B287735

Court of Appeal
State of California

Second Appellate District
Division 8

W.M.,
Petitioner and Appellant,

vs.

V.A.,
Respondent.

Appeal from Los Angeles Superior Court
Case No. 17STPT00486
Hon. Mark H. Epstein

APPELLANT'S REPLY BRIEF

WALZER MELCHER LLP
Christopher C. Melcher (170547)
5941 Variel Avenue
Woodland Hills, California 91367
Telephone: (818) 591-3700
ccm@walzermelcher.com

ALAN DERSHOWITZ, ESQ.
Of Counsel (*Pro Hac Vice*)
1575 Massachusetts Avenue
Cambridge, MA 02135
Telephone: (561) 922-6111
alandersh@gmail.com

Attorneys for Appellant, W.M.

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I. INTRODUCTION

It is undisputed that California has subject matter jurisdiction over the parties' child ("baby L.") in this child custody action by Appellant W.M. ("William") under the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA" or "Act"). (Fam. Code, § 3400 et seq.)[1] The issues on appeal are:

(A) Whether the Republic of Belarus previously took jurisdiction over baby L. in substantial conformity with the UCCJEA in the action filed on behalf of Respondent V.A. ("Victoria") on May 25, 2017, in Belarus to determine the residency of baby L. (the "Belarus Residency Action"); and,

(B) Whether that action was a child custody proceeding within the meaning of the Act.

If the answer to either question is no, then the trial court erroneously surrendered its jurisdiction to Belarus under the first-in-time rule in Section 3426, and the order quashing William's action must be reversed.

Victoria concedes that Belarus could not have had jurisdiction in substantial conformity with the UCCJEA if adequate notice and opportunity to be heard were not provided to William in the Belarus Residency Proceeding. The Respondent's Brief states: " 'Substantial conformity' requires both subject matter jurisdiction and notice and opportunity to be heard."[2]

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[1] Undesignated statutory references are to the Family Code.

[2] Respondent's Brief ("RB"), p. 13.

Victoria correctly states the law. (§ 3425, subd. (a) ["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...."].) The trial court, however, concluded that due process matters only for the enforceability of a foreign court order, rather than being a prerequisite for jurisdiction.[3] That was an error of law.

Because due process is a jurisdictional requirement under the UCCJEA, this Court must determine whether William received due process in the Belarus Residency Action. Section 3408 allows for service of process according to the law where service is made, but it must "be given in a manner reasonably calculated to give actual notice…." (§ 3408, subd. (a).) That is the minimum standard for service of process for a foreign court to have jurisdiction in substantial conformity with the UCCJEA.

The trial court found that the residency "order was made without notice or opportunity to be heard" to William.[4] Victoria states William was served by mail at his registered address in Minsk, Belarus ("Apartment 7"), but it would have been impossible for William to receive those papers because the trial court found he "never actually lived" in that apartment.[5] The

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[3] 16 AA, pp. 3615:26 - 3616:5; 3622:5 - 3624:5.

[4] 16 AA, pp. 3615:18-25; pp. 3607:20 - 3611:10 [discussion of evidence].

[5] 16 AA, pp. 3608:9-12.

parties were in Paris together when Victoria's mother filed the action, and they were in Spain the day her mother appeared at the residency hearing.[6] The trial court did not believe Victoria's testimony that she tried to hand the papers to him.[7] Instead, the trial court accepted William's testimony that he received no notice of the action before it was decided, and believed that William would not have left Belarus had he known of the hearing.[8] The hearing occurred on June 7, 2017, less than two weeks after it was filed.[9]

The trial court concluded that the lack of any notice to William precluded enforcement of the residency decree and it refused to recognize the decree as a valid order under the UCCJEA, even if service by mail satisfied Belarus law.[10] Victoria argues the lack of actual notice was not fatal to Belarus having jurisdiction in substantial conformity with the UCCJEA because William received "sufficient standards for due process under the Belarusian legal system…."[11] That is not the standard for notice under the UCCJEA. Because service by mail was not reasonably

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[6] Victoria's mother applied for the residency decree and appeared on behalf of Victoria at the hearing; neither party was present in Belarus when it was filed or heard. (RB, pp. 25, fn. 3 & 27.)

[7] 16 AA, p. 3609:12-24.

[8] 16 AA, pp. 3615:18-25; 3609:26 - 3610:1.

[9] RB, p. 39.

[10] 16 AA, pp. 3615:18-25; pp. 3607:20 - 3611:10 [discussion of evidence].

[11] RB, p. 67.

calculated to give actual notice to William under the circumstances, the notice requirement in Sections 3408 and 3425 were not met. Therefore, Belarus did not have jurisdiction in substantial conformity with the UCCJEA.

Besides the due process violation, William argued that the Belarus court took jurisdiction in the Belarus Residency Action on principles inconsistent with the UCCJEA. The trial court found that the Belarus court made the residency decree using a best interests test for jurisdiction,[12] which the trial court acknowledged is forbidden by the UCCJEA.[13] The trial court attempted to reconcile these issues by concluding that Belarus could have, hypothetically, taken jurisdiction consistent with the UCCJEA based on baby L.'s connections with Belarus. Hypothetical conformity is not the test under Section 3426. California will not surrender its jurisdiction over a child to a foreign state that took jurisdiction out of conformity with the UCCJEA.

A second reason the Belarus Residency Action does not qualify for first-in-time treatment under Section 3426 is that it was not a child custody proceeding within the meaning of the UCCJEA. That issue is addressed in the Opening Brief and is not discussed further here. Because Belarus did not have jurisdiction in substantial conformity with the UCCJEA, the order quashing

[12] 16 AA, pp. 3594:25 - 3595:2.

[13] 16 AA, p. 3580:1-9.

William's action may be reversed without deciding whether the residency action was a custody proceeding.

II. THE TRIAL COURT'S CONCLUSIONS OF LAW ARE REVIEWED *DE NOVO* BASED ON ITS FINDINGS OF FACT

The Respondent's Brief discusses the standard of review for factual findings,[14] but William is not trying to overturn any findings. William's appeal seeks review of the trial court's interpretation of the UCCJEA, which led to its conclusion that California had to surrender jurisdiction to Belarus per Section 3426. The trial court's findings show that California was not legally required to relinquish its jurisdiction over baby L. to Belarus under the circumstances.

(A) The findings show that California was not mandated to surrender its jurisdiction to Belarus under Section 3426.

These are the pivotal findings and the legal conclusions that should be drawn therefrom.

(1) *California has subject matter jurisdiction per Section 3421(a)(2).*

The trial court found that (a) baby L. and his parents have significant connections to California,[15] and (b) substantial evidence is available in California on the child's care, protection,

[14] RB, pp. 43-45.

[15] 16 AA, p. 3589:22-25.

training, and personal relationships.[16] These findings support the trial court's legal conclusion that California has subject matter jurisdiction over baby L.[17] (§ 3421, subd. (a)(2).) Victoria acknowledges the trial court properly concluded that California has subject matter jurisdiction over baby L.[18]

(2) *Mail service was not reasonably calculated to impart actual notice to William in the residency action.*

The trial court found that (a) William received no actual notice or opportunity to be heard in the Belarus Residency Action,[19] (b) William never lived at the address where the court papers were mailed, [20] (c) Victoria was not credible in her testimony that she attempted to hand the papers to William,[21] (d) Victoria made no effort to provide William's email address to the Belarus court to provide notice of the action to him,[22] and (e) when William appealed to the Belarus court for lack of notice, the Belarus court "simply ignored the entire subject" and affirmed the decree on the merits of the residency decree.[23] These finding support the trial court's legal conclusion that the decree issued in

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[16] 16 AA, p. 3591:25-26.

[17] 16 AA, p. 3592:18-20.

[18] RB, p. 37.

[19] 16 AA, p. 3615:18-25.

[20] 16 AA, p. 3608:7-12.

[21] 16 AA, p. 3609:12-24.

[22] 16 AA, p. 3608:7-12.

[23] 16 AA, p. 3614:3-6.

the Belarus Residency Action is not capable of enforcement or recognition under the UCCJEA.[24]

The findings also support the legal conclusion William asks this Court to make: that Belarus did not have jurisdiction in substantial conformity with the UCCJEA.

(3) *The manner in which Belarus took jurisdiction over baby L. contradicted the UCCJEA.*

The trial court found that (a) the Belarus court took jurisdiction over baby L. in the Belarus Residency Action by considering factors that cannot be considered under the UCCJEA, i.e., the Belarus court used a best interests test for jurisdiction instead of where the child had lived before the action was filed,[25] (b) none of the experts called by the parties opined that Belarus jurisdictional law is substantially similar to the UCCJEA,[26] and (c) it would be futile to communicate with the Belarus court to resolve the jurisdictional dispute.[27] These findings led the trial court to *reject* Victoria's argument "that Belarus [applied] an analysis similar to a UCCJEA analysis in making its decision."[28] The trial court stated that the Belarus court made its determinations "based on [baby L.]'s best interest,

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[24] 16 AA, p. 3615:18-25.

[25] 16 AA, pp. 3594:25 - 3595:2; p. 3580:1-9.

[26] 16 AA, pp. 3594:25 - 3595:2.

[27] 16 AA, p. 3598:21-28, fn. 3.

[28] 16 AA, p. 3594:21-23.

not on any of the factors articulated in the UCCJEA."[29] But the trial court concluded that the manner in which the Belarus court assumed jurisdiction is not legally important "if the facts would support jurisdiction under a UCCJEA analysis, whether or not the other court does such an analysis."[30]

Victoria's brief correctly states the test for substantial conformity "requires analyzing the facts and circumstances under which the sister-state exercised jurisdiction. [Citation.]"[31] The dispute is how those circumstances are to be considered by this Court as a matter of law. Specifically:

(A) Does Section 3426 require a showing that the Belarus court used principles in substantial conformity with the UCCJEA in taking jurisdiction over baby L. to receive first-in-time treatment? (This is William's position.)

(B) Or, does it make no difference how the Belarus court took jurisdiction, even if repugnant to UCCJEA principles, provided the facts could have permitted the Belarus court to take jurisdiction in substantial conformity with the Act? (This is Victoria's position and the trial court's conclusion.)

It would frustrate the law to give first-in-time treatment to the residency action when Belarus took jurisdiction over baby L. in a way that offended the principles of the UCCJEA. The trial court misinterpreted Section 3426 as requiring only the

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[29] 16 AA, p. 3595:1-2.

[30] 16 AA, p. 3595:9-13; 9 RT, pp. 6756:21 - 6757:6.

[31] RB, p. 51.

possibility that Belarus *could have* taken jurisdiction in substantial conformity with the UCCJEA. Section 3426 requires actual substantial conformity with the UCCJEA, not hypothetical substantial conformity.

There was no substantial conformity under the circumstances because (1) Belarus assumed jurisdiction using a best interests standard not allowed under the Act, (2) William received no notice or opportunity to be heard before the Belarus court made the residency decree, and (3) Belarus law permitted no examination whether another state, like California, is the more appropriate forum to determine custody based on where baby L. lived.[32] Therefore, this Court should conclude, based on its interpretation of the UCCJEA, that Belarus did not have jurisdiction in substantial conformity with the Act.

(4) *California is the most appropriate forum to determine custody, but for the Section 3426 issue.*

The trial court found that, if the only issue were inconvenient forum, it would have exercised its jurisdiction over baby L. instead of relinquishing jurisdiction to Belarus. The trial court made that statement because of "the additional procedural safeguards that California provides to ensure that both sides are heard, and therefore that the best decision is ultimately made."[33]

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[32] 2 AA, pp. 493 - 494 [opinion of Victoria's expert]; 2 AA, p. 479:20-22 [declaration by Victoria's counsel as to expert opinion].

[33] 16 AA, pp. 3621:21 - 3622:2 [fn. 6 omitted].

"[T]he procedures that the Belarus court has employed thus far leave no doubt in this Court's mind that the parties will have a fairer chance to present their positions here than there."[34]

These finding show the prejudicial effect of the trial court's error; the only reason the trial court gave up its jurisdiction was because it thought it had to under Section 3426. Had it concluded that Section 3426 did not apply, the trial court would have exercised its jurisdiction to make a child custody determination over baby L.

(B) No deference is given to the trial court's legal conclusions in interpreting the UCCJEA.

Victoria correctly states that factual findings are reviewed for substantial evidence, but she asserts that deference should be given to the trial court's legal conclusions.[35] Subject matter jurisdiction is a question of law, so a reviewing court does not defer to a trial court's application of the law to the facts. (*Brown v. Garcia* (2017) 17 Cal.App.5th 1198, 1203.) When the facts giving rise to subject matter jurisdiction are in conflict, the trial court's factual determinations are reviewed for substantial evidence, and the legal significance of those facts is reviewed independently. (*Ibid.*) The same standard of review applies in an appeal of a UCCJEA ruling:

> With respect to purely factual findings, we will defer to the trial court's assessment of the parties' credibility. . . . [Citations.] . . . Since subject matter

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[34] 16 AA, p. 3620:8-11.

[35] RB, pp. 43 & 45.

> jurisdiction is at issue, however, we are not bound by the trial court's findings and may *independently weigh the jurisdictional facts.* [Citations.]

(*In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 492 ("*Nurie*"), emphasis added.)

The reference to reweighing "jurisdictional facts" in cases like *Nurie* should not be misread as allowing independent review of the trial court's factual findings on conflicting evidence. (See, *Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276 ("*Schneer*") ["the notion an appellate court may independently reweigh the trial court's findings of jurisdictional facts runs counter to the fundamental principle that appellate courts do not reweigh facts and generally must defer to the trial court's resolution of credibility and conflicts in the evidence"]; *In re Aiden L.* (2017) 16 Cal.App.5th 508, 520 ("*Aiden L.*") [same].) Although *Schneer* and *Aiden L.* clarified that findings of fact are reviewed for substantial evidence, neither case held that the trial court's legal conclusions are reviewed with deference. *Aiden L.* explained that the role of a reviewing court "is to ensure that the provisions of the UCCJEA have been properly interpreted and that substantial evidence supports the factual basis for the [inferior] court's determination whether California may properly exercise subject matter jurisdiction in the case." (*Aiden L., supra,* 16 Cal.App.5th at p. 520 [juvenile dependency].)

Victoria argues, though, that "deferential review is particularly appropriate in this case because it turns on a

question of foreign law."[36] As explained in the two cases cited by Victoria, evidence of foreign law sometimes presents a mixed question of law and fact. "Where treaties or statute law alone are before the court the construction thereof is a matter of law, but the question of how the foreign country has construed and applied such treaties or statutes is a question of fact." (*In re Arbulich's Estate* (1953) 41 Cal.2d 86, 89–90 & 100.) "Where the meaning of the statutory law of a foreign country is in controversy and its elucidation requires expert testimony, the resolution of such conflict as to the meaning and effect of the foreign law remains a question to be determined by the trier of the facts [citation] and such determination, if supported by substantial evidence, will not be disturbed on appeal. [Citation.]" (*Logan v. Forster* (1952) 114 Cal.App.2d 587, 595–596.) Absent a factual dispute, the content of foreign law is a question of law that may be received in evidence by judicial notice. (Evid. Code, §§ 310, subd. (b) & 452, subd. (h) [judicial notice of foreign law].)

The trial court received expert testimony from Belarussian lawyers called by each party, and made factual findings and credibility determinations on the evidence. Those factual findings show that the UCCJEA did not require California in these circumstances to surrender its jurisdiction over baby L. to Belarus.

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[36] RB, p. 45.

III. BELARUS DID NOT TAKE JURISDICTION IN SUBSTANTIAL CONFORMITY WITH THE UCCJEA

The main reasons the Belarus court did not have jurisdiction in substantial conformity with the UCCJEA were the due process violation and its use of a best interests standard to make the residency decree, instead of considering where baby L. lived before that action was filed. In addition, Belarus law did not allow it to surrender jurisdiction to another forum (like Section 3426 provides), and the trial court believed it would be futile to communicate with the Belarus court to resolve the dispute (which could be treated as a declination of jurisdiction under Section 3426). Those issues were addressed in the Opening Brief and are discussed further here.[37]

(A) William was not afforded due process, so Belarus did not have jurisdiction in substantial conformity with the Act.

Victoria concedes that notice and opportunity to be heard were requirements for Belarus to have jurisdiction in substantial conformity with the UCCJEA.[38] She claims, however, "the trial court fully understood that 'substantial conformity' with the U.C.C.J.E.A. required both subject matter jurisdiction and notice and opportunity to be heard."[39] That is not correct. The trial court mistakenly concluded that notice and opportunity to be heard were *not* jurisdictional requirements:

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[37] AOB, pp. 60-64.

[38] RB, pp. 42 & 59.

[39] RB, p. 59.

> [T]he additional notice requirements [in the UCCJEA] are found exclusively in the chapter dealing with the enforcement of a foreign decree. There are no similar limits or constraints with regard to whether this Court has subject matter jurisdiction or must refuse to exercise that jurisdiction. The Court cannot conclude that the omission of any reference to section 3408 in section 3426 was a mere accident. Rather, the Court must conclude that the UCCJEA's drafters knew what they were doing and elected not to incorporate the specific notice requirements in section 3408 into the simultaneous proceedings statute [section 3426].[40]

The trial court's conclusion overlooked section 3425, in the jurisdiction chapter of the UCCJEA, which requires due process per Section 3408 before a court can make a child custody determination. (§ 3425, subd. (a).) Although statutory headings do not "affect the scope, meaning, or intent" of the code section (§ 5), the trial court placed significance on its belief that the notice provisions of the UCCJEA were only in the enforcement chapter.

The plain meaning of Section 3425 shows that due process is jurisdictional: "*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. . . ." (§ 3425, subd. (a), emphasis added.) This shows legislative intent that (1) due is process is a jurisdictional prerequisite, and (2) the standard for giving notice is specified in Section 3408. The trial court's interpretation of the UCCJEA, therefore, was in error.

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[40] 16 AA, pp. 3622:18 - 3623:5.

Victoria has conceded that error,[41] but insists Belarus law on the service of process controls whether Belarus had jurisdiction in substantial conformity with the UCCJEA, even if the manner of service was not sufficient under the UCCJEA for its orders to be enforced.[42] That is the same interpretation the trial court reached.[43]

Deferring completely to Belarussian law on service of process fails to give effect to the express requirement in Section 3408 that foreign service be reasonably calculated to give actual notice. (See, Code Civ. Proc., § 1858 [in construction of a statute, courts may not "omit what has been inserted" and must strive to "give effect to all" parts of the statute].) The rules of statutory construction also require a commonsense interpretation that does not lead to absurd results. "The terms of the statute must be given a reasonable and commonsense interpretation that is consistent with the Legislature's apparent purpose and intention. [Citation.] Our interpretation should be practical, not technical, and should also result in wise policy, not mischief or absurdity. [Citation.]" (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, 938.) The trial court recognized the harsh effect of its conclusion that due process only relates to enforcement, not jurisdiction, but stood by its technical reading of Section 3426:

> It may well seem unfair or illogical that a state that is capable of making a decree without adequate

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[41] RB, pp. 42 & 59.

[42] RB, pp. 57-58.

[43] 16 AA, pp. 3623:17 - 3624:5.

> notice may nonetheless be the state that has sufficient jurisdiction so as to force this Court to be unable to exercise its jurisdiction under section 3426(a), and one could certainly argue that it would be better public policy to allow California to exercise its jurisdiction under those circumstances. But it is not this Court's province to enact public policy, nor it is this Court's province to revise or rewrite statutes so that they adhere more closely to what this Court believes a good public policy might be....[44]

If the trial court's interpretation of Section 3426 were correct, California would be mandated to surrender its jurisdiction over baby L. to Belarus even though the residency decree by the Belarus court (which the trial court concluded was a child custody proceeding) resulted from a due process violation to William, one of the child's parents. The purpose of Section 3426 is to avoid jurisdictional tussles over a child by deferring to another state that has legitimately taken jurisdiction in a child custody proceeding filed before the one in California. There is no reason California must surrender its jurisdiction over a child born in California, who is a U.S. citizen, and has significant connections to our state simply because Victoria's mother previously filed and prosecuted an action in Belarus on Victoria's behalf, with no notice or opportunity for William to be heard.

[44] 16 AA, p. 3623:17-24.

(1) *The trial court found William did not receive notice in the Belarus Residency Action according to UCCJEA requirements.*

The UCCJEA allows for notice per the law of where service of process is effected, but such process must be reasonably calculated to give actual notice. (§§ 3408, subd. (a) & 3425, subd. (a).)

> Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process *or by the law of the state in which the service is made*. Notice must be given in a manner *reasonably calculated to give actual notice* but may be by publication if other means are not effective.

(Fam. Code, § 3408, subd. (a), emphasis added.)

Victoria contends the trial court determined Belarusian law satisfied the requirements of notice and opportunity under sections 3408 and 3425.[45] That assertion conflicts with the record, including the portions to which she cites. The trial court acknowledged that the procedures for service by mail in Belarus "at least *potentially* on their face may satisfy section 3408," but that abstract proposition "does not answer the question when applied to this specific case."[46] The trial court correctly stated

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[45] RB, pp. 59-60.

[46] 16 AA, p. 3609:3-7, emphasis added [cited at RB, p. 60 as "R.A. 2:RA141:3-7]. The Respondent's Appendix includes a copy of the January 12, 2018, Order on Respondent's Motion to Quash, which is part of the Appellant's Appendix. When referencing this and other portions of the Respondent's

that mail service, in the abstract, might impart actual notice to the person served, depending on the circumstances.[47]

Victoria's argument focuses on what Belarus law requires for service of process, rather than the circumstances in which the papers were mailed.[48] Even if mail service to William at his registered address in Belarus was proper under Belarus law, that does not answer whether service was reasonably calculated to give actual notice. When the trial court considered how service by mail was attempted, the trial court credited William's testimony that he had no notice of the June 7 hearing.[49] The trial court found that the residency decree issued "without notice or an opportunity to be heard" to William.[50]

The trial court heard conflicting expert testimony whether service was proper under Belarus law.[51] Mail notice is permitted in Belarus, but there was a dispute between the experts whether a return receipt was necessary.[52] Although the trial court did not

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Appendix relied on by Victoria that are also in the Appellant's Appendix, William cites to the Appellant's Appendix.

[47] 16 AA, p. 3609:3-7.

[48] RB, pp. 59-61.

[49] 16 AA, pp. 3609:8 - 3610:4.

[50] 16 AA, p. 3615:18-25. That finding was not used in the trial court's jurisdictional analysis because the court believed due process was only relevant to the enforceability of the residency decree, not to whether Belarus had jurisdiction in substantial conformity with the UCCJEA. (16 AA, p. 3623:17-24.)

[51] 16 AA, pp. 3607:23-24.

[52] 16 AA, pp. 3607:23 - 3609:7.

resolve that conflict, it found no evidence a return receipt was provided.[53] There was also testimony whether service by other means, such as email, was permissible in Belarus. Without deciding whether those other means were required under Belarusian law, the trial court found:

> [T]here is no evidence that the Belarus court made any attempt to [use such other means of service]. And, while it is true that the Belarus court likely did not have [William]'s email address, [Victoria] had it. She could have provided that information to the Belarus court, especially given that *she knew for a certainty* that the mailed notice addressed to an apartment in Minsk where [William] had *never actually lived would never reach* [William].[54]

Mail service to an apartment where William did not live, when Victoria knew he would be outside Belarus both at the time of mailing and for the hearing itself, was not reasonably calculated to give actual notice to William. The trial court did not believe Victoria's testimony that she tried to hand him a copy of the residency application, that he was uninterested, and would not take it.[55] Instead, the trial court found William to be credible in his testimony about lack of notice. The trial court stated that William would not have left for the trip to Spain with Victoria

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[53] 16 AA, pp. 3607:27 -3608:1.

[54] 16 AA, p. 3608:7-12.

[55] 16 AA, p. 3609:12-24.

had he known a court proceeding was going forward that day in Belarus regarding their child.[56]

The Respondent's Brief ignores those findings and portrays the trial court's findings in a much softer light, claiming "the court concluded that William did not have *sufficient* notice and opportunity to be heard…."[57] The trial court did more than find a lack of sufficient notice, it found a complete lack of notice. The implication from the trial court's findings is that Victoria deliberately withheld notice from William, to prevent him from knowing of the residency action.[58] After keeping William in the dark about the action, Victoria cannot credibly argue that mail service was reasonably calculated to give actual notice under the circumstances.

(2) *Foreign law for service of process must meet the minimum standard for notice in Section 3408.*

Section 3408 is a due process standard: "The requirements of due process of law are met in a child custody proceeding when, in a court having subject matter jurisdiction over the dispute, the out-of-state parent is given notice and an opportunity to be

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[56] 16 AA, pp. 3609:24 - 3610:4.

[57] RB, p. 41, emphasis added.

[58] Victoria did the same thing in her subsequent custody action in Belarus, which was also filed by her mother and served by mail to Apartment 7, when William was in California. The trial court found that Victoria deliberately concealed the existence of the custody action from William. (16 AA, pp. 3612:10 - 3613:17.)

heard." (*Nurie, supra,* 176 Cal.App.4th at p. 493.) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 ("*Mullane*").) As Victoria concedes: "The inquiry … is on the basic fairness of the foreign processes and procedures."[59]

In comments to the UCCJEA by the National Conference of Commissions on Uniform State Laws, the drafters stated "the notice and hearing provisions of the Act [are] necessary to satisfy due process . . . based on Justice Frankfurter's concurrence in *May v. Anderson,* 345 U.S. 528 (1953)." (9 West's U. Laws Ann. (1999) UCCJEA, com. to § 201.)[60] In *May v. Anderson,* Justice Frankfurter observed that the Full Faith and Credit Clause does not require blind obedience to another state's child custody orders; consideration of the circumstances in which the other state made the order is proper to ensure the protection of

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[59] RB, pp. 65-66.

[60] " ' "Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes." ' [Citations.]" (*Nurie, supra,* 176 Cal.App.4th at 492, fn. 11.) Code provisions that come from a uniform act "shall be construed to effectuate the general purpose to make uniform the law in those states which enact that provision." (§ 3.)

children. (*May v. Anderson, supra,* 345 U.S. at pp. 535-536, conc. opn. of Frankfurter, J.)

> [T]he Full Faith and Credit Clause does not require Ohio, in disposing of the custody of children in Ohio, to accept, in the circumstances before us, the disposition made by Wisconsin…. Ohio is no more precluded from [examining those circumstances] than a court of Ontario or Manitoba would be, were the mother to bring the children into one of these provinces.
>
> Property, personal claims, and even the marriage status [citation] generally give rise to interests different from those relevant to the discharge of a State's continuing responsibility to children within her borders. *Children have a very special place in life which law should reflect. Legal theories, and their phrasing in other cases readily leads to fallacious reasoning if uncritically transferred to determination of a State's duty towards children*…. But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time. Reliance on opinions regarding out-of-State adjudications of property rights, personal claims, or the marital status is bound to confuse analysis when a claim to the custody of children before the courts of one State is based on an award previously made by another State. Whatever light may be had from such opinions, they cannot give conclusive answers.

(*Ibid.*, emphasis added.)

It is the state's interest in child custody decisions that led the drafters of the UCCJEA to require due process before a state can make a child custody decision. (See, 9 West's U. Laws Ann. (1999) UCCJEA, com. to § 201.) The same logic applies in

interpreting Section 3426—a foreign state that has taken jurisdiction over a child is not entitled to first-in-time treatment unless that court had jurisdiction in substantial conformity to the UCCJEA.

To know if Belarus had jurisdiction in substantial conformity with the UCCJEA, the circumstances in which the residency decree was made must be examined (assuming the decree resulted from a child custody proceeding). Victoria, instead, asks this Court to hold that service by mail of the Belarus Residency Action was reasonably calculated to give William actual notice based on her claim that mail service at William's registered address was proper under Belarus law, considering none of the circumstances in which those papers were mailed. That approach does not satisfy the UCCJEA or the state's interest in ensuring child custody orders are made properly. The trial court found a due process violation because the mailing of papers to an apartment where William did not live, when Victoria knew he would be out of country at time of service and when the hearing was to be held, was not reasonably calculated to give actual notice to William in the circumstances.

Victoria is not aided by her lengthy exposition of *AO Alfa-Bank v. Yakovlev* (2018) 21 Cal.App.5th 189 ("*AO Alfa-Bank*").[61] In *AO Alfa-Bank*, the Court of Appeal found the Russian notice procedures (similar to the Belarusian procedure utilized here)

[61] RB, pp. 61-66.

were reasonably calculated to give actual notice to defendant Yakovlev, but the circumstances in *AO Alfa-Bank* were much different.[62] Yakovlev was a Russian citizen with a registered address in Moscow. He was a surety on loans given by the plaintiff. The surety agreement: (1) made the district court in Moscow the exclusive forum for resolving disputes; (2) provided that any notice would be sent to Yakovlev's registered Moscow address; and, (3) required Yakovlev to inform the bank of any change of address within five days of moving. Yakovlev sought political asylum in the United States without notifying the bank or changing his registered address. The Russian court mailed a summons and statement of claim to the address for service Yakovlev gave in the surety agreement, which matched his registered address under Russian law. (*AO Alfa-Bank, supra,* 21 Cal.App.5th at pp. 195-196.)

The *AO Alfa-Bank* court concluded that notice was reasonably calculated " 'under all the circumstances' to impart actual notice." (*AO Alfa-Bank, supra,* 21 Cal.App.5th at 220, quoting *Mullane, supra,* 339 U.S. at p. 314.) "Under *these* circumstances, we conclude the procedure used was reasonably calculated to apprise Yakovlev of the pendency of the action and afford him an opportunity to respond." (*AO Alfa-Bank, supra,* 21 Cal.App.5th at p. 209, emphasis in original.) The Court of Appeal

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[62] Victoria invites this Court to read a Wikipedia page on the history of Belarus. (RB, p. 66, fn. 7.) The apparent request for judicial notice should be denied. (Cal. Rules Ct., rule 8.52(a) [separate motion required for judicial notice].)

considered Yakovlev's contractual obligation to notify the bank of any change of address as "critical" to its decision that service was proper at the address he last provided. (*AO Alfa-Bank, supra,* 21 Cal.App.5th at p. 210.)

As Justice Frankfurter noted in *May v. Anderson*, reliance on property cases for determining the rights of custody "cannot give conclusive answers." (*May v. Anderson, supra,* 345 U.S. at p. 536, conc. opn. of Frankfurter, J.) But even in the banking case of *AO Alfa-Bank*, the court looked to the circumstances in which service was effected in deciding whether it was reasonably calculated to give actual notice to the defendant. (*AO Alfa-Bank, supra,* 21 Cal.App.5th at pp. 209 & 220.)

Victoria knew that mail service at William's registered address was not reasonably calculated to give actual notice because (1) he did not live there, (2) they were in Paris when the papers were mailed, and (3) they would be in Spain at the time of the hearing. The lifespan of the Belarus Residency Action was less than two weeks from start to finish. Mail service for an action that goes from application to final decree in less than two weeks is suspect when Victoria could have given actual notice to William by personal service or other means, but chose not to do so. When William appealed to the Belarus court, that court completely disregarded the notice issue and affirmed the residency decree on the merits.[63] The Belarus court's attitude

[63] 16 AA, p. 3615:18-25. Victoria's description of the Belarus appeal is similar. (RB, pp. 33-34.)

toward notice and opportunity to be heard shows a substantial difference with how due process is treated in Belarus compared to the UCCJEA.

Under these circumstances, mail service at William's registered address was not reasonably calculated to give him actual notice, regardless of whether those means complied with Belarusian law.

(B) Belarus used principles contrary to the UCCJEA in taking jurisdiction in the residency action.

The trial court found that the residency decree was made according to what the Belarus court considered to be baby L's best interests, rather than considering where the child had lived before the action was filed.[64] The trial court acknowledged that the UCCJEA does not allow a best interests test for jurisdiction.[65] The National Conference of Commissioners on Uniform State Laws explained why:

> **Role of 'Best Interests.'** The jurisdictional scheme of the UCCJA [the predecessor to the UCCJEA] was designed to promote the best interests of the children whose custody was at issue by discouraging parental abduction and providing that, in general, the State with the closest connections to, and the most evidence regarding, a child should decide that child's custody. The 'best interest' language in the jurisdictional sections of the UCCJA was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or to

[64] 16 AA, pp. 3594:25 - 3595:2.

[65] 16 AA, p. 3580:1-9.

> otherwise provide that 'best interests' considerations should override jurisdictional determinations or provide an additional jurisdictional basis.
>
> The UCCJEA eliminates the term 'best interests' in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children.

(9 West's U. Laws Ann., supra, Pref. Note 5 to UCCJEA, p. 653, emphasis in original.)

Because the Belarus court considered what it thought were baby L.'s best interests in taking jurisdiction in the Belarus Residency Action, and did so without notice or opportunity for William to be heard, the manner in which Belarus assumed jurisdiction over baby L. was not in substantial conformity to the UCCJEA.

IV. CONCLUSION

Belarus did not have to adopt the UCCJEA, but its proceedings in the Belarus Residency Action are not entitled to first-in-time treatment under Section 3426 because they were not conducted in substantial conformity with the Act.

"Children have a very special place in life which law should reflect. Legal theories, and their phrasing in other cases readily leads to fallacious reasoning if uncritically transferred to determination of a State's duty towards children…." (*May v. Anderson, supra,* 345 U.S. at pp. 535-536, conc. opn. of Frankfurter, J.) Because the interests of a child are at stake, this Court should critically examine the circumstances in which Belarus took jurisdiction over baby L. There is no reason for

California to surrender its subject matter jurisdiction over baby L. to Belarus simply because a proceeding was filed there first, when William was deprived of due process in that action and the Belarus court used a best interests test that is prohibited under the UCCJEA. Because Belarus did not have jurisdiction in substantial conformity with the Act, California did not have to relinquish its jurisdiction under Section 3426.

This Court should reverse the order quashing William's action and remand to the trial court to make an initial custody determination over baby L. per California law.

Dated: September 10, 2018 WALZER MELCHER LLP

By: /s/
Christopher C. Melcher
Attorneys for Appellant

CERTIFICATE OF WORD COUNT

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

Dated: September 10, 2018 WALZER MELCHER LLP

By: /s/
Christopher C. Melcher
Attorneys for Appellant

PROOF OF SERVICE

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County of Los Angeles)

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 September 10, 2018, I served the foregoing document described as **APPELLANT'S REPLY BRIEF** upon the following by placing a true copy thereof in sealed envelopes addressed as follows:

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Los Angeles, CA 90012
T: (213) 830-0781
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Laura A. Wasser, Esq.
Wasser Cooperman & Mandles P.C.
2049 Century Park East, Suite 800
Los Angeles, CA 90067-3110
T: (310) 277-7117
Attorneys for Respondent, V.A.

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111 N. Hill Street, Room 546
Los Angeles, CA 90012
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Attorney at Law
261 South Wetherly Drive
Beverly Hills, CA 90211-2515
Attorneys for Respondent, V.A.

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