

No. _____

TEMPORARY STAY REQUESTED

Trial court stay expires 2/2/18 re order quashing action and dissolving order against removing child to foreign country

Court of Appeal
State of California
Second Appellate District

W.M.,
Petitioner/Appellant,

vs.

V.A.
Respondent.

**PETITION FOR WRIT OF SUPERSEDEAS
AND REQUEST FOR TEMPORARY STAY**

(Supporting Exhibits Filed Separately)

From Order Quashing Parentage Action Entered 1/12/18
Los Angeles Superior Court, Case No. 17STPT00486
Hon. Mark H. Epstein, Dept. 81, Telephone: (213) 830-0781

Related Appeal, No. B287735

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CERTIFICATE OF INTERESTED PERSONS

Per rule 8.488 of the California Rules of Court, counsel for petitioner certifies that no entity or person has a financial or other interest in the outcome of this proceeding other than:

Interested Person	Nature of Interest
W.M. <i>(names withheld because of underlying parentage action)</i>	Petitioner in Superior Court action and in this writ petition.
V.A.	Respondent in Superior Court action and in this writ petition.
Leo A.A. M.	Minor child of the parties.

Dated: January 29, 2018

WALZER MELCHER LLP

By: _____ /s/
Christopher C. Melcher
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I. WHY A TEMPORARY STAY AND WRIT SHOULD ISSUE

A stay is needed by February 2, 2018, or the parties' 13 month old child ("Leo") will be permanently taken from the reach of this jurisdiction. The Superior Court quashed the action filed by Petitioner, W.M. ("William") to establish parental relationship, child custody, and child support.

The Superior Court believed it could not exercise its jurisdiction over Leo simply because Leo's mother, Respondent V.A. (Victoria), had earlier filed an action in the Republic of Belarus to determine Leo's residence, without providing William notice or opportunity to be heard. The Superior Court found that the Belarus residency action was a sham, which it refused to recognize or enforce. The Superior Court also found that California is the best forum to determine custody of Leo, and that surrendering its jurisdiction to Belarus will "drastically limit" William's interaction with Leo.¹

Nevertheless, the Superior Court felt constrained to decline its jurisdiction and surrender it to Belarus. The Superior Court misunderstood the law. That ruling was made January 12, 2018, and was stayed for three weeks until February 2.

William filed a notice of appeal and pleads for a temporary stay by this Court, so California's jurisdiction over Leo is preserved. William needs a temporary stay by February 2, so Leo is not removed from California before this Court rules on William's Petition for Writ of Supersedeas. William requests that the current joint custody orders and orders preventing Victoria from abducting Leo remain in place during the stay.

¹ Ex. 5, (PE, p. 91:6-8).

The criteria for granting or denying a stay requires balancing the cost of each decision.

- If a stay is denied and this Court, on appeal, reverses the order quashing his California action, that decision will be moot because Leo will be outside the reach of the California courts. The prejudice to William and Leo will be permanent and irreparable. It will cause a de facto termination of their parent-child relationship.
- If a stay is granted, no significant harm will occur to anyone, even if William loses his appeal. Victoria spends significant time in California at her home in Manhattan Beach. The parties will continue sharing equal custodial time with Leo in California until the appeal is decided. This ensures frequent and continuing contact with Leo and his parents, which is a critical for a 13 month old baby.
- The balance of harm to each party points to the extension of the current stay until the appeal is final.

Therefore, William prays for a temporary stay of the order quashing his California until this Court rules on his Petition for Writ of Supersedeas. William also prays for a writ of supersedeas, staying the order quashing his custody action pending appeal. The effect of those stays will be to keep intact the orders prohibiting the parties from removing Leo from the U.S. and the temporary custody orders pending appeal. If this Court is not inclined to issue a stay on the merits, William asks that a temporary stay be issued for 30 days so he can ask the California Supreme Court for a stay.

II. PETITION FOR WRIT OF SUPERSEDEAS

(A) The parties.

1. Petitioner, W.M. (“William”) is the father of the 13-month-old boy (“Leo”) who is the subject of this child custody and child support action. Leo was born December 19, 2016, in Santa Monica, California.²

2. Leo’s mother is Respondent, V.A. (“Victoria”). William and Victoria were never married.³ The parties separated on July 11, 2017.⁴

3. William and Leo are U.S. citizens.⁵ Victoria is a citizen of the Republic of Belarus, but spends much of her time at her home in Manhattan Beach.⁶

(B) Related appeal and underlying action.

4. William filed a Petition to Establish Parental Relationship, Child Custody, Visitation and Child Support regarding Leo on July 20, 2017, in Los Angeles Superior Court, case number 17STPT00486.⁷

5. Victoria claimed Belarus has exclusive jurisdiction to determine custody issues regarding Leo.⁸ The Superior Court agreed and quashed William’s Petition to Establish Parental Relationship on January 12, 2018.⁹

² Ex. 1 (PE, p. 5, ¶¶ 1.a & 2). The exhibits to this petition are filed separately and referred to as Petitioner’s Exhibits (“PE”).

³ Ex. 1 (PE, p. 5, ¶ 5).

⁴ Ex. 8 (PE, p. 193:1-3).

⁵ Ex. 5 (PE, p. 54:22-24).

⁶ Ex. 5 (PE, p. 33:19-24).

⁷ Ex. 1 (PE, p. 5).

⁸ Ex. 13 (PE, p. 285).

⁹ Ex. 5 (PE, p. 29).

6. On January 19, 2018, William filed a Notice of Appeal from the order quashing his Petition to Establish Parental Relationship.¹⁰ The record on appeal has not been designated.

(C) Authenticity of exhibits.

7. All exhibits are copies of original documents on file in the Superior Court and are incorporated by reference.

8. There is no reporter's transcript of the ruling on Victoria's motion to quash because it was taken under submission and the Superior Court issued a written decision.¹¹

(D) Timeliness of petition.

9. William could not have filed this petition earlier due to the effort needed to prepare it. The trial judge emailed the 63-page ruling on the motion to quash to counsel at 6:09 p.m. on Friday, January 12.¹² The minute order and official copy of the order were mailed to counsel by the clerk on January 12, 2018.¹³

10. William requested a stay from the Superior Court, which was only granted for three weeks.¹⁴ That stay expires February 2, 2018. William rushed to file this petition so this Court would have time to consider his request for a temporary stay.

¹⁰ Ex. 2 (PE, p. 8).

¹¹ Ex. 5 (PE, p. 29).

¹² Ex. 4 (PE, p. 26).

¹³ Ex. 5 (PE, pp. 29 & 31).

¹⁴ Ex. 5 (PE, p. 91:14-16).

(E) Summary of facts and procedural history.

11. This section fairly summarizes the “jurisdictional facts” material to the issues on appeal.

(1) *William is a California resident.*

12. William became a California resident in 2016. He holds a California driver’s license and California real estate broker’s license, works in California, has a California bank account, rents a house in California, and has family in California.¹⁵

(2) *Victoria spends significant time at her home in Manhattan Beach.*

13. Victoria is a professional tennis player. The Superior Court found: “Her career has made her a world traveler, and it is probably fair to say that there is no one single country where she spends the great majority of her time.”¹⁶ “The evidence is undisputed that [Victoria] spends a significant amount of time at [her Manhattan Beach home].”¹⁷

14. Victoria denied being a California resident, claiming her visa does not permit her to stay in the U.S. more than six months per year. The Superior Court found her legal right to be in the U.S. is based on a P1 visa (an international athletic visa), but her visa has no such six-month limitation.¹⁸

¹⁵ Ex. 5 (PE, pp. 32:24 - 33:7).

¹⁶ Ex. 5 (PE, p. 33:13-14).

¹⁷ Ex. 5 (PE, p. 33:19-24).

¹⁸ Ex. 5 (PE, pp. 34:1-15 & 85:20).

15. The Superior Court found that Victoria has significant connections to California:

[Victoria] is, in many ways, more connected to California than [William]. She owns significant real estate here (and has for a number of years); she spends considerable time here each year; she has had things mailed to her in California for a long time, including personal correspondence and items she has purchased. [William] is right that she does have a significant connection to California, and, in the Court's view, the question is not a close one.¹⁹

(3) *The parties meet.*

16. The parties began dating in 2015.²⁰ In December 2015, William traveled to Los Angeles and stayed with Victoria at her home in Manhattan Beach, California.²¹ William accompanied Victoria to tennis tournaments.

17. In June 2016, the parties began living together in Victoria's home in Manhattan Beach, and the parties travelled together for business and pleasure.²²

18. When Victoria became pregnant, the parties agreed they wanted Leo to be born here. The Superior Court found that William and Victoria lived in California leading up to Leo's birth and this "was not accidental; the parties agreed that Leo would be born here."²³

¹⁹ Ex. 5 (PE, p. 56:6-12).

²⁰ Ex. 5 (PE, p. 34:17).

²¹ Ex. 5 (PE, p. 34:18-19).

²² Ex. 5 (PE, p. 34:18-24).

²³ Ex. 5 (PE, pp. 34:26 - 35:1).

19. “Before Leo’s birth, neonatal care was provided in California (at least while [Victoria] was here), and Leo had a pediatrician here for the period after he was born.”²⁴

(4) *Leo is born in Santa Monica, California.*

20. Leo was born in Santa Monica, California on December 19, 2016.²⁵ Each party’s family was in California for the birth.²⁶

21. Leo is a U.S. citizen. Ex. 5 (PE, p. 54:22-24).

22. The parties stayed in Victoria’s home in Manhattan Beach from Leo’s birth on December 19, 2016, through March 1, 2017.²⁷

(5) *The Superior Court found Leo has significant connections to California and substantial evidence exists here as to his care, protection, training, and relationships.*

23. The Superior Court found that “Leo, having been born here, having lived a significant part of his life in California, and being an American citizen, has a significant connection to California.”²⁸ “The Court also believes that there is substantial evidence here relating to Leo’s care, protection, training, and personal relationships, at least in light of Leo’s young age.”²⁹

²⁴ Ex. 5 (PE, pp. 34:26 - 35:5).

²⁵ Ex. 5 (PE, p. 34:26-27).

²⁶ Ex. 5 (PE, p. 35:1-2).

²⁷ Ex. 5 (PE, p. 54:5-8).

²⁸ Ex. 5 (PE, p. 54:22-25).

²⁹ Ex. 5 (PE, p. 56:25-26).

(6) *The parties travel abroad with Leo.*

24. The parties and Leo traveled to Belarus on March 1, 2017, to visit Victoria's parents and for Victoria's tennis training.³⁰ The itinerary changed due to her training schedule.³¹

25. The parties visited other countries during the trip, and planned to return to Los Angeles at the end of their trip.³² The Superior Court found: "Nursery equipment remained in the Manhattan Beach home, as well as other baby-related things.... Moreover, of course, airline tickets were purchased for the intended return [to Los Angeles] in July 2017."³³

26. The parties and Leo arrived in Belarus on March 2, 2017, where Leo stayed until June 7, 2017.³⁴

27. William and Victoria visited Paris, France from May 24 to May 31, 2017, leaving Leo in Belarus with Victoria's mother.³⁵

28. On June 7, 2017, the parties and Leo travelled to Mallorca, Spain, and stayed there until June 25.³⁶

29. On June 25, they traveled from Spain to London, England because Victoria competed in the Wimbledon tennis tournament.³⁷

³⁰ Ex. 5 (PE, p. 35:8-13) & Ex. 6 (PE, p. 110:5-6).

³¹ Ex. 6 (PE, p. 110:5-22).

³² Ex. 5 (PE, p. 35:14).

³³ Ex. 5 (PE, pp. 50:26 - 51:2).

³⁴ Ex. 5 (PE, p. 46:2-5).

³⁵ Ex. 5 (PE, p. 66:7-8).

³⁶ Ex. 5 (PE, p. 36:16-18) & Ex. 6 (PE, p. 111:25).

³⁷ Ex. 5 (PE, p. 36:19-20) & Ex. 6 (PE, p. 111:26).

30. William returned to Los Angeles on July 12, 2017.³⁸

31. Victoria returned to her Manhattan Beach home with Leo on July 15, 2017, as planned.³⁹

32. Leo has remained in California since July 15, 2017.⁴⁰ This history is summarized below.

33. To summarize, Leo was present since birth in these places:

12/19/16	Leo is born in Santa Monica, CA
12/19/16 to 3/1/17	Leo lives in Victoria's home in Manhattan Beach, CA with the parties
3/2/17 to 6/7/17	Leo visits Belarus with the parties to see Victoria's family and stays in a residence owned by Victoria
6/7/17 to 6/25/17	Leo visits Mallorca, Spain with the parties
6/25/17 to 7/15/17	Leo travels to London, England with the parties for the Wimbledon tennis tournament; Victoria returns to Manhattan Beach, CA with Leo
7/15/17 to present	Leo, William and Victoria live in California

34. William always considered Leo's home state to be California, and all absences were temporary.⁴¹

³⁸ Ex. 5 (PE, p. 36:21-23).

³⁹ Ex. 5 (PE, p. 36:24-25) & Ex. 6 (PE, p. 111:17-18).

⁴⁰ Ex. 6 (PE, p. 111:27-28).

⁴¹ Ex. 5 (PE, p. 46:12-20).

(7) *During their international trip, William applied for a temporary residency visa in Belarus.*

35. The parties' extended overseas trip was mostly due to Victoria's career commitments. William had to apply for an extension of his Belarus visa, which was set to expire May 29, 2017.⁴² William submitted the visa application in Belarus on May 17, 2017.⁴³ The document is entitled, "Application for temporary residence permission issuance."⁴⁴

36. To get the visa, William was told he needed to have a lease agreement for a property in Belarus.⁴⁵ William signed a lease for an apartment in Belarus, which Victoria owned.⁴⁶ The application asks for the "Address of current temporary stay (registration) in the Republic of Belarus" and his "Address of planned temporary residence in the Republic of Belarus."⁴⁷ To which, William listed "apartment 7, house 12" for the apartment he leased from Victoria, which is also known as Minsk, 12 Polevaya Street, apartment 7.⁴⁸

37. William never stayed at that apartment in 2017 and never paid rent to Victoria.⁴⁹ They slept at another property owned by Victoria during their visit to Belarus. Victoria "owns multiple properties in Belarus,

⁴² Ex. 6 (PE, p. 111:17-22).

⁴³ Ex. 8 (PE, p. 281, box 17).

⁴⁴ Ex. 8 (PE, p. 281, title).

⁴⁵ Ex. 5 (PE, p. 36:7-10).

⁴⁶ Ex. 5 (PE, p. 36:3-5).

⁴⁷ Ex. 12 (PE, p. 281, box 17 & p. 282, box 19).

⁴⁸ Ex. 12 (PE, p. 281, box 17 & p. 282, box 19).

⁴⁹ Ex. 5 (PE, p. 36:4-7).

at least one of which was given to her by the government after she won the Olympics.”⁵⁰

(8) *Without William’s knowledge, Victoria’s mother files an action in Belarus, on Victoria’s behalf, to determine that Leo is a resident of Belarus.*

38. On May 25, 2017, an action was filed on Victoria’ behalf (by her mother) in Belarus court to determine Leo’s residency (which is referred to as the “Belarus residency action”).

39. The Belarus residency action was filed the same day William and Victoria left for a trip to Paris, leaving Leo with Victoria’s mother.⁵¹ The Superior Court noted that the Belarus residency action was filed “while the parties were still together.”⁵²

40. According to the Belarus court, service of the Belarus residency action was allegedly accomplished by mailing the court papers to the apartment William leased from Victoria (*i.e.*, Minsk, 12 Polevaya Street, apartment 7), which he listed as his temporary residence on his visa application.⁵³

41. The Superior Court, however, found that no notice of the Belarus residency action was given to William, and believed William that he did not know about the case.⁵⁴

⁵⁰ Ex. 5 (PE, p. 33:14-16).

⁵¹ Ex. 5 (PE, p. 66:7-8).

⁵² Ex. 5 (PE, p. 37:2-5).

⁵³ Ex. 12 (PE, p. 281, box 17 & p. 282, box 19).

⁵⁴ Ex. 5 (PE, pp. 74:24 - 75:4).

42. William and Victoria returned to Belarus from their Paris trip on May 31, 2017.⁵⁵

43. On June 7, 2017, at 6:10 a.m., William and Victoria left Belarus with Leo for their trip to Spain. William was told that Victoria's mother had to stay behind in Belarus "for an innocuous reason" (*i.e.*, to work on her U.S. visa application).⁵⁶

44. However, at 10:00 a.m. on June 7, Victoria's mother appeared in the Belarus court for a hearing on the residency action.⁵⁷ The hearing occurred two weeks after the Belarus residency action was filed.

45. No one appeared for William because he did not know of the proceeding.⁵⁸ "The hearing nonetheless went forward, with Ms. Azarenka's mother, [Ala], acting in Ms. Azarenka's stead."⁵⁹

46. In its decree of June 7, 2017, the Belarus court found that William and Victoria "have a dispute about the place of residence of the child."⁶⁰ The Belarus court then declared:

To determine the place of residence of minor Leo [], born on December 19, 2016, by the place of residence of her mother Victoria [], born on July 31, 1989, at the address: Minsk: 12 Polevaya Street, apartment 7.⁶¹

⁵⁵ Ex. 5 (PE, p. 66:7-8).

⁵⁶ Ex. 5 (PE, p. 74:18-22).

⁵⁷ Ex. 5 (PE, p. 37:6-8).

⁵⁸ Ex. 5 (PE, p. 37:7).

⁵⁹ Ex. 5 (PE, p. 37:2-5).

⁶⁰ Ex. 5 (PE, p. 69:1-2).

⁶¹ Ex. 13 (PE, 303, under "Has Decided" heading); Ex. 5 (PE, p. 69:19-23).

47. The place of Leo’s “residence” was the same apartment Victoria leased to William for his visa application, which William listed as his temporary residence while in Belarus (*i.e.*, Minsk, 12 Polevaya Street, apartment 7).⁶² Neither William, Victoria, nor Leo ever stayed at the apartment in 2017.

48. There was no dispute between the parties regarding Leo that William knew of during the two week existence of the Belarus residency action. William and Victoria were together on a romantic trip to Paris when the Belarus residency case was filed, and they were together in Spain with Leo as a family when the hearing was held. The proceedings were conducted in secret and were a sham.

49. In William’s California custody action, Victoria claimed that California has no jurisdiction over Leo because “the Court in Belarus has already determined Leo is a resident of that country” and she “properly commenced paternity proceedings in Belarus” before William filed his California action.⁶³ To impugn William’s credibility, Victoria complained in her motion to quash that “William utterly failed to mention [the Belarus residency decree] in his RFO papers [for temporary custody orders in California].”⁶⁴

⁶² Ex. 12 (PE, p. 281, box 17 & p. 282, box 19).

⁶³ Ex. 13 (PE, pp. 289:24 -291:8).

⁶⁴ Ex. 13 (PE, p. 289:19-21).

50. However, the Superior Court found that William was unaware of the Belarus proceeding and did not receive notice of the filing or the hearing.⁶⁵

On this issue, the Court credits [William]’s testimony. The lack of any written or electronic communication of any type discussing the June 7, 2017 hearing strongly suggests that [William] was unaware of it before the fact. The Court also believes [William] when he states that he would not have left the country on the same day as a court hearing involving his son was going to go forward. The Court is left with the conclusion that [William] was unaware of the application, the hearing, or the decree until August 2017, when it came to light in the California action [for custody filed by William on July 20, 2017].⁶⁶

51. The Superior Court also concluded the Belarus court made the residency determination without considering any of the jurisdictional factors a California court would use.⁶⁷

52. Nevertheless, as will be seen, it was the secret filing of the Belarus residency proceeding upon which this entire case turned.⁶⁸ The Superior Court applied a first-in-time rule and concluded the Belarus residency action was, in effect, a child custody proceeding that deprived California of its jurisdiction over Leo because it was filed before William’s California action.⁶⁹ The Superior Court found California has child custody jurisdiction over Leo, but thought it had to decline to exercise that jurisdiction, simply because the Belarus residency action was filed before

⁶⁵ Ex. 5 (PE, p. 74:24-26).

⁶⁶ Ex. 5 (PE, pp. 74:24 - 75:4).

⁶⁷ Ex. 5 (PE, pp. 59:21 - 60:2).

⁶⁸ Ex. 5 (PE, p. 70:14-19).

⁶⁹ Ex. 5 (PE, p. 70:14-19)

William filed his California action.⁷⁰ That was an error of law because the Uniform Child Custody Jurisdiction and Enforcement Action (“UCCJEA”) (Fam. Code, §§ 3400 *et seq.*) provides for jurisdiction and does not recognize foreign proceedings which lack notice and the opportunity to be heard.

(9) *During the London trip, the parties break up and return to Los Angeles.*

53. On July 11, 2017, while in London, Victoria punched William in the face during an argument.⁷¹ The Superior Court noted that each party claimed the other committed domestic violence in that argument.⁷²

54. William stayed in a separate hotel the night of July 11.⁷³ Victoria told William to find his own way back to California, that she had cancelled his return flight to Los Angeles, and he was no longer welcome in her home.⁷⁴ William wanted to return to California with Leo, but Victoria had Leo’s passport. William went to the U.S. Embassy to obtain a duplicate passport for Leo, but was told he could do nothing.⁷⁵

55. William returned alone to Los Angeles on July 12, 2017, and moved into a new residence in Hermosa Beach, close to Victoria’s home in Manhattan Beach, to facilitate visitation of Leo between the parties.⁷⁶

⁷⁰ Ex. 5 (PE, p. 70:14-19)

⁷¹ Ex. 6 (PE, p. 111:10-11).

⁷² Ex. 5 (PE, p. 36:20-22).

⁷³ Ex. 6 (PE, p. 111:14-16).

⁷⁴ Ex. 8 (PE, p. 193:1-3).

⁷⁵ Ex. 8 (PE, p. 193:18-21).

⁷⁶ Ex. 6 (PE, p. 111:16-17).

56. Victoria returned to her Manhattan Beach home with Leo on July 15, 2017, as she had planned to do so when the family left for their trip.⁷⁷ Leo has remained in California ever since.⁷⁸

(10) *William files a child custody and child support action in Superior Court.*

57. On July 20, 2017, William filed a Petition to Establish Parental Relationship, Child Custody, Visitation and Child Support regarding Leo in Los Angeles Superior Court.⁷⁹ It is undisputed that William is the father of Leo.

(11) *William obtains temporary custody orders and the Superior Court finds Leo's country of habitual residence is the U.S.*

58. William made an *ex parte* application in Superior Court for temporary orders regarding Leo on July 26, 2017.⁸⁰ Victoria was given notice and opportunity to be heard.⁸¹ Victoria contested jurisdiction at the hearing.

59. On July 26, 2017, the Superior Court found that Leo's country of habitual residence is "The United States of America."⁸² The order states that California "has jurisdiction to make child custody orders in this case under the Uniform Child Custody Jurisdiction and Enforcement

⁷⁷ Ex. 5 (PE, p. 35:14 & pp. 50:26 - 51:2); Ex. 6 (PE, p. 111:27-28).

⁷⁸ Ex. 6 (PE, p. 111:17 & 28).

⁷⁹ Ex. 1 (PE, p. 5).

⁸⁰ Ex. 8 (PA, p. 173).

⁸¹ Ex. 10 (PE, p. 263, ¶ 3.e.2).

⁸² Ex. 10 (PE, p. 263, ¶ 3.e.3).

Act....”⁸³ It is unclear, but this reference may have been to the emergency jurisdiction provisions of the UCCJEA. (See, Fam. Code, § 3424.)

60. Abduction prevention orders were made. The Superior Court “was concerned that the United States does not have a sufficient treaty with Belarus that would ensure that Leo would be returned here if taken there.”⁸⁴

61. The Superior Court found Victoria has not cooperated with William in parenting Leo, and that she has a history of domestic violence.⁸⁵ (An application by William for a domestic violence prevention order is pending under the same case number as William’s petition for custody and child support. Victoria disputes the domestic violence allegations.)

62. The Superior Court found a risk that Victoria would take Leo outside the United States without permission from William or court order.⁸⁶

[Victoria] is a professional tennis player who frequently travels nationally and internationally for tennis tournaments. She confiscated [Leo]’s passports and has not demonstrated any willingness to comply with the Automatic Temporary Restraining Orders [Fam. Code, § 2040] compelling her to leave [Leo] in the state of California. She has at least 10 tennis tournaments this year, 9 of which are outside the state of California, and 6 of those tournaments are in foreign countries.⁸⁷

⁸³ Ex. 10 (PE, p. 263, ¶ 3.e.1).

⁸⁴ Ex. 5 (PE, p. 39:8-11).

⁸⁵ Ex. 10 (PE, p. 264, ¶ 1.d).

⁸⁶ Ex. 10 (PE, p. 264, ¶ 1).

⁸⁷ Ex. 10 (PE, p. 264, ¶ 1.c).

63. A professional monitor was appointed during Victoria’s custodial time because “[t]he Court is concerned about [Victoria] posing a risk of abducting [Leo].”⁸⁸

64. William was temporarily awarded sole legal and physical custody of Leo, with visitation to Victoria.⁸⁹ The parties were ordered not to remove Leo from Los Angeles County.⁹⁰ Victoria was ordered to surrender all of Leo’s passports, and not to apply for new ones.⁹¹

65. The temporary custody orders were modified several times. The orders in effect now provide joint physical and legal custody of Leo.⁹² In its ruling on the motion to quash, the Superior Court lifted the monitoring requirement because Victoria convinced the court that, “had she really wanted to leave [the U.S. with Leo in violation of the court order], she likely could have done so.”⁹³

(12) *The following day, Victoria files a custody action in Belarus and keeps it secret from William.*

66. On July 27, 2017, the day after the Superior Court made its temporary custody orders, Victoria filed an action in the Belarus court to determine her rights of custody and visitation over Leo (which is referred to

⁸⁸ Ex. 7 (PE, pp. 167:19-27).

⁸⁹ Ex. 10 (PE, p. 262, ¶ 3.b).

⁹⁰ Ex. 10 (PE, p. 263, ¶ 3.c.2.b).

⁹¹ Ex. 10 (PE, p. 264, ¶ 7 & p. 265, ¶ 8).

⁹² Ex. 7 (PE, pp. 167-168).

⁹³ Ex. 5 (PE, 92:15).

as the “Belarus custody action”).⁹⁴ Neither the parties nor Leo were in Belarus when that case was filed.⁹⁵ They were all living in California.

67. The Belarus custody action was given a different case number than the residency action.⁹⁶ William was not notified of the Belarus custody action because the documents were mailed to the apartment in Belarus owned by Victoria (*i.e.*, Minsk, 12 Polevaya Street, apartment 7).⁹⁷

68. Then, on July 28, 2017, Victoria filed a motion to quash William's Petition to Establish Parental Relationship for lack of subject matter jurisdiction, or to dismiss or stay his action for *forum non conveniens*.⁹⁸

(13) *Less than a week after filing the Belarus custody action, the Belarus court awards Victoria sole custody of Leo in a final judgment, without notice to William.*

69. On August 3, 2017, just six days after Victoria filed her custody action in Belarus, the Belarus court held a hearing without notice to William.⁹⁹ The Belarus court awarded Victoria sole custody of Leo and limited William’s visitation to one visit a month, to take place in Victoria’s presence in Belarus.¹⁰⁰ There is no evidence Victoria notified the Belarus court of the pending California action or the temporary custody orders the Superior Court had made the day before she filed the Belarus custody action.

⁹⁴ Ex. 5 (PE, p. 38:4-6).

⁹⁵ Ex. 5 (PE, p. 36:17-20).

⁹⁶ Ex. 5 (PE, p. 67:5-7).

⁹⁷ Ex. 5 (PE, pp. 76:10 - 77:10).

⁹⁸ Ex. 13 (PE, p. 285).

⁹⁹ Ex. 5 (PE, p. 76:10-22).

¹⁰⁰ Ex. 5 (PE, p. 38:8-11).

70. The Superior Court noted that Victoria’s custody action in Belarus “went from filing to decision in under a week. That is suspiciously fast.”¹⁰¹ The Superior Court found it “troubling” how Victoria secretly obtained a custody order from the Belarus court while the California action was pending.¹⁰²

The process [in Belarus] went from application to judgment in record-breaking time. [Victoria] filed the application on Thursday, July 27, 2017. It appears to have been mailed on Monday, July 31, 2017. The hearing was held a scant few days later, at which point the decree was issued. The total time was under a week, without any showing anywhere in the court papers of any urgency. [¶]

There is no possibility that [William] could have received notice from the Belarus court at the apartment in Minsk; he was in California during the entire period and did not have agents or contacts in Minsk that would have checked the mail. Nor did [Victoria] provide him with any notice during the relevant period. She claims that she tried to tell him orally but that he refused to let her. [William] denies that, and again, the Court credits [William]’s testimony. [¶]

It is impossible for this Court to believe that in the middle of custody proceedings in California, [William] would refuse to hear about similar proceedings in Belarus. Moreover, it would have been natural and easy for [Victoria] to have her attorneys in California provide notice to [William]’s attorneys in California. The Court believes that [Victoria] testified that she did so, although the Court does not have a transcript of those proceedings and [Victoria]’s counsel has claimed that the Court is mis-remembering. But whether the Court remembers correctly or not, it is undisputed that [Victoria]’s counsel provided no advance notice of the August 3, 2017 hearing and that they made no attempt to do so. But be that as it may, the fact remains that no notice was provided to [William] or his counsel. [¶]

¹⁰¹ Ex. 5 (PE, p. 77:10-11).

¹⁰² Ex. 5 (PE, p. 76:10-11).

Nor did [Victoria] make any attempt to inform the Belarus court that [William] was out of the country during the period in which notice was being given, or suggest that the court attempt to reach [William] through any other method, even though she plainly was able to communicate with him and his California counsel and had ready access to the Belarus court.¹⁰³

71. The Superior Court found that Victoria actively concealed the existence of the Belarus custody action from William:

[T]here were a number of filings in California before [the hearing in Belarus on] August 3, 2017. In none of them did [Victoria] or her counsel inform the Court or [William] that a hearing was about to go forward in Belarus. The only reasonable inference is that the proceedings were deliberately hidden from [William] (although perhaps not by California counsel) so that he would be unable to retain counsel in Belarus and be heard there. That is not to say that the Belarus court was aware of all of this; there is no direct evidence to that effect. But it is to say that the combination of the unusual (to put the best light on it) speed of the proceedings in Belarus coupled with the decision to keep those proceedings secret from [William] is a problem. [¶]¹⁰⁴

72. The Superior Court also found that Victoria's mother lied to the Belarus court about William having been informed about the hearing on the Belarus custody action:

However, it gets even worse. According to the transcript of the August 3, 2017 hearing in Belarus (exhibit 89), [Victoria]'s mother informed the Belarus court [Victoria] informed her that [William] 'knows that the issue on determination of the baby's place of residence and definition of the order of the father's participation in his son's upbringing is being considered in the court of the Republic of Belarus. But he does not want to come to Belarus to the place of his registration in the Republic of Belarus.' That statement

¹⁰³ Ex. 5 (PE, pp. 76:10 - 77:10).

¹⁰⁴ Ex. 5 (PE, pp. 77:21 - 78:4).

was flatly false. (That is, the representation is untrue; the Court has no way of knowing whether or not [Victoria] told her mother what her mother repeated to the Belarus court.)
[¶]

In any event, without any apparent meaningful questioning as to how [William] had notice or any proof that he had, the Belarus court nonetheless went forward on the merits. The Court cannot help but conclude that [William] was accorded nothing like notice that complies with Family Code section 3408.¹⁰⁵

73. After learning of the court action in Belarus, William appealed to the Belarus court to change its ruling, but he lost.¹⁰⁶ The Superior Court found: “[William] raised the notice issue in his appeal of the August 3, 2017 decree. In its decision affirming the decree, the Belarus court simply ignored the entire subject. Instead, it re-considered the merits and concluded that the right outcome had been reached.”¹⁰⁷

(14) *The Superior Court rejects Victoria’s contention that the Belarus residency and custody actions are a single proceeding.*

74. Under the UCCJEA, a California court must not exercise jurisdiction if, at the time the California action was filed, a child custody proceeding was filed in a foreign state having jurisdiction in substantial conformity with the UCCJEA. (Fam. Code, § 3426, subd. (a).)

75. William argued that the Belarus residency action was not a child custody proceeding because no issues of custody or visitation were involved in the residency determination. To bolster her claim that the Belarus residency action was a “child custody proceeding” under the

¹⁰⁵ Ex. 5 (PE, p. 78:4-17).

¹⁰⁶ Ex. 5 (PE, p. 79:3-6).

¹⁰⁷ Ex. 5 (PE, p. 79:3-6).

UCCJEA, Victoria claimed that her Belarus custody action (which was filed after William's California action) was part of the Belarus residency action.

76. The Superior Court rejected the contention that the Belarus residency action and Belarus custody action were a single proceeding:

[William]'s expert, Dr. Danilevich, opined that the residency application and the visitation application were two different applications, and should be considered separately; that is, the residency application stands or falls on its own, it ought not be considered a part of a single action or proceeding that comprises both. [Victoria]'s expert, Dr. Babkina, differed. She opined that the residency application was the first step toward a custody determination, and thus should be considered a part of a single overall legal process. [¶]

It is hard for the Court to harmonize those two opinions, and the Court is not itself well enough versed in Belarus law to have a high degree of confidence as to the outcome. Yet there are some salient facts that bear on the question. Dr. Babkina admitted that the two applications could be heard by different jurists (although in this case, they were not). And nothing required [Victoria] to file the visitation application if she had not chosen to do so—in other words, the question of custody or visitation would not have come up by necessity in the residency application. [¶]

Similarly, the residency application yielded a final decision (that is, a decision that resolved all of the issues before the Court in the application without the need for further hearings at the trial court level), and did so before the visitation application was even filed; it began and ended before the visitation application began. The two applications also had different case numbers, and there is no order stating that the two applications need to be considered together or that they are deemed related. [¶]¹⁰⁸

¹⁰⁸ Ex. 5 (PE, pp. 66:14 - 67:13).

(15) *The Superior Court concludes that it has jurisdiction over Leo under the UCCJEA.*

77. The Superior Court found that California has subject matter jurisdiction over Leo to make an initial child custody determination, per Family Code section 3421, subdivision (a)(2), because of Leo’s significant connections to the state and the availability of substantial evidence here to make a best interests finding.¹⁰⁹

(16) *The Belarus residency decree and custody decree were not entitled to recognition or enforcement in California.*

78. The Superior Court found that none of the orders entered by the Belarus court were capable of recognition under the UCCJEA “as no notice was given as required under Family Code section 3408.”¹¹⁰

In sum, the Court will not enforce the August 3, 2017 decree. It was made without notice or an opportunity to be heard, as is required pursuant to Family Code sections 3408 and 3445(d)(3). In the Court's mind, the question is not even close. The Court also will not enforce the June 7, 2017 decree either, although the question is a closer one. While it may well be that under Belarus law, the appeal from that decree was properly denied, it remains the case that the order was made without notice or an opportunity to be heard, and the UCCJEA speaks of notice and an opportunity to be heard at the hearing, not at the appellate stage.¹¹¹

79. “Moreover, none of the experts in this case—from either side—opined that Belarus law on jurisdiction is substantially similar to the UCCJEA. In fact, the Belarus court stated often that its determinations were

¹⁰⁹ Ex. 5 (PE, p. 58:2-5).

¹¹⁰ Ex. 5 (PE, p. 90:21-24).

¹¹¹ Ex. 5 (PE, p. 80:15-23).

made based on Leo's best interest, not on any of the factors articulated in the UCCJEA.”¹¹²

80. The Superior Court, therefore, declined to recognize or enforce the Belarus court decrees in the Belarus residency action and the Belarus custody action.¹¹³

(17) *The Superior Court quashes William’s Petition to Establish Parental Relationship for lack of jurisdiction over Leo.*

81. The Superior Court found “it has subject matter jurisdiction pursuant to Family Code section 3421(a)(2).”¹¹⁴ Nevertheless, the Superior Court ruled, on January 12, 2018, that it could not exercise its jurisdiction to render an initial child custody determination over Leo. It concluded that the Belarus residency action was, as a matter of law, a child custody proceeding that “was commenced before those in the instant case.”¹¹⁵

82. To reach that conclusion, the Superior Court considered whether the Belarus residency action was, in effect, a child custody proceeding within the meaning of the UCCJEA, which it viewed solely “as a question of California law.”¹¹⁶ The UCCJEA defines a child custody proceeding as “a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue.” (Fam. Code, § 3402, subd. (c).)

¹¹² Ex. 5 (PE, pp. 59:25 - 60:2).

¹¹³ Ex. 5 (PE, p. 90:21-24).

¹¹⁴ Ex. 5 (PE, p. 90:14-22).

¹¹⁵ Ex. 5 (PE, p. 90:14-22).

¹¹⁶ Ex. 5 (PE, p. 70:3-17).

83. In answering that legal question, the Superior Court concluded that the Belarus residency action was a child custody proceeding. “The issue that the Belarus court was deciding [in the residency action] was ... where, as a legal matter, he was to live as his principal residence.”¹¹⁷ The Superior Court stated:

The Belarus court then decides to ‘determine the place of residence of minor Leo Alexander Azarenka McKeague, born on December 19, 2016, by the place of residence of [his] mother Victoria Azarenka, born on July 31, 1989, at the address: Minsk, 12 Plevaya Street, apartment 7.’ In other words, the Court does not find that Leo is a Belarus citizen for purposes of benefits or the like; *it gives the actual street address*. And critical to its finding is not just that Leo's mother is a Belarus citizen, but the fact that she takes care of Leo herself. The Court's reading of the decree is that Leo's principal residence is wherever his mother is as opposed to wherever his father is. That makes it a proceeding in which ‘physical custody’ of Leo is at issue.¹¹⁸

84. One of the problems with that conclusion is the “actual street address” mentioned in the Belarus residency decree is the apartment where none of the parties or Leo ever stayed.¹¹⁹ More importantly, custody and residency are not synonymous, so an action to determine Leo’s place of residence was not a proceeding in which custody or visitation were at issue for purposes of the UCCJEA.

85. Even if it were, the UCCJEA does not permit a California Court to decline jurisdiction to a foreign state unless that state has “jurisdiction substantially in conformity with” the UCCJEA. (Fam. Code, § 3426, subd. (a).) A fundamental requirement of the UCCJEA is that,

¹¹⁷ Ex. 5 (PE, p. 69:10-13).

¹¹⁸ Ex. 5 (PE, pp. 69:19 - 70:1), emphasis added.

¹¹⁹ Ex. 5 (PE, p. 36:4-7).

“[b]efore a child custody determination is made under [the UCCJEA], notice and an opportunity to be heard in accordance with the standards of Section 3408 must be given to all persons entitled to notice....” (Fam. Code, § 3425, subd. (a).) Another fundamental requirement of the UCCJEA is that jurisdiction is to be determined exclusively on the factors listed in Family Code section 3421—not based on the child’s best interests. (Fam. Code, § 3421, subd. (b).)

86. Despite the finding William received no notice of, or opportunity to be heard in, the Belarus residency action,¹²⁰ and the finding that Belarus made the residency decree on best interests factors that are inconsistent with the UCCJEA,¹²¹ the Superior Court concluded that Belarus acted with jurisdiction substantially in conformity with the UCCJEA.¹²²

87. William believes the Superior Court erred in concluding the Belarus residency action deprived California of its jurisdiction to make an initial custody determination over Leo. The Belarus residency action was not a custody proceeding and the Belarus court did not have jurisdiction in substantial conformity with the UCCJEA.

(18) *The order quashing William’s petition was prejudicial error.*

88. The Superior Court found that California is the best forum to determine custody, had it not surrendered its jurisdiction over Leo to Belarus:

Weighing all of these factors together, the Court believes that if the issue were only one of inconvenient forum, on balance

¹²⁰ Ex. 5 (PE, p. 90:21-24).

¹²¹ Ex. 5 (PE, pp. 59:25 - 60:2).

¹²² Ex. 5 (PE, pp.58:20 - 63:9).

it would exercise its jurisdiction. The factor that tips the scale is the additional procedural safeguards that California provides to ensure that both sides are heard, and therefore that the best decision is ultimately made.

[fn. 6: That is not to say that such a decision would favor [William] ... the Court is only stating that before awarding custody, the Court would ensure that all parties had a full and fair opportunity to present their respective cases.]¹²³

89. The Superior Court acknowledged it “is very aware that the likely outcome of this decision will be to drastically limit [William]’s interaction with Leo—probably far more than the limit that would occur were [William] to have primary custody.”¹²⁴

90. The Superior Court hoped Victoria would allow more time, based on something Victoria’s mother told the Belarus court when she was obtaining the custody orders against William in secret: “In the Belarus proceedings, [Victoria]’s mother told the court that [Victoria] would be open to have Leo visit the United States and increase [William]’s time with Leo. The Court very much hopes that she makes good on that representation.”¹²⁵

(19) *A three-week stay was granted by the Superior Court.*

91. William asked the Superior Court for a stay pending appeal.¹²⁶ “To protect the Court of Appeal’s jurisdiction, this Court stays the effect of its order for three weeks from the date this order is entered (and the protective orders are extended for a like period of time), which will

¹²³ Ex. 5 (PE, pp. 86:21 - 87:3).

¹²⁴ Ex. 5 (PE, p. 91:6-8).

¹²⁵ Ex. 5 (PE, p. 92:18-22).

¹²⁶ Ex. 5 (PE, p. 91:14-16).

allow [William] time to seek an additional stay from the Court of Appeal.”¹²⁷

92. That stay expires February 2, 2018.

(F) Basis for relief.

93. Code of Civil Procedure section 923 empowers this Court to stay proceedings, issue a writ of supersedeas, or to make any order necessary to aid of its appellate jurisdiction.

(G) Absence of other relief.

94. This Court is the only option for a further stay pending appeal to protect William’s fundamental right to have parent-child relationship with Leo.

(H) Need for a stay.

95. This petition requests an temporary stay of the order quashing William’s Petition to Establish Parental Relationship under rule 8.112 (c)(1) of the California Rules of Court pending the ruling on this petition, and for a stay pending appeal.

96. The U.S. and Belarus are not parties to any treaty addressing child abduction or the mutual recognition of child custody orders. As the Superior Court noted, the lack of such a treaty means there is no process to “ensure that Leo would be returned here if taken there.”¹²⁸ Belarus’ accession to the Hague Convention on the Civil Aspects of International Child Abduction has not been accepted by the U.S. due to concerns about human rights in Belarus.¹²⁹

¹²⁷ Ex. 5 (PE, p. 91:21-25).

¹²⁸ Ex. 5 (PE, p. 39:8-11.)

¹²⁹ Ex. 14 (PE, p. 386:4-21).

97. William believes Victoria will remove Leo from the U.S. after the trial court stay expires on February 2, 2018. Victoria has requested and received a wild card to compete in a tennis tournament in Doha, Qatar from February 12 to 18, 2018. If this Court does not extend the stay, Victoria will take Leo with her and he will be out of reach of our courts to compel his return. A stay is needed to extend the existing protective orders, prohibiting Victoria from removing Leo from the U.S.

98. The Superior Court found that Victoria posed a risk of abduction,¹³⁰ failed to cooperate with William in co-parenting Leo,¹³¹ withheld Leo's passport from William,¹³² and actively concealed the Belarus custody action from William.¹³³

99. If Leo were removed from the U.S. it would render moot any reversal of the Superior Court ruling, as there would be no way to get Leo back here for custody proceedings.

100. There is no prejudice in the issuance of a stay because no order has been made by any alternate jurisdiction capable of recognition and enforcement under the UCCJEA. The terms of the UCCJEA require that, in any declination of a State to exercise its jurisdiction, the remedy is a stay and the maintenance of protective orders, pending further determination of the court of competent jurisdiction and orders being rendered by such court capable of enforcement. (See, Fam. Code, § 3426, subd. (b).)

¹³⁰ Ex. 10 (PE, p. 264, ¶¶ 1 & 1.c).

¹³¹ Ex. 10 (PE, p. 264, ¶ 1.d).

¹³² Ex. 10 (PE, p. 264, ¶ 1.c).

¹³³ Ex. 5 (PE, pp. 77:21 - 78:4).

101. William's appeal may be granted preference to shorten the time the parties must wait for a decision, lessening any prejudice the stay on appeal may cause to Victoria.

III. PRAYER

(A) Issue a temporary stay of the January 12 order.

102. William prays for a temporary stay of the January 12, 2018, order granting Victoria's motion to quash William's Petition to Establish Parental Relationship, Child Support, Child Custody and Visitation regarding their 13-month-old son, Leo. William requests that the temporary orders by the Superior Court, awarding joint physical and legal custody and prohibiting the removal of Leo from this jurisdiction, remain in effect during the stay.

103. The Superior Court stayed its order until February 2, 2018.

104. A temporary stay by this Court is needed under rule 8.112 (c)(1) of the California Rules of Court to preserve the status quo. Before a writ of supersedeas may be issued, Victoria must be given 15 days to oppose this petition per rule 8.112(b)(1), unless shortened by this Court. The Superior Court stay will expire before Victoria's brief in opposition is due.

105. If a temporary stay is not granted, the joint custody orders will evaporate and the anti-abduction orders will be lifted. Victoria can then take Leo out the U.S. as William believes she intends to do, thereby removing Leo from the reach of the California courts. That will result in a de facto termination of William and Leo's parent-child relationship, and render the appeal moot. It will also moot this petition since there will be no mechanism to compel Leo's return here if the writ is issued.

106. Therefore, William needs a temporary stay and extension of the temporary custody and anti-abduction orders so there is time for this Court to rule on the petition for writ of supersedeas.

(B) Issue a writ of supersedeas.

107. After affording Victoria time to file an opposition and this Court has considered the merits of this petition, William prays for a writ of supersedeas, staying the January 12 order quashing his Petition to Establish Paternal Relationship. The stay is requested for the duration of his appeal, with an extension of the temporary custody and anti-abduction orders.

108. A stay on appeal will preserve William's rights as a parent. A reversal of the order quashing his parentage action will be meaningless once Leo is taken out of the U.S., since there is no treaty between the U.S. and Victoria's native country, the Republic of Belarus, for the return of a child. Leo will be outside the jurisdiction of the California courts and deprived of his relationship with William if a stay on appeal is not granted.

(C) If these requests are denied, issue a temporary stay so William can petition the California Supreme court for a stay.

109. If this Court is not inclined to issue a stay on the merits, William asks that a temporary stay, and an extension of the temporary custody and anti-abduction orders, be issued for 30 days so he can petition the California Supreme Court for a stay.

(D) Award William such other and further relief as deemed just and proper.

Dated: January 29, 2018

WALZER MELCHER LLP

By: _____/s/

Christopher C. Melcher
Leena Hingnikar
Edward M. Lyman
Attorneys for Petitioner

IV. VERIFICATION

I am the petitioner, am over the age of 18, and have read this Petition for Writ of Supersedeas and know its contents. The facts alleged are within my own personal knowledge and I know these facts to be true (except for those stated on information and belief, of which I am informed and believe are true).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 27, 2018

_____/s/
Petitioner, W.M.

V. MEMORANDUM OF POINTS AND AUTHORITIES

(A) Summary of relief requested.

William prays for a temporary stay before February 2, 2018 (when the trial court stay expires). The temporary stay will allow this Court time to rule on his Petition for Writ of Supersedeas. The temporary stay is needed because Victoria must be given 15 days to oppose the Petition before a writ of supersedeas can issue. The Superior Court stay will have expired by the time Victoria's briefing is due. Therefore, the temporary stay is necessary to preserve this Court's jurisdiction and the status quo while it rules on the Petition for Writ of Supersedeas. The temporary custody and anti-abduction orders should be extended during the stay.

Once this Court has considered the merits of this Petition, William asks for issuance of the writ of supersedeas, staying the order quashing his Petition to Establish Parental Relationship, Child Support, Child Custody, and Visitation. That stay, and the extension of the temporary custody and anti-abduction orders, will preserve this Court's jurisdiction and the status quo pending William's appeal.

If this Court is not inclined to grant either stay, William requests a temporary stay and extension of the temporary custody and anti-abduction orders for 30 days so he can petition the California Supreme Court for a stay.

(B) William and Leo will suffer irreparable harm if a stay is denied.

The Superior Court applied the wrong legal standard in ruling on Victoria's motion to quash William's Petition to Establish Parental Relationship, Child Support, Child Custody, and Visitation. Because the Superior Court misunderstood the law, each step of its jurisdictional analysis was flawed. The error is apparent from the conclusion it reached.

The Superior Court concluded that Leo's home state was not California, even though his parents decided he would be born here and brought him into Victoria's home in Manhattan Beach where they raised him until leaving for an overseas trip for Victoria's career as an international tennis athlete. The Superior Court found that the U.S. was Leo's country of habitual residence when William filed this California action, but ultimately concluded that California was not Leo's home state.

Although lacking home state jurisdiction, the Superior Court found that it had jurisdiction to make a custody determination over Leo because of his significant connections to California and that substantial evidence exists here. The Superior Court found that California is the best forum to decide rights of custody because the procedural safeguards in California ensure each parent will have frequent and continuing contact with their 13 month old son. The Superior Court recognized that Leo's time with William will be drastically limited if Belarus were to decide custody, compared the joint custody orders made by the Superior Court.

The Superior Court, however, incorrectly thought it had to decline jurisdiction because Victoria had filed her Belarus residency action before William commenced custody proceedings here. That decision was an error because the Belarus residency action was not a custody proceeding and Belarus did not have jurisdiction over Leo in substantial conformity with the UCCJEA. The Superior Court found that the Belarus residency action was conducted without notice to William. Still, the Superior Court believed that sham proceeding in Belarus deprived California of its legitimate jurisdiction to make an initial custody determination over Leo, simply because the Belarus action was filed first.

The order quashing William’s custody action rewards the forum shopping our jurisdictional statutes are meant to prevent. William was the first party to file an action for custody of Leo. William filed his action in California because this is Leo’s home state.

Absent a stay, there will be a de facto termination of William and Leo’s parent-child relationship, depriving them of their fundamental rights. Leo was born here, is a US citizen, this is his country of habitual residence, and he has significant connections here. This is his home, and it is the only forum where custody decisions can legitimately be made.

William urgently needs a stay from this Court to prevent an injustice from occurring. When the trial court stay expires on February 2, the Superior Court’s joint custody orders will evaporate and its order preventing Victoria from removing Leo from the US will be lifted. Allowing Victoria to remove Leo from this jurisdiction will create irreparable harm. Because the Superior Court declined jurisdiction, while also refusing to recognize or enforce the Belarus custody order, there will be no custody orders capable of being enforced here once the trial court stay expires on February 2. The Superior Court found that surrendering its jurisdiction to Belarus will “drastically limit” William’s interaction with Leo.¹³⁴

William believes Victoria will take Leo out of the U.S. immediately thereafter. Leo will then be out of reach of the California courts. The U.S. has no treaty with Belarus for the return of a child for custody proceedings. William’s appeal will be moot once Leo is removed from the country.

There is no prejudice to Victoria by extending the stay because, as the Superior Court found, she spends significant time at her home in

¹³⁴ Ex. 5, (PE, p. 91:6-8).

Manhattan Beach, California. That is her residence when she is not travelling for her tennis career. The parties have joint physical custody under the current Superior Court order, providing both of them frequent and continuing contact with Leo. Since Leo is only 13 months old, it is imperative that his bonds and attachment to both parents not be broken. The only way to prevent Leo from being taken 6,000 miles away to Belarus is to grant a stay.

(1) *A stay is needed to preserve the status quo and this Court's jurisdiction over Leo.*

“Appellate courts are empowered to issue a writ of supersedeas in appropriate circumstances. [Citations.] A writ of supersedeas is an appellate court order suspending the enforcement of a trial court judgment or order while an appeal is pending. [Citation.]” (*Quiles v. Parent* (2017) 10 Cal.App.5th 130, 136.)

“ ‘The right of appeal would be but an empty thing if the appellate court could not, and in proper cases did not, afford to the appellant a means whereby the fruits of victory were fully preserved to him in the event of a reversal of the judgment against him.’ [Citation.]” (*Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 66.)

“The writ of supersedeas is a purely auxiliary writ, serving the sole function of preserving our appellate jurisdiction pending review of the appeal and a ruling on its merits. [Citations.] ... [T]he writ may issue without oral argument once the matter has been fully heard on the verified pleadings.” (*Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861.)

There is statutory authority for a writ of supersedeas in section 923 of the Code of Civil Procedure:

The provisions of this chapter shall not limit the power of a reviewing court or of a judge thereof to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction.

(Code Civ. Proc., § 923.)

A writ of supersedeas may be granted upon a showing that (1) an appeal is pending, (2) a stay is needed to preserve the status quo, the effectiveness of a future judgment, or otherwise aid in the Court's jurisdiction, and (3) the appeal has merit. (Code Civ. Proc., § 923; *Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 67.)

William meets the legal criteria for a stay:

First, he has filed a notice of appeal from the order quashing his Petition to Establish Parental Relationship, Child Support, Child Custody, and Visitation.

Second, a stay is needed to preserve the status quo and to maintain this Court's jurisdiction over Leo. Without a stay, the joint custody orders will evaporate and the abduction prevention orders will be lifted (allowing Victoria to take Leo to Belarus where he will be out of reach of this Court's jurisdiction to order his return). The only way to maintain frequent and continuing contact between Leo and both of his parents is to maintain the joint custody orders and anti-abduction orders pending appeal. The only way to maintain this Court's jurisdiction over Leo is to prohibit his removal from the U.S.

Third, the appeal has merit because prejudicial error occurred. The Superior Court misunderstood the law and declined to exercise its jurisdiction to make custody orders using an incorrect first-in-time approach instead of following the jurisdictional mandates of the UCCJEA, as discussed below.

(2) *William requested a trial court stay.*

“An application for a stay of a judgment should, wherever possible, be made first in the superior court. [Citation.]” (*Veyna v. Orange County Nursery, Inc.* (2009) 170 Cal.App.4th 146, 157.)

William requested a stay from the Superior Court pending appeal.¹³⁵ A three-week stay was granted: “To protect the Court of Appeal’s jurisdiction, this Court stays the effect of its order for three weeks from the date this order is entered (and the protective orders are extended for a like period of time), which will allow [William] time to seek an additional stay from the Court of Appeal.”¹³⁶ That stay expires February 2, 2018.

(3) *A temporary stay may be granted pending a ruling on a petition for writ of supersedeas*

The rules recognize that a stay may be needed so the other party has an opportunity to oppose the writ petition. “The petition may include a request for a temporary stay under rule 8.116 pending the ruling on the petition.” (Cal. Rules Ct., rule 8.112(c).)

A temporary stay is needed because the Superior Court stay will expire on February 2, before this Court can issue a writ of supersedeas. “The court may not issue a writ of supersedeas until the respondent has had the opportunity to file an opposition.” (Cal. Rules Ct., rule 8.112(b)(3).)

¹³⁵ Ex. 5 (PE, p. 91:14-16).

¹³⁶ Ex. 5 (PE, p. 91:21-25).

“Unless otherwise ordered, any opposition must be served and filed within 15 days after the petition is filed.” (*Id.*, subd. (b)(1).)

(4) *A balancing of the hardships weighs in favor of a stay.*

The Court should balance the hardships between the parties by considering the impact of granting a stay if the appealed order is affirmed, versus the impact of denying the stay if the order is reversed. (*Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal.App.2d 368, 375–376.)

In *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861, the Court stayed a judgment that would have prohibited a county from increasing local fees as a special tax. The judgment was stayed to protect the county’s rights if its appeal succeeded. “A stay will not result in disproportionate injury to [plaintiff-respondent] in the event of an affirmance, since excessive fees may easily be refunded [by the county].” (*Ibid.*)

In *Estate of Murphy* (1971) 16 Cal.App.3d 564, 569, the Court stayed an order terminating a trust, to keep the trust property from being distributed before the appeal was decided. The Court fast-tracked the appeal to lessen any impact on the plaintiff-respondent.

Should the trust property be distributed and appellants later prevail on appeal, the task of recovering the property and redistributing it would be enormous. Many of the beneficiaries reside in other states, which would further complicate the litigation which might follow. At least some of the appellants (claimants to an interest in the trust) are of limited financial means, and a \$175,000 undertaking may be prohibitive. The trustee is a reputable financial institution, so there is little likelihood that delay in distribution may result in the beneficiaries' not realizing the fruits of the judgment.

We believe the potential damage which may result to appellants in allowing the estate to be distributed at this time outweighs the hardship to respondent in postponing

distribution. Moreover, any hardship which may be occasioned by delay can be mitigated by expeditious prosecution and determination of the appeal. . . . No extensions of time will be granted for preparation of briefs and argument.

(*Estate of Murphy, supra*, 16 Cal.App.3d at p. 569.)

Here, a denial of the stay will make William’s appeal an “empty thing.” Without a stay, the joint custody orders will evaporate, the abduction prevention orders will be lifted, and no orders capable of enforcement will exist. Victoria could then take Leo out of the U.S., beyond the reach of this Court’s jurisdiction, depriving William and Leo of their fundamental right to a parent-child relationship. The Superior Court found that surrendering its jurisdiction to Belarus will “drastically limit” William’s interaction with Leo.¹³⁷ Due to the gravity of issues at stake, justice requires that a stay be granted while this Court considers the appeal.

William believes that Victoria plans to take Leo out of the U.S. once the trial court stay expires on February 2 because she has a tennis tournament two weeks from now in Doha, Qatar.¹³⁸ The Superior Court found that Victoria posed a risk of abduction, albeit a lessened risk since she did not abduct Leo during the Superior Court proceedings.¹³⁹

If William’s appeal is unsuccessful, the stay will not impose a hardship on Victoria. During the appeal, the Superior Court will continue to exercise jurisdiction to make temporary custody orders based on Leo’s best interests, ensuring both parties have frequent and continuing contact with their 13 month old son. Victoria spends significant time at her home in Manhattan Beach, which is her home base when she is not traveling for her

¹³⁷ Ex. 5, (PE, p. 91:6-8).

¹³⁸ Petition for Writ of Supersedeas, p. 38, ¶ 97, above.

¹³⁹ Ex. 10 (PE, p. 264, ¶¶ 1 & 1.c) & Ex. 5 (PE, 92:6-15).

tennis career. Allowing Victoria to take Leo outside the U.S. would deprive the California courts of power to compel Leo's return if William's appeal succeeds.

On balance, the disruption to the parent-child relationship between William and Leo, a 13 month old child, that would be caused by a denial of a stay outweighs any inconvenience to Victoria by granting the stay.

(5) *William and Leo's constitutional rights will be violated if a stay is denied and the order is not reversed.*

There is a compelling state interest in establishing paternity for all children. (Fam. Code, § 7570, subd. (a).)¹⁴⁰ “[K]nowing one's father is important to a child's development.” (*Id.*, subd. (b).)

The right to “[t]he biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship.” (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816.) The California Supreme Court explained in *Adoption of Kelsey S.*:

The child has a genetic bond with its natural parents that is unique among all relationships the child will have throughout its life. ‘The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility.’ [Citation.] It therefore would be curious to conclude that the child's best interest is served by allowing the one parent (the mother) who wants to sever her legal ties to decide unilaterally that the only other such tie (the father's) will be cut....”

(*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 848.)

¹⁴⁰ Undesignated statutory references are to the Family Code.

The right to raise one's child has been deemed by the United States Supreme Court to be a basic civil right. (*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541; *Stanley v. Illinois* (1972) 405 U.S. 645, 651 [fundamental right].) This is a right far more precious than property rights. (*May v. Anderson* (1953) 345 US 528, 533.) A parent's right to make decisions concerning the care, custody, and control of his or her child are fundamental rights protected under the due process clause of the Fourteenth Amendment of the United States Constitution. (*Troxel v. Granville* (2000) 530 U.S. 57, 66.)

If a stay is denied, allowing Victoria to remove Leo from the reach of the California courts, there will be a de facto termination of William and Leo's fundamental right to a parent-child relationship.

(C) William's appeal raises substantial issues.

The exclusive jurisdictional basis for making a child custody determination is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). (§ 3421, subd. (b).) "The purposes of the UCCJEA are 'to avoid jurisdictional competition between states or countries, promote interstate cooperation, avoid relitigation of another state's or country's custody decisions and facilitate enforcement of another state's or country's custody decrees.' [Citations.]" (*Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276, 1287.)

Absent an emergency, "a court of this state has jurisdiction to make an initial child custody determination only if any of the following are true:

- (1) This state is the home state of the child on the date of the commencement of the proceeding....
- (2) A court of another state does not have jurisdiction under paragraph (1) ... and both of the following are true:

(A) 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.

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

(3) All courts having jurisdiction under paragraph (1) or (2) 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 Section 3427 or 3428.

(4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

(§ 3421, subd. (a).)

(1) *The Superior Court misinterpreted the law in determining California is not Leo’s home state.*

‘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. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(§ 3402, subd. (g).)

“The UCCJEA prioritizes home state jurisdiction over other bases of jurisdiction.” (*Schneer v. Llauro*, *supra*, 242 Cal.App.4th at p. 1287.)

California is Leo’s home state because Leo was born in California and has lived here since. The parties decided that Leo would be born in Los Angeles and they picked a pediatrician for him here.¹⁴¹ Leo was raised in

¹⁴¹ Ex. 5 (PE, pp. 34:26 - 35:5).

Victoria's home in Manhattan Beach, where she spends significant time. The Superior Court found that Victoria's connections to California are just as strong as, if not stronger than, William's connections.¹⁴²

Leo's temporary absence from California during the overseas trip with his parents is deemed "part of the period" he lived in California. (§ 3402, subd. (g).) Leo was in Belarus to visit Victoria's family, went to Spain and London due to Victoria's training and tournament schedule, then returned to California.¹⁴³ They had tickets to return to Los Angeles.¹⁴⁴ Leo's nursery remained intact at Victoria's home in Manhattan Beach when they left for the trip. When the parties broke up in London, Victoria came home to Manhattan Beach with Leo.

When William filed his custody action on July 20, 2017, California was Leo's home state. The time Leo spent outside the U.S. is deemed time in California because he did not abandon California when he accompanied his parents on the overseas trip. (See, § 3402, subd. (g).) Therefore, Leo had lived here with both parents "for at least six consecutive months immediately before the commencement of a child custody proceeding." (§ 3402, subd. (g).) On July 26, 2017, the Superior Court found that Leo's country of habitual residence is the U.S.¹⁴⁵

But the Superior Court incorrectly concluded that Leo did not "live" in California for at least six consecutive months prior the commencement of William's custody action. The Superior Court thought Leo could not have lived in California during the time he spent Belarus, Spain, and

¹⁴² Ex. 5 (PE, p. 56:6-12).

¹⁴³ Ex. 5 (PE, p. 35:8-13) & Ex. 6 (PE, p. 110:5-6).

¹⁴⁴ Ex. 5 (PE, pp. 50:26 - 51:2).

¹⁴⁵ Ex. 10 (PE, p. 263, ¶ 3.e.3).

England. The Court failed to properly apply the law that “[a] period of temporary absence of any of the mentioned persons is part of the period” the child lived in the state. (§ 3402, subd. (g).) The Superior Court used a physical presence test to determine where Leo lived in concluding California was not Leo’s home state.

But the UCCJEA provides that “[p]hysical presence of . . . a party or a child is not necessary or sufficient to make a child custody determination.” (§ 3421, subd. (c).) The Superior Court noted, however: “At the outset, it is agreed that Leo was not *physically present* in any single state for the six months immediately prior to [William]’s petition.”¹⁴⁶ After acknowledging that temporary absences “do not stop the six month clock from ticking,”¹⁴⁷ the Superior Court concluded that California was not the home state because William “candidly admitted that the parties had not discussed where Leo would be raised, and thus he cannot show a mutual intent that Leo reside in California.”¹⁴⁸

The Superior Court conceded: “The question [was] not an easy one.”¹⁴⁹ It concluded that Leo stopped living in California after he went on the trip to Belarus on March 1, 2017.

The Superior Court also found that there was no proof the parties mutually intended for Leo to live in Belarus, and so Leo did not live there either.¹⁵⁰ Clearly, Leo must have lived somewhere, but the Court’s confusion over the home state definition led it down the wrong road to find

¹⁴⁶ Ex. 5, (PE, p. 46:1-2).

¹⁴⁷ Ex. 5, (PE, p. 46:6-8)

¹⁴⁸ Ex. 5, (PE, p. 46:18-20).

¹⁴⁹ Ex. 5, (PE, p. 51:14).

¹⁵⁰ Ex. 5, (PE, p. 52:20 - 54:2).

he lived nowhere.

The home state question is easily resolved when applying an objective standard to the facts, rather than decipher the subjective intentions of the parties after the fact. There is nothing more the parties could have done to objectively manifest their intention that California is Leo's home state—they decided he would be born here, they selected a pediatrician here, they brought him to Victoria's home here, where they set up a nursery, they purchased tickets to return here when they left for their trip, and Victoria returned to her home here after the parties broke up in London.

Those were the facts upon which the Superior Court should have concluded that California is Leo's home state. Instead, the Court delved into Victoria's subjective intentions and concluded that Leo was a nomad, with no home state.

Since Leo's absence from California was temporary, the six month test was met, making California his home state. Home state jurisdiction takes precedence, so the Superior Court's analysis should have ended there and it should have denied Victoria's motion to quash.

The Superior Court found that Leo's "country of habitual residence" was the U.S. when William commenced his California action.¹⁵¹ That finding is irreconcilable with the Superior Court's conclusion that California was not Leo's home state. That habitual residence finding was made after an *ex parte* hearing on July 26, 2017. The identification of Leo's country of habitual residence was a required finding before the Superior Court could make any custody orders, even on an emergency basis. "Notwithstanding any other provision of law, in any proceeding to determine child custody or visitation with a child, every custody or

¹⁵¹ Ex. 10 (PE, p. 263, ¶ 3.e.3).

visitation order shall contain ... [an] ... Identification of the country of habitual residence of the child or children....” (§ 3048, subd. (a)(5).)

The terms “habitual residence” and “home state” are used for different purposes, but the test for habitual residence may be higher than for home state. Habitual residence is a required element for the return of an abducted child under the Hague Convention on the Civil Aspects of International Abduction. As explained by *In re Marriage of Eaddy* (2006) 144 Cal.App.4th 1202:

The Convention does not define the term ‘habitual residence,’ although the cases interpreting it have concluded that the term refers to the child's customary residence prior to the wrongful removal or retention. [Citations.] Most frequently, the analysis of this issue begins with an examination of the intent of the person or persons entitled to determine where the child lives. [Citation.] If the child has not yet reached a stage in her development that she is deemed capable of making an independent decision about her living arrangements, the parents' last shared intent as to the child's residence is frequently determinative, provided that that intent has been carried out for an appreciable period of time. [Citations.]

Although the determination of the relevant intent involves a factual question, the ultimate determination of a child's habitual residence presents a mixed question of law and fact. [Citation.] Thus, a trial court considering a petition under the Convention must determine the historical facts and the applicable law and then apply the law to the facts. [Citations.] On appeal, we review the trial court's determination of the historical facts for substantial evidence but conduct a *de novo* review of the questions of law. [Citation.]

(*In re Marriage of Eaddy, supra*, 144 Cal.App.4th at p. 1213.)

Federal case law has considered whether a child’s country of habitual residence can change when a child spends time in different countries. In *Valenzuela v. Michel* (9th Cir. 2013) 736 F.3d 1173, the Court stated:

In the Ninth Circuit, we look for the last shared, settled intent of the parents in an attempt to determine which country is the ‘locus of the children's family and social development.’ [*Mozes v. Mozes* (9th Cir. 2001) 239 F.3d 1067, 1084]. *Mozes* requires that there be a shared intent to abandon the prior habitual residence, unless the child ‘consistently splits time more or less evenly between two locations, so as to retain alternating habitual residences in each.’ [Citation.] Once intent is shown, *Mozes* requires an ‘actual change in geography’ combined with an ‘appreciable period of time’ to establish a change in habitual residence. [Citations.].

(*Valenzuela v. Michel, supra*, 736 F.3d at p. 1177.)

By comparison, home state is where “a child lived with a parent ... for at least six consecutive months immediately before the commencement of a child custody proceeding.... A period of temporary absence of any of the mentioned persons is part of the period.” (§ 3402, subd. (g).)

In *Ocegueda v. Perreira* (2015) 232 Cal.App.4th 1079, the court considered where the home state was for a child who was under six months old when the action was commenced. The Court of Appeal looked to out-of-state authority under the UCCJEA because “these decisions interpret the same statutory provisions....” (*Ocegueda v. Perreira, supra*, 232 Cal.App.4th at p. 1087.) The court in *Ocegueda* stated:

In [*Powell v. Stover* (Tex. 2005) 165 S.W.3d 322 (*Stover*)], the Texas Supreme Court considered what it means to ‘live’ in a state for purposes of conferring home state jurisdiction. [fn.] The Texas court looked to the plain meaning of the statutory language and found ‘[t]he word “lived” strongly connotes physical presence. [Citation.]’ (*Stover, supra*, 165 S.W.3d at p. 326.) The [*Stover*] court found it ‘significant that

the [Texas] Legislature chose the word ‘lived’ as opposed to ‘resided’ or ‘was domiciled.’ The test for ‘residence’ or ‘domicile’ typically involves an inquiry into a person's intent. [Citation.] [¶]

In our view [i.e., the California Court of Appeal], the Legislature used the word ‘lived’ ‘precisely to avoid complicating the determination of a child's home state with inquiries into the states of mind of the child or the child's adult caretakers.’ [Citation.]” (*Ibid.*) [¶]

The Texas Supreme Court also considered the purpose of the UCCJEA. (*Stover, supra*, 165 S.W.3d at p. 326.) In so doing, the court reviewed the comments written by the National Conference of Commissioners on Uniform State Laws, appended to the original version of the UCCJEA, and found the Legislature drafted the statutory scheme in order to make ‘the determination of jurisdiction more straightforward.’ (*Stover*, at p. 326.) As noted by the Texas Supreme Court, those comments include the National Conference of Commissioners on Uniform State Laws' directive that the UCCJEA ‘should be interpreted to “avoid jurisdictional competition and conflict with courts of other States,” to ‘promote cooperation with the courts of other States,’ to ‘discourage the use of the interstate system for continuing controversies over child custody,’ and to ‘deter abductions of children.’ [Citation.]” (*Stover*, at p. 326.)

(*Ocegueda v. Perreira, supra*, 232 Cal.App.4th at pp. 1087–1088.)

The Superior Court did not use that test for home state. It considered Victoria’s subjective intent as to where she considered her residence to be. The Superior Court failed to interpret “home state” in light of the overall purposes of the UCCJEA.

Remarkably, the Superior Court found Leo’s country of habitual residence to be the U.S. (which involves a question of subjective intent to settle a child here), but in answering the question of where Leo “lived” to determine his home state the Superior Court examined the subjective intent of both parties and found a lack of shared intent to live here with Leo. The

Superior Court did not explain how Leo’s country of habitual residence was the U.S. on July 20, 2017 (when William filed his California action), but Leo’s home state was not California.

(2) *The Superior Court found jurisdiction under Section 3421(a)(2), then declined to exercise it.*

Even if this Court concludes that California was not Leo’s home state when William’s action was filed, California still had jurisdiction to make an initial custody determination under the second prong of the UCCJEA analysis. The Superior Court found that it had such jurisdiction.

Section 3421, subdivision (a)(2) provides jurisdiction when a child has no home state and: (A) the child and at least one parent have a significant connection with California; and, (B) substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships. (§ 3421, subd. (a)(2).)

The Superior Court found that Leo meets that test, *i.e.*, he has no home state, a significant connection exists, and substantial evidence is present as required by Section 3421, subdivision (a)(2).¹⁵² The Superior Court concluded it “has at least some level of subject matter jurisdiction” under that section.¹⁵³

However, the Superior Court then concluded that it had to decline to exercise its jurisdiction over Leo because of the residency action Victoria filed in Belarus without notice to William.

¹⁵² Ex. 5, (PE, pp. 54:4 - 58:6.)

¹⁵³ Ex. 5, (PE, pp. 57:26 - 58:4).

(3) *The Superior Court misinterpreted the law in determining the Belarus residency action deprived California of jurisdiction.*

[A] court of this state may not exercise its jurisdiction under this chapter 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 part, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 3427.

(§ 3426, subd. (a).)

For Section 3426, subdivision (a) to apply it must be shown that (1) a child custody proceeding was commenced in another state before the California action was filed, and (2) the other state has jurisdiction over the child in substantial conformity with the UCCJEA. (§ 3426, subd. (a).)

The Superior Court found that Victoria filed a “Residency application in May 2017—before the instant California action was filed.” Ex. 5 (PE, p. 64:17-18). However, the residency action was not a child custody proceeding and Belarus did not have jurisdiction in substantial conformity with the UCCJEA. Section 3426, therefore, did not apply.

A “child custody proceeding” is defined as a “proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue....” (§ 3402, subd. (d).)

The Belarus residency action does not meet that definition because the only issue presented was residency, not rights of custody or visitation. The Belarus court found there is a “dispute about the place of residence of the child.”¹⁵⁴ The Belarus court order declared “the place of residence of

¹⁵⁴ Ex. 5 (PE, p. 69:1-2).

minor Leo ... [is] Minsk, 12 Polevaya Street, apartment 7.”¹⁵⁵ Those are not custody orders. The Belarus residency action could not have been one for custody or visitation because there was no dispute regarding Leo; the parties were together as a couple in Paris when it was filed, and the family was together in Spain when the hearing was held.¹⁵⁶ Nor did Victoria ever assert any custodial rights under the residency decree after it was issued.

The second action she filed in Belarus was clearly one for custody, but it does not qualify under Section 3426 because it was filed after William filed his California action. If the residency action was a custody proceeding, there would have been no reason for Victoria to file the second action. The Superior Court found that the Belarus residency and custody actions were separate, unrelated cases.¹⁵⁷ Still, the Superior Court concluded that the residency action was a child custody proceeding, as a matter of law.¹⁵⁸ That was error.

Furthermore, the Superior Court erred when it concluded that Belarus had jurisdiction over Leo in substantial conformity with the UCCJEA, despite its finding that William received no notice of the filing of that action and that the hearing was held in his absence. A fundamental requirement of the UCCJEA is notice and opportunity to be heard:

Before a child custody determination is made under this part, notice and an opportunity to be heard in accordance with the standards of Section 3408 must be given to all persons entitled to notice under the law of this state

(§ 3425, subd. (a).)

¹⁵⁵ Ex. 5 (PE, p. 69:19-23).

¹⁵⁶ Ex. 5 (PE, pp. 66:7-8; 74:18-22 & 37:6-8).

¹⁵⁷ Ex. 5 (PE, pp. 66:14 - 67:13).

¹⁵⁸ Ex. 5 (PE, p. 70:12).

The Belarus court did not have jurisdiction to make any orders in the residency action in substantial conformity with the UCCJEA when one of the fundamental principles of the UCCJEA was not observed.

Also, the Superior Court found that the Belarus residency decree was made on best interests criteria, which is inconsistent with the UCCJEA.¹⁵⁹ These problems with the Belarus residency action caused the Superior Court to find that the residency decree was not capable of recognition or enforcement by a California court under the UCCJEA.¹⁶⁰

Despite those findings, the Superior Court believed that the manner in which the residency decree was made was not important. The Superior Court apparently believed that the substantial conformity test was whether Belarus acted consistent with its own laws, rather than with the UCCJEA. That was an error of law.

(4) *Additional arguments will be raised on appeal.*

This is a writ petition, not an opening brief on appeal, so William reserves the right to raise his additional claims of error in that brief.

VI. CONCLUSION

The Superior Court found that California has jurisdiction to make a custody decision over Leo, but surrendered its jurisdiction to Belarus based on its incorrect conclusion that it had to treat the Belarus residency action was a “child custody proceeding,” despite the Superior Court’s finding that the action could not be recognized or enforced in California due to William’s lack of notice or opportunity to be heard.

¹⁵⁹ Ex. 5 (PE, pp. 59:21 - 60:2).

¹⁶⁰ Ex. 5 (PE, p. 80:15-23).

William respectfully requests a stay of the order quashing his California action for child custody and child support, and the extension of the temporary custody orders and anti-abduction orders.

Dated: January 29, 2018

WALZER MELCHER LLP

By: _____ /s/ _____

Christopher C. Melcher
Leena H. Hingnikar
Edward M. Lyman
Attorneys for Petitioner,
William McKeague

CERTIFICATE OF WORD COUNT

I certify, pursuant to Rule 8.204(c)(1) of the California Rules of Court, the attached Petition contains less than 14,000 words according to the program used to create this document, excluding tables, certificates and the cover page.

Dated: January 29, 2018

WALZER MELCHER LLP

By: _____ /s/_____
Christopher C. Melcher
Leena S. Hingnikar
Edward M. Lyman
Attorneys for Petitioner

PROOF OF SERVICE

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 5941 Variel Avenue, Woodland Hills, California 91367.

On January 29, 2018, I served the foregoing document described as **PETITION FOR WRIT OF SUPERSEDEAS AND REQUEST FOR TEMPORARY STAY** upon the following by placing a true copy thereof in sealed envelopes addressed as follows:

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Stanley Mosk Courthouse
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/s/
Annais Alba