorz Dlugi, the Mother's attorney in Poland, states in his declaration that the Poland court "asserted jurisdiction...to avoid the danger of [Patryk] being wrongfully removed from Poland." (CP 133, ¶5) This is not in substantial conformity with the jurisdictional standards of the UCCJEA.²³ Instead, it is in derogation of those standards as the Mother wrongfully retained the child in Poland then used the family court of that state to obtain an order prohibiting the child from being returned to his home state.²⁴ This is a custody decision that should not be recognized by Washington.^{25,26}

Court should have been concerned with the lack of evidence from the Mother, and at the very least, held an evidentiary hearing on this issue (as addressed below).

²² CP 82, Decl. of K. McGlynn, ¶12: "no notice of hearing" before Polish family court granting Respondent exclusive care and custody of Patryk.

²³ Pursuant to the UCCJEA, a court has jurisdiction to make an initial child custody determination only if it 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.

²⁴ "On October 24, 2008, the court granted me exclusive care and custody of Patryk" (CP 19-24, Decl of K. Batkiewicz, at CP 21, ¶8).

²⁵ 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) (A Reply which the Father did not have an opportunity to rebut and which adds

In the Father's opening brief, he cites to *Bellew v. Larese*, 288 Ga. 495, 499, 706 S.E.2d 78 (2011) where the Georgia Supreme Court wrote:

[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...

Here, however, the trial court's decision to dismiss recognizes and gives effect to the 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 King County Superior Court as Patryk's home state with respect to initial custody determinations. In the present case, the trial court failed to inquire into the basis of the Polish family law court's jurisdiction at all, and neither the Polish family law court (nor

new evidence) However, the alleged Polish court proceedings cited by Respondent were in the Hague Convention Court and not the Polish family law court.

²⁶ The Mother's Brief mixes the Hague Court case with the Polish family court case. (See Resp's Br. P.27) The Father does not deny that he participated in the separate Hague Court case which was his petition for the return of the child. The Mother's brief also asserts that Kevin McGlynn was given "actual notice" of the Polish family court case. (Resp's Br. Pg 28) There is no citation to the record here and the Father was not provided notice BEFORE a decision was made granting the exclusive care and custody of this child solely to the Mother. (CP 82-83, ¶¶ 12-13, Decl. of K. McGlynn) The Mother's brief asserts that the Father participated in mediation in Poland (Resp's Br. at Pg. 27) but what she also does not disclose is that this was part of the Hague Court case. The Mother asserts that the Father has appeared and testified in Poland, giving the indication that he has participated in the family court case there. That is not correct. The Father has fully participated in the Hague Court hearings.

Respondent) provided any evidence as to the basis of that alleged jurisdiction, or the ability to decide matters expeditiously.²⁷

(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, there is no evidence that the same is true of the courts. Instead, a tremendous amount of time, money and energy has been spent in Washington Superior Court due to the Mother’s first challenge of Washington as the child’s home state. And thus the Washington court would appear to be much more familiar than the Polish family law court. Furthermore, no evidence was presented that the Polish family law court had any more familiarity with the case than Washington.

However, the trial court (CP 139-141 at 140) found that:

Poland has already asserted jurisdiction over Patryk’s residential schedule and Mr. McGlynn has participated in those proceedings.

There is no other evidence that supports the trial court’s finding here, since the proceedings that the Respondent’s Motion to Decline Jurisdiction refer to are with respect to the Polish Hague Court

²⁷ The Mother’s brief states that both jurisdiction’s courts have demonstrated a capacity to deal with issues expeditiously Mother. (Resp’s Br. Pg. 18) However, the only evidence available showed a significant delay by the Polish Hague Court and a separate, ex parte decision by the Polish family law court having far reaching implications. The Mother’s brief then states that “Poland” has dealt with the practicalities of a residential schedule and evidence including a court ordered evaluation. (Resp’s Br. Pp. 6, 18) This was not done by the Polish family law court, but by the Hague Court.

case(s) and not the separate Polish family law case.²⁸ 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 Mother’s Brief here hides behind generic reference to “Polish Courts” taking action as she blends the Hague Court’s decisions (over a two plus year period) with the separate Polish family law court which made the ex parte decision. (See Resp’s Br. Pg 18)

This should not be enough to carry the moving party’s burden on this prong. And, as discussed above, the Polish family law court’s assertion of jurisdiction was not in conformance (or even substantial conformance) with the UCCJEA and should not be recognized.

2. Case Law Analysis of RCW 26.27.261

Of the cases discussed in the Father’s opening brief, the Mother’s brief only addresses three: *In re Custody of A.C.*, *In re Marriage of Hamilton*, and *In re Marriage of Ieronimakis*, 66 Wash.App. 83 (1992). The Mother’s Brief states that no Washington case addresses the forum non-conveniences issues (but instead only addresses jurisdictional issues).

²⁸ CP 25-66, at CP 27-28; and CP113-138 at CP 117. 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) Thus, the Hague court is not the proper court to “settle” residential contacts.

(Resp's Br. Pg. 20) However, and despite the Mother's argument to the contrary, these cases are instructive and helpful to the present case.

Beginning with *In re Custody of A.C.* 165 Wn.2d 568, 200 P.3d 689 (2009) and just like the foreign state in that case, the Polish family law court has demonstrated an unwillingness to abide by Washington law and entered a custody order without authority (a decision which *In Re Custody of A.C* would hold should not be honored). *In Re Marriage of Hamilton*, 120 Wn.App. 147, 157, (Div. 3 2004) shares that view, writing:

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.'

Thus, both *In re Custody of A.C.* and *In Re Marriage of Hamilton* make clear that any custody decisions taken by the Polish family law court cannot be given full faith and credit because such decisions are not in accordance with the UCCJEA and PKPA – since Washington is the home state of Patryk (and until and unless Washington ultimately declines that jurisdiction).²⁹ And finally, there is the pre UCCJEA case of *In re Marriage of Ieronimakis*, 66 Wash.App. 83, 831 P.2d 172 (1992) which was quoted at length by the *Hamilton* court:

²⁹ 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, so as not to “**circumvent the intent of the jurisdiction laws to prioritize home state jurisdiction.**” 120 Wn.App. at 155-156 (emphasis added)

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 (citing *Ieronimakis*).³⁰

While the UCCJEA may have changed since *Ieronimakis*, 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

In considering both the statutory factors under RCW 26.27.261 (and weighing all relevant considerations including public policy), the trial court should have acknowledged the lack of due process to the Father in Poland as a major concern weighing against 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 opportunity to be heard must be 'at a meaningful time and in a meaningful manner,' appropriate to the case.

³⁰ The *Ieronimakis* court emphasized a "strict policy to deter abductions and other self-help measures undertaken to obtain custody." 66 Wash.App. at 96.

Bellevue School District v. E.S., 171 Wn.2d 695, 704, 257 P.3d 570 (2011)

In Washington, the Father has parental rights that are considered "liberty" interests protected by the due process clause of the Fourteenth Amendment.³¹ Thus, the Father has a substantive due process right to parenting and a right to procedural due process under the UCCJEA.

[d]ue 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, 96 P.3d 1008w (Wash.App. Div. 3 2004)

And the Father furnished evidence that a significant initial custody and visitation determination had been made without any notice to him, and without an opportunity to be heard. (CP 82, ¶12)³² The Mother failed to provide any evidence refuting this (instead she only argues that the Father has hired an attorney and appeared in the Polish family law court action, and that he litigated the Hague Court action in Poland).³³

The trial court incorrectly placed the burden on the Father to establish the lack of due process. (See CP 139-141, at CP 140). But even

³¹ See *In re Marriage of Ebbighausen*, 42 Wn.App. 99, 708 P.2d 1220 (Div. 3 1985).

³² And, the Father asserted to the trial court that the Polish family law court did not provide the father with substantive or procedural due process. The Father argued that while 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), the same is not so in Poland. (Decl. of K. McGlynn at CP 82), "the Polish [family] court did not provide me with notice...before it made [its] determination." And no original service of that Polish family law court action had been made. (CP 82-83 at ¶12-13)

³³ The Mother's Polish lawyer asserts that the Father hired a Polish attorney who filed a notice of appearance. (CP 132-135 Decl. of Grzegorz Dlugi at CP 133, ¶4) But this was after the Polish family law court issued an ex parte custody and visitation order.

with this burden placed on the Father, the Father provided proof that he was not provided notice of the custody decision before the Court awarded the Mother the exclusive care and control of the Parties' child – a fact that the Mother admits occurred. (Resp's Br. Pg 4) And, 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.

Based on the facts of this case, and what was known to the Court the Court should not have dismissed this case but, at best, stayed it under RCW 26.27.261(3).

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

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". In this case, the Polish Hague Court of Appeals found what should be deemed unjustifiable conduct due to the "wrongful retention" by the Mother. (CP

48-66).³⁴ Although the Mother argues that this is for the Polish family law court to decide, as Washington Superior Courts sit in equity,³⁵ and as RCW 26.27.261 requires that the trial court take into consideration all relevant factors, an equitable decision by the Court would be to deny dismissal and not reward the Mother.

2. Requirement of an Evidentiary Hearing

The Mother asserts that there was no requirement that the trial court permit live testimony and have an evidentiary hearing. (Resp's Br. Pg 26). However, due process requires that the situation and context dictate the manner of hearing. "The opportunity to be heard must be at a meaningful time and in a meaningful manner, appropriate to the case."

Bellevue School District v. E.S., 171 Wn.2d at 704-705

The lack of an evidentiary hearing before the trial court made the decision to decline to exercise its jurisdiction deprives the Court of Appeals a sufficient record to determine whether or not the court declined to exercise its jurisdiction for appropriate reasons. This was the

³⁴ The Mother argues that the Father is attempting to re-litigate his Hague Petition for the Return of a Child. (Resp's Br. Pg. 21-23) That is not close what the Father is arguing. Instead, he is embracing the decision of the Polish Hague Court of Appeals which vindicated his claim that his child had been wrongfully retained in Poland.

³⁵ *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).

conclusion reached by the Nebraska Supreme Court:³⁶

Although the [trial] court had discretionary authority under §43-1244 to find that it was an inconvenient forum and thus to decline to exercise its jurisdiction, the court failed to correctly apply the provisions of §43-1244(b) in making its determination.

In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court...Section 43-1244(b) instructs trial courts to ‘allow the parties to submit information’ and to ‘consider all relevant factors including (certain specified considerations).’ Prior to making a determination that another state is a more convenient forum, courts must consider relevant factors under §43-1244(b). Because an evidentiary hearing was not held, this court is unable to review whether the district court declined to exercise its jurisdiction for appropriate reasons. The record does not contain any evidence or analysis by the district court as required under §43-1244.

Without an evidentiary hearing, the trial court failed to provide a record sufficient to develop its review of each of the required statutory factors as well as other relevant information sufficient to justify a dismissal. In addition to developing the record, an evidentiary hearing will clear up the disputed issues of material fact and provide the Father an opportunity to rebut an overlength reply that included new evidence.

Respectfully submitted this 4th Day of January 2012.



Noah Davis, WSBA #30939
Attorney for Kevin McGlynn
Appellant

³⁶ *Watson v. Watson*, 272 Neb 647, 724 N.W.2d 24 (Neb 2006). See also *In re McNamara and Spotanski*, 257 P.3d 201, 209 (Colo 2011): “[The Nebraska court] failed to provide reasons for declining jurisdiction and to engage in even a cursory consideration of whether Nebraska is a more appropriate forum. The [Nebraska] court did not mention child custody, the UCCJEA, home state jurisdiction, inconvenient forum, or unjustifiable conduct.”

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 4 PM 4:01

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

REPLY BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JAN 4 PM 4:01

TO CLERK OF THE COURT OF APPEALS

AND TO: MATTHEW JOLLY
LAW OFFICE OF MATTHEW JOLLY
9 LAKE BELLEVUE DR STE 218
BELLEVUE WA 98005-2452

I, Taylor Kuhlmann, 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 January 4, 2012.

DATED this 4th day of JANUARY 2012

By


Taylor A. Kuhlmann
Legal Assistant
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104
206.734.3055