IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Parentage of P.M.M. KEVIN COLUMBA McGLYNN, Appellant, and KLAUDIA KATARZYNA BATKIEWICZ, Respondent.	)	No. 67533-8-I DIVISION ONE UNPUBLISHED OPINION FILED: May 29, 2012

Appelwick, J. — McGlynn seeks reversal of the order dismissing his action for a parenting plan and support order for his minor son, P.M.M. Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, chapter 26.27 RCW, Washington is the home state of P.M.M. and had jurisdiction to establish a parenting plan and order child support. But, the superior court determined that Poland is a more convenient

forum, declined jurisdiction, and dismissed the action. We affirm.

FACTS

Kevin McGlynn and Klaudia Batkiewicz met while traveling abroad. McGlynn is a dual citizen of Ireland and the United States and resides in Washington. Batkiewicz is a Polish citizen. While outside the United States, they conceived a child. Batkiewicz came to the United States on June 4, 2007 on a tourist visa and gave birth to P.M.M. on September 20, 2007, in Washington. Due to complications during P.M.M.'s birth, he stayed in Washington through the end of 2007 to receive special medical care.

In January 2008, McGlynn, Batkiewicz, and P.M.M. flew to Poland together. A week later, McGlynn returned to Washington alone. Batkiewicz and P.M.M. stayed in Poland. In February, McGlynn met Batkiewicz and P.M.M. in Barbados for a ten day vacation. McGlynn claims he purchased a ticket for Batkiewicz and P.M.M. to return to Washington from Barbados, and that Batkiewicz agreed to do so. He claims that, instead, she changed her mind and they agreed she would temporarily return to Poland with P.M.M. In April and May, McGlynn made two trips to Poland where he unsuccessfully tried to convince Batkiewicz to return to Washington with P.M.M. P.M.M. and Batkiewicz have resided in Poland ever since.

These events spawned a series of overlapping legal actions in the United States and Poland. On June 27, 2008, McGlynn filed a petition for a parenting plan and child support in King County Superior Court. On April 3, 2009, the superior court granted Batkiewicz's motion to dismiss for lack of subject matter jurisdiction. But, on January 25, 2010, this court reversed that order, determining that Washington was P.M.M.'s home state and that Washington had subject matter jurisdiction. In re the Parentage of

McGlynn, noted at 154 Wn. App. 1020, 2010 WL 276159, at *5. In doing so, we noted that the superior court did not have to exercise its jurisdiction if it determined that Washington is an inconvenient forum and Poland is a more appropriate forum. Id.

On October 24, 2008, after McGlynn filed his petition in King County, a family court in Nowy Targ, Poland granted Batkiewicz exclusive care and custody of P.M.M. We do not have a copy of that order, but we noted in our previous decision that it appears to be similar to a temporary custody order. Id. at *1. McGlynn claims he had no notice or opportunity to be heard before the court made its ex parte decision. On January 5, 2009, he signed a document granting Polish attorney Joanna Trojanowska power of attorney regarding the Polish family court matter. On January 13, 2009 Trojanowska filed a notice of appearance with the court. Neither party asserts there has been any further activity in the Polish family court.

On February 4, 2009, after his attorney filed a notice of appearance in the family court proceeding, McGlynn filed a petition to release P.M.M. in the Polish regional court in Nowy Targ under the Hague Convention on the Civil Aspects of International Child Abduction. The regional court dismissed the petition on May 25, 2010. McGlynn appealed the dismissal to the district court in Nowy Sacz, Poland. On March 3, 2011, the appellate court reversed the regional court in part and found that P.M.M. had been wrongfully retained in violation of the Hague Convention. Despite that finding, it declined to return P.M.M. to McGlynn, because it determined that it would not be in P.M.M.'s best interest to separate him from Batkiewicz. That decision was largely based on a report from the Family Diagnostic and Consultation Centre, which the court indicated was not challenged by McGlynn. In the report, experts determined that

releasing P.M.M. would be traumatic, expose P.M.M. to psychological harm, and place P.M.M. in an intolerable situation. The report further stated that a drastic change in the environment and people around him, in addition to the language barrier, would surpass P.M.M.'s adaptation skills.

On June 27, 2011, the superior court in King County determined that Washington is an inconvenient forum and that Poland is a more appropriate forum. It declined jurisdiction and dismissed McGlynn's petition. On July 11, it denied McGlynn's motion for reconsideration.

DISCUSSION

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), chapter 26.27 RCW, is a jurisdictional statute intended to determine which of the several states can properly assert jurisdiction. When a competing forum is a foreign country, it is treated as if it were a state of the United States. RCW 26.27.051. The UCCJEA should be interpreted to "[a]void jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being." UCCJEA § 101, 9 pt. 1A U.L.A. at 657 (1999). Further, it is intended to "[d]iscourage the use of the interstate system for continuing controversies over child custody," and "[d]eter abductions of children." Id.

A court that has jurisdiction pursuant to the UCCJEA may decline to exercise jurisdiction if it determines that it is an inconvenient forum and that a court of another state is a more appropriate forum. RCW 26.27.261. The declining court must first consider eight factors:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

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

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

(d) The relative financial circumstances of the parties;

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

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

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

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

RCW 26.27.261(2).

Here, the superior court found:

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

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

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

McGlynn argues that evaluating P.M.M.'s contacts with Poland as they exist now, rather than as they existed when McGlynn filed his petition in King County, violates policy objectives to prevent forum shopping and deter child abductions. With that in mind, he argues that the superior court's findings were not supported by substantial evidence and that the court abused its discretion by declining jurisdiction. He also argues that the decision deprives him of due process of law, and that the superior court abused its discretion by denying his motion for reconsideration.

I. Dismissal

We review the superior court's decision to dismiss on grounds that Washington courts are an inconvenient forum for an abuse of discretion. Myers v. Boeing Co., 115 Wn.2d 123, 128, 794 P.2d 1272 (1990). To the extent the decision involved findings of fact, those findings must be supported by substantial evidence. McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 227 (2012).

A. Consideration of facts arising after the action commenced

McGlynn's central argument is that the superior court acted against public policy by considering P.M.M.'s contacts in Poland that have arisen since the King County petition was filed. He argues that to do so would reward forum shopping which is against public policy. His argument would be correct if the issue here was whether Washington has jurisdiction, as opposed to whether Washington should exercise that jurisdiction.

RCW 26.27.201, which deals with making an initial child custody determination, is the anti-forum shopping provision of the statute. It states that jurisdiction exists if Washington is the child's home-state "on the date of the commencement of the

proceeding." Id. Indeed, case law confirms that allowing a parent to obtain jurisdiction by abducting the child and generating new considerations and new evidence in a new state circumvents the intent of the jurisdiction laws. In re Marriage of Hamilton, 120 Wn. App. 147, 156, 84 P.3d 259 (2004). But, RCW 26.27.201 and the cases cited by McGlynn deal only with establishing jurisdiction, not declining jurisdiction on forum non conveniens grounds under RCW 26.27.261. See, e.g., Id.; In re Custody of A.C., 165 Wn.2d 568, 200 P.3d 689 (2009).

In contrast, RCW 26.27.261 does not state that the court can only consider evidence that existed at the time the action was commenced. In fact, it expressly provides that the court shall consider current factors. Id. For instance, it directs the court to consider whether domestic violence will occur in the future, how long the child has resided outside Washington, and the nature and location of evidence. Id. Those factors necessarily require looking at current circumstances, not the circumstances that existed when the petition was originally filed.

If the sole purpose of the UCCJEA was to litigate where there were the most contacts at the time the petition was filed, then litigation would be restricted to the home state and there would be no forum non conveniens provision. But, that is not the sole purpose. The statute recognizes that litigation will not and should not always proceed in the home state of the child. It vests that decision within the discretion of the court that maintains lawful jurisdiction.

The superior court was entitled to consider contacts that have arisen since the King County petition was filed.

B. Consideration of the statutory factors

McGlynn argues that the superior court erred by not making written findings analyzing each statutory factor. We need not decide whether the statute requires the superior court to make findings on each relevant factor; the court did make such findings here. The parties acknowledge that factors (a) and (e) do not apply. We consider the rest of the RCW 26.27.261(2) factors in turn.

RCW 26.27.261(2)(b) The length of time the child has resided outside this state

The superior court determined that P.M.M. lived in Poland for the majority of his life and had lived there consistently since January 2008. These facts findings are undisputed and supported by substantial evidence.

RCW 26.27.261(2)(c) The distance between the court in this state and the court in the state that would assume jurisdiction

The superior court noted that the new forum was inconvenient for McGlynn, but that the burden was outweighed by the burden of bringing Batkiewicz, P.M.M., and evidence to Washington. McGlynn correctly asserts that RCW 26.27.111 explicitly allows telephonic appearances, which would mitigate the burden on Batkiewicz. Nevertheless, in light of Batkiewicz's presence in Poland, and the existence of Polish witnesses and physical evidence located in Poland and written in Polish, the superior court's findings are supported by substantial evidence.

RCW 26.27.261(2)(d) The relative financial circumstances of the parties

The superior court found that the "financial resources of the parties are not largely disparate." In a declaration, McGlynn stated that Batkiewicz owns two residences and a commercial building, and that Batkiewicz was living in a $6,500 per month London flat when they met. Batkiewicz argues that McGlynn has greater

financial resources, because he travels to Poland to visit P.M.M. and attend proceedings, and he paid for Batkiewicz's travel to Washington and Barbados. The superior court's determination that the parties do not have "largely disparate" financial resources is supported by substantial evidence.

RCW 26.27.261(2)(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child

The superior court determined that, other than McGlynn, all of the witnesses who have interacted with P.M.M. in the last three years are in Poland. Those witnesses include his mother, his mother's family, day care providers, and doctors. McGlynn argues that Batkiewicz did not provide proof that P.M.M. is receiving necessary medical care in Poland. But, in making a jurisdictional decision, the superior court was not required to make a substantive conclusion regarding what medical care P.M.M. was receiving or whether that care was adequate. Further, McGlynn's argument that Batkiewicz must provide evidence of P.M.M.'s medical care in Poland is misplaced. One of the factors in forum non conveniens analysis is to determine if there is evidence that is located in the foreign jurisdiction. The fact that the Polish medical records are not available in Washington is precisely the point. If all of the evidence and witnesses were available in Washington, then the forum non conveniens analysis would be unnecessary. The superior court's findings are supported by substantial evidence.

RCW 26.27.261(2)(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence

The superior court determined that "Poland has already asserted jurisdiction over [P.M.M.'s] residential schedule and Mr. McGlynn has participated in those court

proceedings." McGlynn argues that the superior court should not have relied on the Polish court's assertion of jurisdiction, because it disregarded Washington law by awarding Batkiewicz custody while the King County petition was pending. He also argues that he did not participate in the custody proceedings, because he did not receive notice or an opportunity to be heard before the temporary custody order was entered.

RCW 26.27.251 provides that, "a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter." It was improper under Washington law for the Polish family court to enter a temporary custody order. Thus, McGlynn argues that we cannot give the Polish family court's custody decision full faith and credit. We do not; that is not the issue before us. The superior court did not defer to the Polish family court's initial substantive determination. Rather, it cited Poland's action as evidence that the Polish courts are willing and able to preside over the matter, which is appropriate for the superior court's purely jurisdictional decision.

With regard to the superior court's finding that McGlynn participated in the Polish proceedings, McGlynn asserts that he did not receive notice or an opportunity to be heard before the temporary custody order was entered in the Polish family court. He argues that, although he participated in the Hague Convention proceedings, that court could not have resolved the merits of the underlying custody claims. In re Application of Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991).

McGlynn may not have received proper notice prior to the Polish family court's initial decision. We cannot resolve that issue on the record before us. However, subsequent to the initial decision, he appointed an attorney who appeared in the matter. He has not made any argument that he did not have an opportunity to appeal the temporary custody decision. Without an appropriate record, which McGlynn has not provided, we are left to speculate whether he has or has not been afforded a subsequent opportunity to be heard on the merits of a final decision.

However, he initiated and actively participated in another action in Poland, and in fact in the same city. Even if the court in the Hague Convention proceedings could not have set a parenting plan and child support as McGlynn asserts, it had an opportunity to effectively vitiate that initial order and order Batkiewicz to return P.M.M. to McGlynn. The court ruled the child had been wrongfully retained. In considering P.M.M.'s best interests, it relied on an expert evaluation of the affects on the child of being moved. McGlynn did not challenge that report. Based on the evaluation's recommendation, the court declined to return P.M.M.

The superior court's finding that Poland's action is evidence that the Polish courts are willing and able to preside over the matter is supported by substantial evidence.

RCW 26.27.261(2)(h) The familiarity of the court of each state with the facts and issues in the pending litigation

The superior court determined that the Polish court is familiar with the facts and issues in the case. McGlynn argues that there is no evidence that Polish courts are more familiar with the case than Washington courts. But, there is no dispute that all

records and contacts with the child for three years are in Poland. The original proceeding and the Hague Convention proceeding, which included an expert evaluation of the impacts on the child of being taken from his mother, took place there. We do not have copies of the court records or the evaluation. The superior court's statement that the Polish courts are familiar with the case is supported by substantial evidence.

Based on these findings of fact, supported by substantial evidence, the trial court did not abuse its discretion when it dismissed the case on forum non conveniens grounds.

II. Due Process

McGlynn argues that he has not received due process in Poland, that Batkiewicz has not provided evidence of due process rights in Poland, and that the superior court thus deprived him of his due process rights by declining jurisdiction. McGlynn also argues that the superior court improperly placed the burden on him to prove that he would be denied due process rights in Poland.

We review alleged constitutional due process violations de novo. Post v. City of Tacoma, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009). Due process requires notice and an opportunity to be heard. See, e.g., In re Marriage of Tsarbopoulos, 125 Wn. App. 273, 281, 104 P.3d 692 (2004). And, parents have a fundamental liberty interest in the care and custody of their children. See, e.g., In re Dependency of J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). But, there is no legal authority for McGlynn's assertion that the burden should have been on Batkiewicz to prove McGlynn would receive due process rights in Poland. Normally, the party asserting a constitutional

violation has the burden of proving the violation. See, e.g., State v. Momah, 141 Wn. App. 705, 706, 171 P.3d 1064 (2007), aff'd, 167 Wn.2d 140, 217 P.3d 321 (2009). The UCCJEA provides that the superior court may decline to apply the statute if a foreign jurisdiction violates fundamental principles of human rights, but makes no mention of due process. RCW 26.27.051(3). There is no provision that requires the party seeking to remove a case from Washington to affirmatively prove that due process will be afforded in the foreign jurisdiction.

The entirety of McGlynn's due process argument is that Batkiewicz has not afforded him adequate visitation with P.M.M., and that he did not receive notice before the temporary custody order was entered. Whether Batkiewicz has afforded McGlynn adequate visitation is an enforcement issue separate from the jurisdictional issue here. Batkiewicz's alleged personal restrictions on visitation are a substantive issue to be dealt with in an enforcement context. There is no enforcement order before us. Since jurisdiction has been properly declined, enforcement is a question under Polish law.

As we already noted, McGlynn may not have received proper notice prior to the Polish family court's initial decision. We cannot tell on the record before us. But, he subsequently appointed an attorney who appeared in the matter. Then, he actively participated in another action that he initiated in Poland. He has not articulated why there has been no further activity in the original Polish family court proceeding, but it was suggested at oral argument that the proceedings were stayed pending the outcome of the Hague Convention proceedings. McGlynn has not made any argument that he did not have an opportunity to appeal the temporary custody decision.

Further, the court in the Hague Convention proceedings had an opportunity to

effectively vitiate that initial order and order Batkiewicz to return P.M.M. to McGlynn after it determined that P.M.M. was wrongfully retained. It is clear McGlynn participated in that proceeding. The court found in his favor on wrongful retention. The court noted that McGlynn did not challenge the report of the experts who evaluated whether P.M.M. should be returned. The inference is that he could have done so. The decision not to return the child turned on that evaluation report. Had the decision gone the other way, which it could have, the original Polish order would have been of no effect against McGlynn. Though he lost on the merits, the record lacks evidence that McGlynn was denied due process in Poland.

It cannot be said that, by declining jurisdiction, the superior court denied McGlynn due process by virtue of process or result.

III. Motion for Reconsideration

We review the superior court's denial of McGlynn's motion for reconsideration for an abuse of discretion. Kleyer v. Harborview Med. Ctr. of Univ. of Wash., 76 Wn. App. 542, 545, 887 P.2d 468 (1995).

In addition to reiterating his original arguments, McGlynn argued in his motion for reconsideration that the superior court should have retained jurisdiction because Batkiewicz engaged in unjustifiable conduct, and that the superior court should have held an evidentiary hearing to determine if McGlynn was denied due process in Poland.

RCW 26.27.271 provides that Washington should not assert jurisdiction if the person attempting to invoke jurisdiction has engaged in unjustifiable conduct. McGlynn argues that Batkiewicz's wrongful retention of P.M.M. is unjustifiable conduct. But, even if it is, Washington is not asserting jurisdiction. It is undisputed that Washington

had rightful jurisdiction. RCW 26.27.271 does not apply to a forum non conveniens decision to decline jurisdiction and the superior court did not abuse its discretion by refusing to maintain jurisdiction based on Batkiewicz's alleged unjustifiable conduct.

McGlynn also asserts that he was denied due process because the superior court did not hold an evidentiary hearing to determine whether he was afforded due process in Poland, whether P.M.M. receives medical care in Poland, and whether McGlynn has been denied meaningful visitation with P.M.M.. RCW 26.27.101 provides:

> (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.
>
> (2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

McGlynn argues that this provision creates a due process mechanism that guarantees him a right to be heard before a jurisdictional decision is made. That assertion is incorrect. The statute only provides that, if a court communicates with a court in another state and the parties do not participate in that communication, then the parties are entitled to a hearing. Id. But, the superior court did not communicate with the Polish family court. RCW 26.27.261 does not require the superior court to consult with a foreign court before declining jurisdiction, nor does it mandate an evidentiary hearing. Further, whether P.M.M. receives adequate medical care and whether McGlynn is receiving meaningful visitation rights are substantive issues that the superior court was not required to consider, let alone decide. It was not an abuse of discretion to deny McGlynn's request for an evidentiary hearing.

We understand the pain McGlynn must feel due to his son residing in Poland and having limited contact with him. But, a child cannot be in two places at once and the result in this case should not be surprising. Batkiewicz and McGlynn met abroad. They were only in Washington together for part of Batkiewicz's pregnancy and the first few months of P.M.M.'s life. P.M.M. only lived in Washington during the short period after his birth when he was receiving necessary medical care. Batkiewicz is Polish, maintained her Polish citizenship and residence, and asserts she never had any intent to remain in Washington. And, P.M.M.'s contacts with Poland were, at least initially, consensual. Here, the superior court considered the great burden of maintaining McGlynn's parenting plan petition in Washington and understandably concluded that it would be more expeditious to grant jurisdiction to Poland. That decision properly considered the extensive contacts with Poland that have amassed since P.M.M. moved to Poland in January 2008. The UCCJEA clearly contemplates the factual scenario encountered here, and empowers the superior court to decline jurisdiction in its discretion.

We affirm.

WE CONCUR: