No. B287735

Court of Appeal
State of California

Second Appellate District
Division 3

W.M.,
Petitioner and Appellant,

vs.

V.A.,
Respondent.

Los Angeles Superior Court Case No. 17STPT00486
Hon. Mark H. Epstein, Presiding

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The trial court found subject matter jurisdiction to make a child custody determination over baby L. in this parentage, child custody, and child support action by Appellant W.M. (William), but quashed the action per the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA or Act). The trial court surrendered its jurisdiction to the Republic of Belarus because Respondent V.A. (Victoria) had previously filed an action there to determine baby L.'s residency. The order quashing William's action was reversible error because the UCCJEA did not require California to give up its jurisdiction.

The UCCJEA (Fam. Code, § 3400 et seq.)[1] is the exclusive basis for subject matter jurisdiction over a child custody or visitation proceeding. Jurisdiction is determined by these fundamental principles: (1) the proper forum to make a custody determination is where the child lived for six months before the action was filed or, if there is no home state, where the child and a parent have a significant connection and where substantial evidence is available about the child's care, protection, training, and personal relationships; (2) only one forum can have jurisdiction over a child at a time, to prevent re-litigation of custody disputes in multiple places; (3) courts of other states, including foreign countries which have not adopted the Act, must communicate to resolve jurisdictional disputes; and, (4) parents must be afforded notice and opportunity to be heard before a

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

child custody determination is made. Because of the "one forum" rule, section 3426 prohibits a California court from asserting custody jurisdiction when a child custody proceeding has been filed in another state that has adopted the UCCJEA, or in a foreign court *if* the jurisdictional law of that country substantially conforms to the Act. (See, § 3426, subd. (a).)

Baby L. was born in California on December 19, 2016, and lived here with William and Victoria as a family in Victoria's Manhattan Beach home after his birth. William and baby L. are U.S. citizens, and Victoria is a citizen of the Republic of Belarus. The trial court ruled that baby L. has no home state because the child spent time in several countries before William filed his action on July 20, 2017, and therefore did not "live" in California for the required six month period for home state jurisdiction. (See, § 3421, subd. (a)(1).) Nevertheless, the trial court found California has jurisdiction to make an initial child custody determination under the alternate test for jurisdiction in the UCCJEA because baby L. and the parties are significantly connected to our state, and substantial evidence is available here about the child's care, protection, training, and personal relationships. (See, § 3421, subd. (a)(2).)

The prejudicial error occurred when the trial court quashed William's action and relinquished its jurisdiction over baby L. to Belarus. The trial court thought section 3426 applied because an action had been filed in Belarus on May 25, 2017, to determine baby L.'s residency (the "Belarus Residency Action"), resulting in a decree by the Belarus court on June 7, 2017, that the child was

a resident of Belarus. That action was filed by Victoria's mother when the parties were together in Paris. The hearing was held while the parties and baby L. were in Spain. Victoria's mother made the appearance for Victoria. The trial court found that William received no notice of the proceeding, so it refused to enforce or recognize the residency decree as a valid order. The trial court also found that Belarus jurisdictional law was inconsistent with UCCJEA standards.

Despite those findings, the trial court concluded that Belarus *could have* taken jurisdiction in substantial conformity with the UCCJEA because baby L. and Victoria have significant connections to Belarus. The trial court concluded that the lack of due process only went to the enforceability of the residency decree, and did not mean Belarus lacked jurisdiction over the dispute in substantial conformity with the UCCJEA. The trial court also concluded that Belarus jurisdictional law did not have to conform at all with the UCCJEA, as long as the facts and circumstances of the case would have allowed Belarus to assert jurisdiction over baby L. had the Belarus court applied a UCCJEA-compliant analysis.

The trial court's interpretation of section 3426 undercuts the UCCJEA. California is not required to surrender its jurisdiction to a foreign country under section 3426 unless that country has jurisdiction over a child in substantial conformity with the UCCJEA. (§ 3426, subd. (a).) Substantial conformity with the Act means Belarus must have jurisdictional laws founded on principles similar enough to those underlying the Act,

and to have applied those principles in taking jurisdiction in a previously-filed custody proceeding over baby L. The possibility that Belarus could have asserted jurisdiction over baby L. consistent with the UCCJEA, had the laws of Belarus been different and had the Belarus court followed different procedure, is not the test for substantial conformity. The Act requires substantial conformity, not hypothetical conformity.

Therefore, the trial court erred in ordering that William's action be quashed per section 3426. This Court should reverse the order and remand the action to the trial court to make a custody determination per its finding of jurisdiction under section 3421, subdivision (a)(2).

II. ISSUES ON APPEAL

A. Was the Belarus Residency Action "a proceeding concerning the custody of" baby L. under section 3426, subdivision (a)?

B. Did Belarus have jurisdiction over baby L. in the Belarus Residency Action "substantially in conformity with" the UCCJEA under section 3426, subdivision (a)?

Unless the answer to both question is yes, the trial court erred as a matter of law in declining to exercise its jurisdiction over baby L.

III. STATEMENT OF THE CASE

William filed a Petition to Establish Parental Relationship, Child Custody, Visitation and Child Support regarding baby L.

on July 20, 2017, in Los Angeles Superior Court.[2] On July 28, 2017, Victoria moved to quash, claiming that Belarus has exclusive jurisdiction to determine custody issues regarding baby L.[3] Following an evidentiary hearing, the trial court granted the motion on January 12, 2018, quashing William's Petition to Establish Parental Relationship.[4] William filed a notice of appeal on January 19, 2018.[5]

IV. APPEALABILITY

An order quashing service of summons is appealable. (Code Civ. Proc., § 904.1, subd. (a)(3); see also, subd. (a)(14) [final order in bifurcated child custody proceeding appealable].)

V. STATEMENT OF FACTS AND PROCEDURAL HISTORY

(A) Background.

The parties were never married.[6] Their dating relationship started in 2015, and by June 2016 they were living together in Victoria's Manhattan Beach home. The parties traveled together for Victoria's career and for pleasure throughout their relationship.[7]

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[2] 1 AA, pp. 76 - 84.

[3] 1 AA, pp. 140 - 169.

[4] 16 AA, pp. 3566 - 3628.

[5] 16 AA, p. 3629.

[6] See, 1 AA, p. 76.

[7] 16 AA, p. 3569:17-24.

(B) The parties decided baby L. would be born in California.

Victoria became pregnant and the parties decided they wanted baby L. to be born here. As the trial court found, the reason William and Victoria lived in California before baby L.'s birth "was not accidental; the parties agreed that baby L. would be born here."[8]

"Before [baby L.]'s birth, neonatal care was provided in California (at least while Victoria was here), and baby L. had a pediatrician here for the period after he was born."[9] Baby L. was born in Santa Monica on December 19, 2016.[10] The parties lived in Victoria's home in Manhattan Beach as a family from baby L.'s birth on December 19, 2016, through March 1, 2017.[11]

(C) Baby L. has significant connections to California and substantial evidence exists here as to his care, protection, training, and relationships.

The trial court found that "[baby L.], 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."[12] "The trial court also believes that [per section 3421, subdivision (a)(2)] there is substantial evidence here relating to

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[8] 16 AA, pp. 3569:26 - 3570:1.

[9] 16 AA, pp. 3569:26 - 3570:5.

[10] 16 AA, pp. 3569:26-27.

[11] 16 AA, p. 3570:5-8.

[12] 16 AA, pp. 3589:22-25.

[baby L.]'s care, protection, training, and personal relationships, at least in light of [baby L.]'s young age."[13]

(D) William is a California resident, and Victoria spends significant time in California.

William and baby L. are United States citizens.[14] William became a California resident in 2016. He holds a California driver's license and real estate broker's license, works in California, has a California bank account, rents a house in California, and has family in California.[15]

Victoria is a citizen of the Republic of Belarus, but spends much of her time at her Manhattan Beach home.[16] Victoria is a professional tennis player. The trial 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."[17] "The evidence is undisputed that [Victoria] spends a significant amount of time at [her Manhattan Beach home]."[18] The trial court found that Victoria has a significant connection to California under the test for jurisdiction in section 3421, subdivision (a)(2):

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[13] 16 AA, pp. 3591:25-26.

[14] 16 AA, p. 3589:22-24.

[15] 16 AA, pp. 3567:24 - 3568:7.

[16] 16 AA, p. 3568:19-24.

[17] 16 AA, p. 3568:13-14.

[18] 16 AA, p. 3568:19-24.

> [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]

Victoria denied being a California resident, and there was no finding she was. She claimed her ability to stay in the U.S. was limited to six months per year.[20] The trial court found that Victoria's right to be in the U.S. is based on a P1 visa (issued to international athletes), but the trial court found no evidence of a six-month limitation to the visa.[21]

(E) <u>The parties traveled abroad with baby L., planning to return to California when the trip ended.</u>

The parties and baby L. traveled to Belarus on March 1, 2017, to visit Victoria's parents, for Victoria's tennis training and tournaments, and to vacation together.[22] The itinerary changed due to her training schedule.[23] They visited several countries and planned to return to Victoria's Manhattan Beach home at the end

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[19] 16 AA, p. 3591:6-12.

[20] 16 AA, p. 3568:25-28.

[21] 16 AA, p. 3569:4-16; 16 AA, pp. 3620:20 - 3621:16.

[22] 16 AA, p. 3570:8-13.

[23] 2 AA, p. 601:5-22.

of their trip in July 2017.[24] The trial 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."[25]

(F) During the trip, William applied for a temporary residency visa in Belarus.

The parties and baby L. arrived in Belarus on March 2, 2017, where baby L. stayed until June 7, 2017.[26] Because William is a U.S. citizen, he needed a visa to visit Belarus. His Belarus visa was set to expire May 29, 2017, which had to be extended because they planned to stay there until June 7, 2017.[27] William submitted the visa extension application in Belarus on May 17, 2017.[28] The document is entitled, "Application for temporary residence permission issuance."[29] To obtain the visa extension, William was told he needed a lease agreement for a property in Belarus to have his visa extended, so he signed a lease for an apartment owned by Victoria in Belarus, with her as the lessor.[30]

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[24] 16 AA, p. 3570:14.

[25] 16 AA, pp. 3585:26 - 3586:2.

[26] 16 AA, p. 3581:2-5.

[27] 2 AA, p. 601:17-22.

[28] 3 AA, p. 891 (see box 17).

[29] 3 AA, p. 891 (see title).

[30] 16 AA, p. 3571:3-13.

The visa application asked for William's "[a]ddress of current temporary stay (registration) in the Republic of Belarus" and his "[a]ddress of planned temporary residence in the Republic of Belarus."[31] William listed the property he leased from Victoria (i.e., "apartment 7, house 12"), which stands for Minsk, 12 Polevaya Street, apartment 7.[32] This is the property he leased from Victoria. The address is important, as will be seen.

William never stayed at the apartment in 2017 and never paid rent to Victoria.[33] They slept at another property owned by Victoria in Belarus during their visit. The trial court found that Victoria "owns multiple properties in Belarus, at least one of which was given to her by the government after she won the Olympics."[34]

(G) **The parties went to Paris, while Victoria's mother filed a residency application for baby L. in Belarus.**

The parties went to Paris, leaving baby L. in Belarus with Victoria's mother from May 24 to May 31, 2017.[35] It was their first trip as a couple since their child's birth.[36]

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[31] 3 AA, p. 891 (see box 17) & p. 892 (see box 19).

[32] 3 AA, p. 891 (see box 17) & p. 892 (see box 19).

[33] 16 AA, p. 3571:5-7.

[34] 16 AA, p. 3568:14-16.

[35] 16 AA, p. 3601:7-8.

[36] See time line in ¶ V(J) below.

On May 25, 2017, the day after the parties left for Paris, an action was filed in Belarus on Victoria's behalf by her mother to determine baby L.'s residency (the Belarus Residency Action).[37] There was no dispute between the parties regarding baby L., at least that William knew of, when the application was filed. The trial court noted the Belarus Residency Action was filed "while the parties were still together" as a couple.[38] Victoria explained to the trial court that the residency proceeding was necessary because baby L. was born outside of Belarus. [39] Victoria described it as a routine proceeding.[40]

No notice of the Belarus Residency Action was given to William. The trial court believed William's testimony that he did not know about the case.[41] According to the Belarus court, service was allegedly accomplished by mailing the court papers to the apartment he listed as his temporary residence on his visa application.[42] The parties were in France when the papers were mailed.

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[37] 16 AA, p. 3601:7-8.

[38] 16 AA, p. 3572:2-5.

[39] 3 AA, p. 701:2-5, ¶ 10.

[40] 6 RT, pp. 4292:25 - 4293:5.

[41] 16 AA, pp. 3609:24 - 3610:4.

[42] 3 AA, p. 891 (see box 17) & p. 892 (see box 19).

(H) Victoria's mother appeared in court on the Belarus Residency Action while the parties were in Spain with baby L.

On June 7, 2017, the parties departed Belarus with baby L. for a trip to Mallorca, Spain.[43] Victoria's mother did not accompany them. William was told Victoria's mother had to stay behind in Belarus "for an innocuous reason" (i.e., to work on her U.S. visa application).[44] However, that morning, Victoria's mother appeared in the Belarus court for a hearing on the residency application.[45] No one appeared for William because, as the trial court found, he did not know of the proceeding.[46] The trial court observed: "The hearing nonetheless went forward, with [Victoria]'s mother, [Ana], acting in Victoria's stead."[47]

The Belarus court issued its decree the same day, on June 7, 2017, finding that William and Victoria "have a dispute about the place of residence of the child."[48] The Belarus court determined the place of baby L.'s residence "by the place of residence of [his] mother Victoria [], born on July 31, 1989, at the address: Minsk: 12 Polevaya Street, *apartment 7*."[49] Apartment 7

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[43] 16 AA, p. 3571:16-18.

[44] 16 AA, p. 3609:18-22; 26 AA, p. 5235.

[45] 16 AA, p. 3572:6-8

[46] 16 AA, p. 3572:7.

[47] 16 AA, p. 3572:2-5.

[48] 1 AA, p. 158; 16 AA, p. 3604:1-2.

[49] 1 AA, p. 158 (see "Has Decided" heading, emphasis added); 16 AA, p. 3604:19-23.

was the unit William leased in Belarus from Victoria for his visa application.[50]

Baby L. never returned to Belarus after leaving for the trip to Spain. The parties stayed in Mallorca, Spain with baby L. until June 25, 2017.[51] From Spain they went to London, so Victoria could compete in the Wimbledon tennis tournament.[52]

(I) The parties broke up in London, and Victoria returned baby L. to her Manhattan Beach home as planned.

On July 11, 2017, while in London with baby L. for Wimbledon, the parties broke up.[53] Each party claimed the other committed domestic violence in the incident.[54] Victoria told William to find his own way back to California, cancelled his return flight to Los Angeles, and said he was no longer welcome in her Manhattan Beach home.[55] William wanted to return to California with baby L., but Victoria had baby L.'s passport. William went to the U.S. Embassy to obtain a duplicate passport for baby L., but was told he could do nothing.[56]

[50] 3 AA, p. 891 (see box 17) & p. 892 (see box 19).

[51] 16 AA, p. 3571:16-18); 2 AA, p. 602:25.

[52] 16 AA, p. 3571:19-20; 2 AA, p. 602:26.

[53] 2 AA, p. 602:10-11; 2 AA, p. 649, ¶ 5; 2 AA, p. 650, ¶ 11.

[54] 16 AA, p. 3517:20-22.

[55] 1 AA, p. 105:1-3.

[56] 1 AA, p. 105:18-21.

William stayed in a separate London hotel the night of July 11.[57] The next day, he returned alone to Los Angeles.[58] Victoria returned to her Manhattan Beach home with baby L. on July 15, 2017, as she had planned when the family left for their trip.[59] William moved into a new residence in Hermosa Beach, close to Victoria's home in Manhattan Beach, to facilitate visitation of baby L. between the parties.[60]

Baby L. has remained in California ever since.[61] William considers baby L.'s home state to be California, and that the time baby L. was away from the state was only a temporary absence.[62]

(J) <u>Summary of dates and places baby L. has stayed since birth.</u>

To summarize, baby L. was present in these places since birth:

12/19/16	Baby L. is born in Santa Monica.
12/19/16 to 3/1/17	Baby L. lives in Victoria's home in Manhattan Beach with the parties.
3/2/17 to 6/7/17	Baby L. visits Belarus with the parties to see Victoria's family

[57] 2 AA, p. 602:14-16.

[58] 16 AA, p. 3571:21-23.

[59] 16 AA, p. 3570:14; 16 AA, p. 3571:24-25; 16 AA, pp. 3585:26 - 3586:2; 2 AA, p. 602:17-28.

[60] 2 AA, p. 602:16-17.

[61] 2 AA, p. 602:17-28.

[62] 16 AA, p. 3581:12-20.

	and stays in a residence owned by Victoria.
6/7/17 to 6/25/17	Baby L. visits Mallorca, Spain with the parties.
6/25/17 to 7/15/17	Baby L. travels to London with the parties for the Wimbledon tennis tournament; Victoria returns to Manhattan Beach with baby L.
7/15/17 to present	Baby L. lives separately with William and Victoria in California.

(K) <u>William filed an action in Los Angeles Superior Court for parentage, child custody, and child support.</u>

On July 20, 2017, William filed a Petition to Establish Parental Relationship, Child Custody, Visitation and Child Support regarding baby L. in Los Angeles Superior Court.[63] William is the father of baby L.[64]

William made an ex parte application for temporary orders on July 26, 2017.[65] Victoria was given notice and opportunity to be heard.[66] Victoria specially appeared because she contested jurisdiction.[67] At the July 26 hearing, the trial court found that

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[63] 1 AA, p. 76.

[64] 1 AA, p. 131:21-22.

[65] 1 AA, p. 85.

[66] 1 AA, p. 137, ¶ 3.e.2.

[67] 1 AA, p. 122.

baby L.'s country of habitual residence is "The United States of America."[68] The ex parte order states California "has jurisdiction to make child custody orders in this case under the Uniform Child Custody Jurisdiction and Enforcement Act…."[69] These findings might refer to temporary emergency jurisdiction since they were made ex parte. (See, § 3424, subd. (a).)

Abduction prevention orders were made because the trial court "was concerned that the United States does not have a sufficient treaty with Belarus that would ensure that [baby L.] would be returned here if taken there."[70] The trial court initially found a risk Victoria might take baby L. outside the United States without permission, stating:

> Victoria is a professional tennis player who frequently travels nationally and internationally for tennis tournaments. She confiscated [baby L.]'s passports and has not demonstrated any willingness to comply with the Automatic Temporary Restraining Orders [Fam. Code, § 2040] compelling her to leave [baby L.] 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.[71]

Temporary custody orders were made, and the parties were ordered not to remove baby L. from Los Angeles County.[72]

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[68] 1 AA, p. 138, ¶ 3.e.3.

[69] 1 AA, p. 138, ¶ 3.e.1.

[70] 16 AA, p. 3574:8-11.

[71] 1 AA, p. 138, ¶¶ 1 & 1.c.

[72] 1 AA, p. 138, ¶ 3.c.2.b); 1 AA, p. 137, ¶ 3.b.

Victoria was ordered to surrender baby L.'s passports and not apply for new ones.[73]

(L) <u>The day after orders were made by the trial court, Victoria filed a custody action in Belarus and kept it secret from William.</u>

On July 27, 2017, the day after the trial court made its temporary custody orders, Victoria filed an action in Belarus to determine her rights of custody and visitation over baby L. (the "Belarus Custody Action").[74] The Belarus Custody Action was given a different case number than the Belarus Residency Action.[75] Neither the parties nor baby L. were in Belarus when the Belarus Custody Action was filed.[76] They were all in California. William was not notified of the Belarus Custody Action; the documents were mailed to the apartment he leased from Victoria in Belarus for his visa application (i.e., Minsk, 12 Polevaya Street, apartment 7).[77]

(M) <u>Victoria moved to quash William's action.</u>

On July 28, 2017, Victoria moved to quash William's Petition to Establish Parental Relationship for lack of subject

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[73] 1 AA, p. 139, ¶ 7 & p. 139, ¶ 8.

[74] 2 AA, p. 486; 3 AA, p. 702:9; 16 AA, p. 3573:4-6.

[75] 16 AA, p. 3602:5-7.

[76] 16 AA, p. 3571:17-20.

[77] 16 AA, pp. 3611:10 - 3622:10.

matter jurisdiction, or to dismiss or stay his action for forum *non conveniens*.[78]

(N) Less than a week after the Belarus Custody Action was filed, the Belarus court awarded Victoria sole custody of baby L. in a final judgment, without notice to William.

Victoria sought orders in the Belarus Custody Action against William that were the mirror-opposite of the temporary orders the trial court had made against her on July 27, 2017.[79] On August 3, 2017, just six days after Victoria filed the Belarus Custody Action, the Belarus court held a hearing on the custody request, again without notice to William.[80] The Belarus court awarded Victoria sole custody of baby L. and limited William's visitation to one visit a month, to take place in Victoria's presence in Belarus.[81]

The trial court noted the Belarus Custody Action "went from filing to decision in under a week. That is suspiciously fast."[82] The trial court found it "troubling" how Victoria secretly obtained a custody order from the Belarus court while the California action was pending.[83]

> The process [in Belarus] went from application to judgment in record-breaking time. [Victoria] filed the

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[78] 1 AA, p. 140.

[79] 2 AA, p. 486.

[80] 16 AA, p. 3611:10-22.

[81] 2 AA, p. 486; 16 AA, p. 3573:8-11.

[82] 16 AA, p. 3612:10-11.

[83] 16 AA, p. 3612:10-11.

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 [in Belarus], 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. [¶]

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.[84]

The trial 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. [¶][85]

The trial court also found that Victoria's mother misrepresented to the Belarus court that William had 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.' [¶]

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[84] 16 AA, p. 3612:10 - 3612:10.

[85] 16 AA, p. 3612:21 - 3613:4.

> That statement 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.[86]

(O) William appealed the decree in the Belarus Custody Action for lack of notice, which was denied.

After learning of the Belarus Custody Action, William appealed to the Belarus court to change its ruling but he lost.[87] The trial court stated:

> [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.[88]

(P) The trial court rejected Victoria's contention that the Belarus residency and custody actions are a single proceeding.

William pointed out that Victoria could not use the Belarus Custody Action as a prior proceeding under section 3426 (even though custody was at issue in that action) because it was filed *after* William's California action. William also argued that the

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[86] 16 AA, p. 3613:4-17.

[87] 16 AA, p. 3614:3-6.

[88] 16 AA, p. 3614:3-6.

Belarus Residency Action did not qualify for first-in-time treatment under section 3426 because (although it was filed before his action) custody was not at issue in the residency application.

Victoria responded by claiming the Belarus Residency Action and the Belarus Custody Action were a single proceeding for custody, which started with the filing of the residency application of May 25, 2017. Victoria claimed the residency application was a precursor to her custody action, so the custody issues she raised in Belarus Custody Action should relate back to the filing of her Belarus Residency Action. The trial court rejected that contention:

> [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. [¶][89]

(Q) <u>The trial court concluded the Belarus Residency Action was made without considering any factors similar to the UCCJEA.</u>

In her motion to quash William's action, Victoria invoked section 3426, which prohibits a California court from exercising its custody jurisdiction if a child custody proceeding was previously filed in a foreign court having jurisdiction in substantial conformity with the UCCJEA. (§ 3426, subd. (a).) Victoria contended "the Court in Belarus has already determined [baby L.] is a resident of that country" and that she "properly commenced paternity proceedings in Belarus" before William filed his California action. [90] To impugn William's credibility, Victoria complained in her motion to quash that "William utterly

[89] 16 AA, pp. 3601:14 - 3602:13.

[90] 1 AA, pp. 144:24 -145:8.

failed to mention [the Belarus residency decree] in his [request for temporary custody orders in California]."[91]

The trial court, however, understood why William never mentioned the Belarus Residency Action—it found that William received no notice of the application or the hearing.[92] The trial court found:

> 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.[93]

The trial court also concluded the Belarus court took jurisdiction over the residency action based on a best interest analysis, without considering any jurisdictional factors that substantially conformed to the UCCJEA.[94] The trial court stated:

> [William] has suggested that for section 3426 to apply, the Belarus jurisdictional *analysis* must be in substantial conformity with the analysis under the UCCJEA. In other words, it is not for this Court to do the jurisdictional analysis for Belarus; the Belarus

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[91] 1 AA, p. 144:19-21.

[92] 16 AA, p. 3609:24-26.

[93] 16 AA, p. 3609:24 - 73610:4.

[94] 16 AA, p. 3594:21 - 3595:2.

> court must itself be governed by the UCCJEA or a statute that is substantially similar to it. [¶]
>
> [Victoria] argues that Belarus did apply an analysis similar to a UCCJEA analysis in making its decision. The Court disagrees. Looking at the Belarus decisions themselves, Belarus essentially made the residency determination based on the relative strengths of the parties and what it considered to be [baby L.]'s best interest. 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 made based on [baby L.]'s best interest, not on any of the factors articulated in the UCCJEA. [95]

(R) <u>The trial court refused to recognize or enforce either of the Belarus decrees because William was not given due process.</u>

The trial court found that none of the orders entered by the Belarus court were capable of enforcement or recognition under the UCCJEA "as no notice was given as required under Family Code section 3408."[96]

> 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

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[95] 16 AA, pp. 3594:21 - 3595:2 (emphasis in original).

[96] 16 AA, p. 3625:21-24.

> heard, and the UCCJEA speaks of notice and an opportunity to be heard at the hearing, not at the appellate stage.[97]

The trial court, therefore, declined to recognize or enforce the decrees in the Belarus Residency Action or the Belarus Custody Action.[98]

(S) <u>The trial court concluded California has jurisdiction over baby L. under the UCCJEA.</u>

The trial court found that baby L. had no home state because he did not live in California or Belarus for six months preceding the filing of this action. However, the trial court found that California has subject matter jurisdiction to make an initial child custody determination per section 3421, subdivision (a)(2), because baby L. and his parents have significant connections to California and because of the availability of substantial evidence here about his care, protection, training, and personal relationships.[99]

(T) <u>The trial court quashed William's action.</u>

On January 12, 2018, the trial court ruled it could not exercise its jurisdiction to make an initial child custody determination over baby L. because the Belarus Residency Action

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[97] 16 AA, p. 3615:15-23.

[98] 16 AA, p. 3625:21-24.

[99] 16 AA, p. 3594:2-5 & pp. 3625:14-22.

was, as a matter of law, a child custody proceeding that "was commenced before those in the instant case."[100]

To reach its conclusion, the trial court considered whether the Belarus Residency Action was a child custody proceeding within the meaning of the UCCJEA, which it viewed solely "as a question of California law."[101] (See, § 3402, subd. (c) ["child custody proceeding" defined].) The trial court concluded the Belarus Residency Action involved custody because "[t]he issue that the Belarus court was deciding was … where, as a legal matter, [baby L.] was to live as his principal residence."[102] The trial court stated:

> The Belarus court then decides to 'determine the place of residence of minor [baby L], born on December 19, 2016, by the place of residence of [his] mother, born on July 31, 1989, at the address: Minsk, 12 Polevaya Street, *apartment 7*.' In other words, the [Belarus] Court does not find that [baby L.] 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 [baby L.]'s mother is a Belarus citizen, but the fact that she takes care of [baby L.] herself. The [trial] Court's reading of the decree is that [baby L.]'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 [baby L.] is at issue.[103]

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[100] 16 AA, p. 3625:14-22.

[101] 16 AA, p. 3605:3-17.

[102] 16 AA, p. 3604:10-13.

[103] 16 AA, pp. 3604:19 - 3605:1 (emphasis added).

Although the trial interpreted the residency decree as awarding custody to Victoria at her place of residence, apartment 7 was not where she lived. That apartment was the place *William* leased from Victoria in Belarus for his visa renewal application.[104] William did not live there and rarely, if ever, went there.[105]

The trial court also concluded Belarus could have taken jurisdiction over baby L. in substantial conformity with the UCCJEA based on the significant connections/substantial evidence test (see, § 3421, subd. (a)(2)),[106] despite the trial court's findings that (1) Belarus jurisdictional law and the analysis actually used by the Belarus court in making the residency decree did not substantially conform to the UCCJEA,[107] and (2) William received no due process in the Belarus Residency Action.[108]

(U) <u>Had the trial court not declined to exercise jurisdiction, it stated California is the best forum to determine custody because William would receive due process here.</u>

Victoria argued that William's action should be quashed based on inconvenient forum, in the alternative to her section 3426 claim. The trial court stated that, had it not surrendered its

[104] 16 AA, p. 3571:4-7.

[105] 16 AA, p. 3571:4-6.

[106] 16 AA, pp. 3589 - 3592 & pp. 3593:20 - 3598:9.

[107] 16 AA, pp. 3594:21 - 3595:2.

[108] 16 AA, p. 3625:21-24.

jurisdiction over baby L. to Belarus, it would have denied Victoria's inconvenient forum claim. The trial court found California is the best forum to determine custody because due process is available to both parents here:

> Weighing all of these factors together, the Court believes that if the issue were only one of inconvenient forum, on balance 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.][109]

(V) <u>The trial court recognizes that quashing William's action will drastically limit his time with baby L.</u>

The trial court acknowledged it "is very aware that the likely outcome of this decision [quashing William's action] will be to drastically limit [William]'s interaction with [baby L.]—probably far more than the limit that would occur were [William] to have primary custody."[110]

The trial court hoped Victoria would allow more time, based on something Victoria's mother told the Belarus court when she was secretly obtaining the custody orders against William: "In the Belarus proceedings, [Victoria]'s mother told the

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[109] 16 AA, pp. 3621:21 - 3622:3.

[110] 16 AA, p. 3626:6-8.

court that [Victoria] would be open to have [baby L.] visit the United States and increase [William]'s time with [baby L.]. The Court very much hopes that she makes good on that representation."[111]

(W) **The order quashing William's action was stayed pending appeal by writ of supersedeas.**

On January 29, 2018, William petitioned this Court for supersedeas. This Court issued a temporary stay on February 1, 2018, and granted the petition on March 26, 2018, staying the order quashing William's action pending appeal. This case was set for calendar preference, including an expedited briefing schedule and preference for setting the matter for oral argument.

VI. ARGUMENT

The trial court found California has jurisdiction under the UCCJEA, but concluded under section 3426 that the Belarus Residency Action deprived California of its jurisdiction over baby L. That was an error of law because this action was the first child custody proceeding to be filed regarding baby L. Custody was not at issue in the Belarus Residency Action, so it did not qualify for first-in-time treatment.

Even if the Belarus Residency Action was a custody proceeding, the jurisdictional law and procedure utilized by the Belarus court in taking jurisdiction over the residency application did not substantially conform to the UCCJEA. Therefore, the

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[111] 16 AA, p. 3627:18-22.

order quashing William's action and surrendering child custody jurisdiction over baby L. to Belarus should be reversed.

(A) <u>The trial court correctly found California has jurisdiction to make an initial child custody determination for baby L., but erred in declining its jurisdiction.</u>

The jurisdictional requirements of the UCCJEA exclusively determine subject matter jurisdiction to make child custody decisions. (§ 3421, subd. (b); *In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 490 ("*Nurie*").) "[A]mong the primary purposes of the [UCCJEA] is to encourage states to respect and enforce the prior custody determinations of other states, as well as to avoid competing jurisdiction and conflicting decisions." (*Nurie, supra,* 176 Cal.App.4th at p. 497.) This prevents harm to children by shifting them from state to state to relitigate custody disputes between their parents. (*Ibid.*; *Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276, 1287 [same].) The Act accomplishes its goal by allowing custody jurisdiction to exist in only one forum at a time.

For an initial custody determination, the proper forum is typically where the child lived for six months immediately before the action was filed, known as the child's "home state." (§ 3421, subd. (a)(1).) When a child has no home state, the Act provides for jurisdiction where the child and at least one parent has a significant connection and where substantial evidence is available about the child's care, protection, training, and personal relationships. (*Id.,* subd. (a)(2).) Other jurisdictional bases are recognized in the UCCJEA, none of which apply here. (See, *id.,*

subds. (a)(3) [other states have declined jurisdiction in favor of California] & subd. (a)(4) [no state has jurisdiction].)

The trial court concluded neither California nor Belarus were the home state of baby L., but found California has jurisdiction per the significant connection/substantial evidence test in subdivision (a)(2).[112] Therefore, California has jurisdiction to make an initial custody determination for baby L. under the UCCJEA.[113]

The trial court also found California (not Belarus) is the most appropriate forum to make a custody determination for baby L. because William would receive due process here. [114] The trial court made that statement in denying Victoria's motion to declare California an inconvenient forum. (See, § 3427, subd. (a) [discretion to decline jurisdiction when California is an inconvenient forum].)

As the trial court observed, the entire case turned on its analysis of the Belarus Residency Action, which it thought

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[112] 16 AA, pp. 3589 - 3592.

[113] William contends California was baby L.'s home state when this action was filed and that baby L.'s absence from the state was only temporary. (See, §§ 3421, subd. (a)(1) & 3402, subd. (g) [temporary absences disregarded].) This appeal, however, can be decided without reaching the home state question because the trial court ultimately found California has jurisdiction under section 3241, subdivision (a)(2). The only issue on appeal is whether section 3426 required the trial court to decline to exercise that jurisdiction.

[114] 16 AA, pp. 3621:21 - 3622:3.

qualified for first-in-time treatment under section 3426.[115] Under that section, a California court may not exercise its jurisdiction if a child custody proceeding was previously filed in a foreign state having jurisdiction in substantial conformity with the UCCJEA. (§ 3426, subd. (a).) Section 3426 provides:

> Except as otherwise provided in Section 3424 [emergency 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).)

William contends the trial court erred in concluding section 3426 applied. The Belarus Residency Action was not a custody proceeding within the meaning of the UCCJEA, and Belarus did not have jurisdiction substantially in conformity with the UCCJEA.

(B) *De novo* review applies to the trial court's order quashing William's action.

Subject matter jurisdiction determinations are reviewed independently on appeal to the extent the jurisdictional facts are undisputed. (*Saffer v. JP Morgan Chase Bank* (2014) 225 Cal.App.4th 1239, 1248.) When those facts are disputed, the

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[115] 16 AA, p. 3605:14-19.

substantial evidence standard applies to the trial court's factual findings, but the appellate court independently reviews the trial court's conclusions on the legal significance of those facts. (*Brown v. Garcia* (2017) 17 Cal.App.5th 1198, 1203; *Nurie, supra,* 176 Cal.App.4th 478, 492 [reviewing court independently reweighs the jurisdictional facts]; *In re Marriage of Sareen* (2007) 153 Cal.App.4th 371, 376 [same].)

As the trial court stated, the issue whether the Belarus Residency Action was a child custody proceeding within the meaning of the UCCJEA is "a question of California law" based on the jurisdictional facts it found.[116] Those facts include (1) the date the Belarus Residency Action was filed and the date William filed his action, (2) that William received no notice or opportunity to be heard in the residency action, (3) that the jurisdictional law and analysis used by the Belarus court was contrary to the UCCJEA, and (4) the contents of the residency decree, from which the trial court gleaned whether custody was at issue in that action.

This Court should independently review the legal significance of the jurisdictional facts and reach its own conclusion whether section 3426 applies, without deference to the trial court's analysis.

[116] 16 AA, p. 3605:3-17.

(C) <u>The trial court erred in concluding the Belarus Residency Action was a child custody proceeding.</u>

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. The term includes a proceeding for dissolution of marriage, legal separation of the parties, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear....

(§ 3402, subd. (d); see also, *id.*, subd. (c) ["child custody determination" defined].)

According to the Belarus court, the Belarus Residency Action involved a "dispute about the place of residence of the child."[117] After the hearing, it "determine[d] the place of residence of minor [baby L], born on December 19, 2016, by the place of residence of [his] mother Victoria, born on July 31, 1989, at the address: Minsk, 12 Polevaya Street, apartment 7."[118] The residency decree is silent on issues of custody or visitation. It states no parenting plan, visitation schedule, or allocation of parental authority between the parties over baby L. Had the residency decree been an award of custody, it would have contained orders like those.

Victoria told the trial court the Belarus Residency Action was a routine matter necessary for baby L. to become a legal

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[117] 16 AA, p. 3604:1-2.

[118] 16 AA, p. 3604:19-23.

resident of Belarus. Victoria testified that William knew about the residency action and did not wish to participate because it was a "normal proceeding."[119] She declared:

> William was aware of the fact that we would have to apply for [baby L.] to become a resident of Belarus, given [baby L.] was not born in Belarus. On May 25, 2017, while William and I were in Paris for the French Open, I commenced the necessary residency proceedings in Belarus.[120] On May 26, 2017, papers were filed in Belarus regarding [baby L.]'s residential status. A hearing was held on June 7, 2017 wherein the court in Belarus declared [baby L.] a resident of Belarus.[121]

Victoria admitted, in the early stages of William's action, that the Belarus Residency Action was not a custody proceeding. Her declaration of August 1, 2017, stated:

> On May 25, 2017, papers were filed in Belarus regarding [baby L.]'s residential status. A hearing was held on June 7, 2017, wherein the court in Belarus declared [baby L.] a resident of Belarus. . . . After the [Belarus] Court determined [baby L.] was a resident of Belarus, I began the process of initiating custody proceedings in Belarus. I intend to seek custody orders in Belarus as this is [baby L.]'s place of residence.[122]

The custody action referenced in the declaration is the Belarus Custody Action, which Victoria filed on July 27, 2017, seven days after William filed his action here. Victoria's

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[119] 6 RT, pp. 4292:25 - 4293:5.

[120] 3 AA, p. 701:2-5, ¶ 10.

[121] 1 AA, p. 190:17-18, ¶ 3.

[122] 1 AA, pp. 350:45 - 351:1.

declaration makes it clear she did not seek custody in Belarus until after William's action was filed, and that the Belarus Residency Action merely determined baby L. to be a resident of Belarus.

Custody was not at issue in the Belarus Residency Action because there was no dispute between the parties regarding baby L. when it was filed. They were together on a romantic trip to Paris when Victoria's mother filed the action on May 25, 2016.[123] When they returned from Paris, they stayed together in Belarus with baby L. until the three departed for Spain on June 7, 2017 (the same day Victoria's mother appeared on the Belarus Residency Action).[124] Victoria admitted, and the trial court found, that the parties were still a couple when the residency action was heard on June 7, 2017.[125] The parties continued to live as a family until they broke up in London in July 2017. In her declaration of July 25, 2017, Victoria stated her relationship with William started in January 2016 and "continued until it abruptly ended approximately two weeks ago" (which means early July 2017).[126] This belies the existence of any custody dispute during the two-week existence of the Belarus Residency Action, from May 25 to June 7, 2017.

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[123] 3 AA, p. 701:2-5.

[124] 16 AA, p. 3601:7-8; 16 AA, p. 3609:18-22; 16 AA, p. 3572:6-8.

[125] 6 RT, pp. 4292:4-13; 16 AA, p. 3572:2-5.

[126] 1 AA, p. 131:19-20.

Only after William filed his California action did Victoria commence custody proceedings in Belarus. She filed the Belarus Custody Action on July 28, 2017, one day after the trial court made temporary custody orders and abduction prevention orders against her.[127] Victoria stated that she did not file for custody in Belarus until after William filed his action here.[128] Victoria admitted:

> [A]fter the [Belarus] Court determined [baby L.] was a resident of Belarus [in the Belarus Residency Action], I began the process of initiating custody proceedings in Belarus.[129]
>
> After [baby L.]'s residency orders were in place, I began discussing with my attorney in Belarus, Anton Greinwich, my options in regards to initiating custody proceedings in Belarus…. We were in the process of drafting the paperwork when I was served with William's Petition to Establish Parentage in California on July 24, 2017. [¶] On July 28, 2017, my attorney filed a motion for child custody in Belarus on my behalf … [i.e., the Belarus Custody Action].[130]

Those admissions were made in the first two weeks of this case, and were an acknowledgment that the Belarus Residency Action was not a custody proceeding. Logically, there would be no need for Victoria to bring the Belarus Custody Action had her custody rights already been determined in the Belarus Residency Action.

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[127] 16 AA, p. 3573:4-6; 1 AA, pp. 137 - 138.

[128] 3 AA, p. 702:9-10.

[129] 1 AA, p. 190:27-28.

[130] 3 AA, pp. 701:26 - 702:8.

Victoria later tried to convince the trial court that her two Belarus actions were linked, claiming the residency action was a precursor to the Belarus Custody Action. Victoria needed to make that argument because the Belarus Residency Action was filed before William's action (but did not involve custody), while the Belarus Custody action was for custody (but it was filed after William's action).[131] She wanted the trial court to believe both actions were a single proceeding, so the custody issues she raised in the Belarus Custody Action would relate back to the filing of the Belarus Residency Action.

In deciding whether the two Belarus actions should be deemed one proceeding, the trial court observed that "the question of custody or visitation would not have come up by necessity in the residency application."[132] The Belarus Residency Action ended June 7, 2017, when the residency decree was issued, leaving nothing left to be decided in that action.[133] The trial court, therefore, rejected Victoria's contention that the two Belarus actions were the same proceeding and found they were separate, unrelated cases.[134]

The trial court then focused on whether the Belarus Residency Action itself was a child custody proceeding, as that was the only foreign action that could possibly qualify for first-in-

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[131] See, 16 AA, pp. 3601 - 3602.

[132] 16 AA, pp. 3601 - 3602.

[133] 16 AA, pp. 3601:14 - 3602:13.

[134] 16 AA, pp. 3601:14 - 3602:13.

time treatment under section 3426. The trial court looked to the wording of the decree from the Belarus Residency Action to determine if custody was at issue. The trial court concluded:

> The Belarus court then decides to 'determine the place of residence of minor [baby L], born on December 19, 2016, by the place of residence of [his] mother, born on July 31, 1989, at the address: Minsk, 12 Polevaya Street, *apartment 7*.' In other words, the [Belarus] Court does not find that [baby L.] 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 [baby L.]'s mother is a Belarus citizen, but the fact that she takes care of [baby L.] herself. The [trial] Court's reading of the decree is that [baby L.]'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 [baby L.] is at issue.[135]

The trial court thought Victoria lived in apartment 7, so it concluded the Belarus court must have been awarding physical custody of baby L. to her.[136] That was a mistaken interpretation of the Belarus residency decree. Apartment 7 was the unit Victoria leased *to William* in Minsk. He signed that lease because it was needed for his temporary residency application in Belarus.[137] The Belarus court could not have been awarding Victoria custody of baby L. at apartment 7, as the trial court concluded, because Victoria did not live there.

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[135] 16 AA, pp. 3604:19 - 3605:1 (emphasis added).

[136] 16 AA, pp. 3604:19 - 3605:1.

[137] 3 AA, p. 891 (see box 17) & p. 892 (see box 19).

Further, determining where a child resides differs from an award of custody. (See, *In re Marriage of Paillier* (2006) 144 Cal.App.4th 461, 466 ("*Paillier*").) In *Paillier*, a French divorce decree stated that the "normal place of residence (résidence habituelle)" of the parties' child was to be with his mother, and contained other provisions for legal and physical custody. (*Paillier, supra,* 144 Cal.App.4th at p. 466, fn. 4.) The *Paillier* court construed the French decree as a child custody determination within the meaning of the UCCJEA because:

- The decree was entered in a divorce proceeding, which would place custody and visitation in issue.

- It included a provision for legal custody (i.e., the parties were to have the "joint exercise of parental authority over" the child).

- The residence provision specified the parent (i.e., the mother) with whom the child would reside.

- The decree included a visitation provision (i.e, the father "was to have visitation … on a specified schedule").

- It forbade mother from taking the child "outside French territory for a period that might prejudice [the father's] exercise of his visitation right."

(*Paillier, supra,* 144 Cal.App.4th at p. 466 & fn. 4.)

The *Paillier* court found it significant that the residency decree used the future tense in stating the child's place of

residence “was *to be with* [his mother].” (*Paillier, supra,* 144 Cal.App.4th at p. 466, ¶ 2, emphasis added.) That language, coupled with the circumstances in which the decree was made, showed that the French court was ordering with whom the child *would live* under an award of custody.

The decree in the Belarus Residency Action lacks any hallmarks of a custody order. It was not entered in a divorce or parentage action, and there was no dispute over custody when the action was filed. The decree contains no provision for legal custody or visitation, no provision allocating decision-making authority over baby L., and no provision enjoining the removal of baby L. from Belarus. The decree merely determined baby L.’s legal residence to be in Minsk, Belarus. No custody determination was made because it was not a child custody proceeding.

Because the Belarus Residency Action was not a child custody proceeding, the trial court erred in declining to exercise custody jurisdiction over baby L. The first custody proceeding to be filed regarding baby L. was William’s action.

(D) <u>The trial court erred in concluding Belarus had jurisdiction substantially in conformity with the UCCJEA.</u>

(1) ***Due process is a jurisdictional requirement that was not afforded William in the Belarus court.***

Belarus could not have had jurisdiction in substantial conformity with the UCCJEA because the trial court found

William did not receive notice or an opportunity to be heard in the Belarus Residency Action.[138] Section 3425 provides:

> 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 as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(§ 3425, subd. (a).) Section 3408, subdivision (a) provides that "[n]otice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective." (§ 3408, subd. (a).)

The UCCJEA requires due process as a condition for a court to have jurisdiction; it is not merely a defense against enforcement of an order. Section 3425 makes due process a jurisdictional standard: "This part does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard." (§ 3425, subd. (b).) It is evident that due process is a jurisdictional requirement because section 3425 appears in Chapter 2 of the UCCJEA, entitled "Jurisdiction." A separate chapter called "Enforcement" addresses the defense for resisting enforcement or registration of an out of state order for lack of notice. (See, §§ 3445, subd. (d)(3), 3448 subd. (d)(1)(C) & 3450, subd. (a)(1)(C).) Therefore, affording due process to parents before making a child custody determination is

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[138] 16 AA, pp. 3609:24 - 3610:4.

not just a procedural requirement; it is an essential element for a court to have jurisdiction to make that determination under the UCCJEA.

The trial court found the Belarus Residency Action was decided "without notice or an opportunity to be heard" to William,[139] and on that basis it refused to recognize or enforce the decree. However, the trial court concluded the due process violation related only to the enforceability of the decree, instead of being a jurisdictional requirement of the UCCJEA.[140] This was error as a matter of law.

A proceeding in another state must afford due process before it will be afforded deference by a California court under section 3426. (See, *Allison v. Superior Court* (1979) 99 Cal.App.3d 993, 1000 ("*Allison*") [decided under former UCCJA].) In *Allison,* the Court held that Texas did not have jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), the predecessor to the UCCJEA, because the Texas court took jurisdiction over a custody proceeding without affording due process to one parent.[141]

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[139] 16 AA, p. 3615.

[140] 16 AA, pp. 3623 - 3624.

[141] The UCCJEA replaced the UCCJA effective January 1, 2000. (Stats. 1999, ch. 867, § 3.) Decisions under the UCCJA are useful in interpreting the UCCJEA, but must be read with the differences in mind. (See, *Paillier, supra,* 144 Cal.App.4th at p. 469.) There is no material difference here. The UCCJA had a provision similar to section 3426, as discussed below.

In *Allison,* the parties were divorced in California and custody orders were made here as to their children. The Los Angeles Superior Court awarded the father the right to remove the children from California to Texas; the mother remained in California. When the father refused visits to the mother, she petitioned the Los Angeles Superior Court to hold the father in contempt for violating the California visitation order. She had the father served with the order to show cause on September 26 for a hearing set for October 10.

The father in *Allison* filed his own action in Texas for custody orders on September 29. The mother was served October 3 for a hearing set for October 6 in Texas. She asked for a continuance, which the Texas court denied. The Texas court found the children would suffer psychologically if they visited their mother in California, and purported to terminate the mother's right of visitation. On October 10, the mother petitioned the Los Angeles Superior Court for further custody orders. The father unsuccessfully moved to dismiss under the UCCJA due to the pending Texas action. The father's writ petition followed.

Although Texas had not adopted the UCCJA, the act required California courts to defer to states having jurisdiction over a child in substantial conformity with the act, even if those states were not parties to the UCCJA. (*Allison, supra,* 99 Cal.App.3d at p. 998.) In deciding the appeal, the *Allison* court applied a provision in the UCCJA similar to section 3426 (i.e.,

fmr. Civ. Code, § 5155). (*Allison, supra,* 99 Cal.App.3d at pp. 999–1000.)[142]

The trial court's assertion of jurisdiction in *Allison* was affirmed because the Texas court failed to afford due process to the mother, and therefore Texas did not have jurisdiction over the children in substantial conformity with the UCCJA. (*Allison, supra,* 99 Cal.App.3d at pp. 1000 & 1003.) Under the heading, "Lack of Substantial Compliance by Texas with the Principles of the [UCCJA]," the Court held:

> A second substantial departure from the procedures mandated by the Act was the 3-day notice of the proceedings given by the Texas court to Irene, the contestant who resided in California, instead of the 10 days notice required by the Act *for the exercise of jurisdiction* over persons outside the state [Citation.] Wholly apart from the Act's specification of 10 days notice, we have grave doubt whether a 3-day notice to a California resident of a proceeding in Texas passes muster as valid notice under general principles of due process.
>
> By reason of these procedural deficiencies we think it readily apparent that Texas was not a state *exercising child custody jurisdiction* 'substantially in conformity' with the [UCCJA]; hence, the Los Angeles Superior Court was not constrained by principles of

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[142] Former Civil Code section 5155 of the UCCJA stated: "A court of this state shall not exercise its jurisdiction under this title if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction *substantially in conformity with this title*, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons." (Emphasis added.)

> comity from an appropriate exercise of its jurisdiction in the cause. [Citations.]

(*Allison, supra,* 99 Cal.App.3d at pp. 999–1000, emphasis added.)

Like the UCCJA at the time of *Allison,* the UCCJEA specifies minimum due process standards as a condition of having jurisdiction in substantial conformity with the UCCJEA. The trial court found William was deprived of due process in the Belarus Residency Action, such that the residency decree was not capable of recognition or enforcement under the UCCJEA.

The finding of a due process violation cannot be reconciled with the trial court's conclusion that Belarus had jurisdiction substantially in conformance with the UCCJEA. The trial court thought the due process requirement in the UCCJEA only applied when a party sought to enforce a foreign custody order. Therefore, the trial court concluded there was no need for a foreign state to afford due process to the parents in a custody dispute for that state to have jurisdiction in substantial conformity with the UCCJEA per section 3426.

The trial court believed its interpretation was correct because section 3426 does not reference section 3408, which specifies the type of notice required under the UCCJEA.[143] The trial court stated:

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[143] Section 3408, subdivision (a) states: "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

> 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.[144]

Section 3408 explains what type of notice is "required for the exercise of jurisdiction…" and appears in Chapter 1 of the Act ("General Provisions"). (See, § 3408.) It is immaterial those notice standards are not referenced in section 3426 because section 3408 applies to the UCCJEA as a whole. There was no need for the Legislature to reference section 3408 in each section of the Act.

The trial court also overlooked that the due process requirement appears in Chapter 2 of the UCCJEA ("Jurisdiction"). (See, § 3425.) This shows the intent of the Legislature for section 3425 to be a jurisdictional standard. For Belarus to have jurisdiction in substantial conformity with the UCCJEA in the Belarus Residency Action, it had to afford William due process per section 3425, in the manner specified in section 3408.

The trial court erroneously deferred to Belarus law regarding notice: "The first question, then, is what notice is required *under Belarus law*."[145] The test, however, is not whether

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calculated to give actual notice but may be by publication if other means are not effective."

[144] 16 AA, pp. 3623 - 3624.

[145] 16 AA, p. 3607 (emphasis added).

notice was correct under Belarus law, but whether it substantially conformed with the notice requirements of the UCCJEA. (See, § 3426, subd. (a).) Although section 3408 allows for notice "by the law of the state in which the service is made. . . ," that notice "must be given in a manner reasonably calculated to give actual notice. . . ." (§ 3408, subd. (a).) This sets the minimum standard for notice acceptable under the UCCJEA, which the trial court found was not met. The trial court found that William received no notice of the Belarus Residency Action and that he was not afforded an opportunity to participate before the Belarus court determined residency. Accordingly, even if notice was proper under Belarus law, it did not meet the minimum requirement of section 3408 of being reasonably calculated to give actual notice. (§ 3408, subd. (a).)

The trial court's finding that William was not afforded due process per section 3408 is supported by substantial evidence. The Belarus decree states notice was mailed to William at apartment 7, his registered address in Belarus. Yet there was no dispute William was with Victoria in Paris when the notice was mailed, and that he did not live in apartment 7.[146] The notice was not reasonably calculated to reach him, as required by section 3408, which is the reason the trial court refused to recognize or enforce the residency decree.

The Belarus Residency Action was kept secret from William. The residency application was filed by Victoria's mother

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[146] 16 AA, p. 3571:4-6.

on May 25, 2017, the day after the parties left for their trip to Paris. It was heard and decided less than two weeks later on June 7, 2017, the day the parties and baby L. went to Spain. Victoria was not present at the hearing. Her mother filed the application and appeared at the hearing. Secret proceedings without participation of the parents do not satisfy the due process requirement of the UCCJEA, so Belarus could not have had jurisdiction in substantial conformity with the UCCJEA.

(2) ***Belarus took jurisdiction over the residency action in a way that was antithetical to the UCCJEA.***

Because Belarus law is so different than the UCCJEA, the jurisdictional bases under the UCCJEA were never considered by the Belarus court. The Belarus court never analyzed whether Belarus or California is the most appropriate forum to make a custody determination for baby L. based on where he lived before the Belarus Residency Action was filed, or where he has significant connections and substantial evidence about his care exists. (See, § 3421, subds. (a)(1) & (2).)

The trial court agreed that the Belarus court did not use a UCCJEA-type analysis in asserting jurisdiction, and instead took jurisdiction based on what the Belarus court thought were baby L.'s best interests.[147] The Belarus court's reliance on baby L's best interests to assert jurisdiction was antithetical to the

[147] 16 AA, pp. 3594:21 - 3595:2.

UCCJEA. (See, *Nurie, supra,* 176 Cal.App.4th at p. 492.) In *Nurie*, the Court stated:

> While we are not unconcerned with the child's best interests, the UCCJEA in fact 'eliminates the term "best interests" from the statutory language to clearly distinguish between the jurisdictional standards and the substantive standards relating to child custody and visitation.' [Citations.] As the trial court aptly noted, 'The issue currently before the court ... is not what is in the best interest of the child. Rather the issue now before the court is which jurisdiction has the *authority* to engage in that inquiry and adjudicate the competing claims.'

(*Nurie, supra,* 176 Cal.App.4th at p. 492, emphasis in original, fns. omitted.)

Victoria's expert on Belarus law, Dr. Babkina, testified that the Belarus court took "best interests of the child" into account when determining jurisdiction, as the Belarus court was required to do under Belarus law.[148] The trial court agreed that the Belarus court used a best interest standard in taking jurisdiction over the Belarus Residency Action:

> Looking at the Belarus decisions themselves, Belarus essentially made the residency determination based on the relative strengths of the parties and what it considered to be [baby L.]'s best interest. 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

[148] 5 RT, pp. 3609:9 - 3611:9, pp. 3943:10 - 3944:1, pp. 3945:4 - 3946:10.

were made based on [baby L.]'s best interest, not on any of the factors articulated in the UCCJEA. [149]

The "best interests" factors considered by the Belarus court in making the residency decree were:[150]

- Victoria "takes care of the child herself from the moment of his birth, in spite of the itinerant nature of [her] work, the child is always with her. In addition, [Victoria's mother] helps her to care for her child."

- "The child is documented by a passport of a citizen of the Republic of Belarus, registered at the place of residence of [Victoria]. [William] does not own any housing accommodation himself, he is registered at the place of residence of [Victoria]."

- "Now they have a dispute about the place of residence of the child. Taking into consideration his young age, as well as the fact that she also takes care of him herself, [Victoria] asked the court to determine the place of [baby L.] by her place of residence at the address: Minsk, 12 Polevaya Street, apartment 7."

To be in substantial conformity with the UCCJEA, Belarus law had to (1) provide for child custody jurisdiction based on where the child lived before the action was filed, or where the child has significant connections and substantial evidence as to

[149] 16 AA, pp. 3594:21 - 3595:2 (emphasis in original).

[150] 3 AA, p. 713.

his care existed, (2) require both parents be afforded due process before a custody determination can be made, and (3) acknowledge that only one forum could exercise jurisdiction over a child, and allow for surrender of its jurisdiction to the most appropriate forum when there are simultaneous proceedings. Instead of relying on such crucial factors, the Belarus court considered baby L.'s best interests (a forbidden factor in a UCCJEA analysis, but which Belarus law uses as the test for jurisdiction).

(3) *Belarus law does not allow its court to decline jurisdiction over a child even when a proceeding has been filed in a foreign court.*

Belarus law has no provision for the surrender of its jurisdiction to another forum, like section 3426. Victoria submitted an opinion from the head of the Belarusian Republican Bar Association, who opined that custody disputes "must be fulfilled on the territory of Belarus," and that any such action "started in the Courts of the Republic of Belarus, must be resolved on the merits even if the case is also under jurisdiction of foreign court."[151]

The requirement of Belarus law that its courts will not recognize the possibility of another country having jurisdiction over a child is hostile to one of the main purposes of the UCCJEA, which is to avoid harm to children by re-litigating custody disputed between parents in multiple jurisdictions. (See, *Nurie, supra,* 176 Cal.App.4th at p. 497.) The lack of any

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[151] 2 AA, pp. 493 - 494; 2 AA, p. 479:20-22.

mechanism under Belarus law to allow another forum to have jurisdiction over a child, even when that forum is the child's home state, is contrary to the UCCJEA.

(4) *The Belarus court would not communicate with the trial court on the jurisdictional dispute.*

Section 3426 provides:

> If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this part, the court of this state shall stay its proceeding *and communicate with the court of the other state*. If the court of the state having jurisdiction substantially in accordance with this part does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(§ 3426, subd. (b), emphasis added.) Under section 3426, California may exercise its jurisdiction, even when a child custody proceeding has been filed in a foreign court having jurisdiction in substantial conformity with the UCCJEA, if the foreign court has terminated or stayed its proceeding. (§ 3426, subd. (a).) The point of communication is to determine which one will cede jurisdiction to the other.

Victoria's expert on Belarus law said the Belarus courts cannot discuss a pending case with anyone, including a foreign court, so such communication was not possible.[152] The trial court said Victoria "stepped back from that position," but the trial court

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[152] 2 AA, pp. 490 - 491; 2 AA, p. 479:15-19.

nevertheless believed it would be futile to speak with the Belarus court:

> Ms. Azarenka has stepped back from that position (perhaps in light of *In re M.M.* (2015) 240 Cal.App.4th 703, 716 [the refusal of a foreign state to communicate with a California court can constitute a finding that the foreign state has been 'deemed' to have declined to exercise jurisdiction]), but, given the circumstances here, there is little doubt but that the Belarus Court will not cede jurisdiction to California. . . . While section 3426(b) does speak in mandatory terms, the law hardly requires that this Court engage in futile acts. . . .[153]

The decision cited by the trial court, *In re M.M., supra,* 240 Cal.App.4th at pp. 716-717, discusses the need for courts to communicate to resolve jurisdictional disputes because one of the purposes of the UCCJEA is to promote the "exchange of information and other mutual assistance between courts of sister states," including foreign countries which have not adopted the UCCJEA. (*In re M.M., supra,* 240 Cal.App.4th at p. 715.)

In *M.M.,* the child's home state was Japan but dependency proceedings were started in California, with our courts assuming temporary emergency jurisdiction over the child. The courts in Japan "unambiguously and repeatedly stated it was inappropriate under their legal system for a Japanese court to communicate with the juvenile court. . . ." (*In re M.M., supra,* 240 Cal.App.4th at p. 706.) The juvenile court attempted to explain the purpose of the call was to discuss which jurisdiction would be

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[153] 16 AA, pp. 3598 21-28, fn. 3.

the most appropriate to handle the case, but was "met with 'polite but solid resistance.' " (*Id.,* at p. 710.) The juvenile court assumed permanent jurisdiction over the child, treating the refusal to communicate as a declination of jurisdiction by the court in Japan. (*Id.,* at p. 714.) The mother appealed, claiming that the juvenile court was obligated to determine whether Japan would assume jurisdiction under the UCCJEA. (*Id.*) The Court of Appeal in *M.M.* affirmed, holding:

> [W]hen a home state declines jurisdiction in any manner that conveys its intent not to exercise jurisdiction over a child in connection with a child custody proceeding . . . by refusing to even discuss the issue of jurisdiction despite myriad good faith attempts to do so by the juvenile court, that such inaction or refusal is tantamount to a declination of jurisdiction by the home state on the grounds California is the more appropriate forum under subdivision (a)(2) of section 3421.

(*In re M.M., supra,* 240 Cal.App.4th at p. 717.)

The situation was the same here. Victoria's expert stated the Belarus court was prohibited by Belarus law from discussing the case with the trial court. The trial court made no attempt to communicate, finding it would be "futile" to do so because it saw no chance of Belarus surrendering jurisdiction to California. Under those circumstances, the Belarus court should be treated as having declined jurisdiction, pathing the way for California to assert its jurisdiction. Also, the trial court should have concluded that Belarus law was not in substantial conformity with the UCCJEA based on the inability to communicate with the Belarus

court over the jurisdictional issue and the trial court's finding that Belarus would never cede jurisdiction to California.

(5) ***The trial court's interpretation of what was needed for Belarus to have jurisdiction "substantially in conformity" with the UCCJEA was incorrect.***

As discussed, Belarus did not have jurisdiction in substantial conformity with the UCCJEA because (1) the jurisdictional law of Belarus is based on a best interests standard, rather than where the child has lived or has significant connections, (2) Belarus law does not permit the relinquishment of jurisdiction to another forum that is properly exercising jurisdiction over a child, which means the parties will face simultaneous custody proceedings in Belarus and the other forum, (3) the courts in Belarus are not allowed to discuss jurisdictional disputes with a foreign court, and (4) due process was not afforded to William before the residency decree was issued. Due to the lack of conformity with the principles on which the UCCJEA is based, there was no need for trial court to surrender its jurisdiction over baby L. to Belarus under section 3426.

Although the trial court acknowledged the substantial differences between Belarus law and the UCCJEA, it believed none of it mattered under section 3426. The trial court stated that requiring Belarus law to substantially conform to the

UCCJEA would be tantamount to requiring Belarus to adopt the UCCJEA for section 3426 to apply.[154]

> The Court believes that the UCCJEA does not require that the alternative court adopt the UCCJEA or a statute similar to it. The Court's view is that the foreign state's decision will qualify if the facts would support jurisdiction under a UCCJEA analysis, whether or not the other court does such an analysis.[155]

While Belarus did not have to enact jurisdictional laws exactly like ours, Belarus law and the procedure it used to acquire jurisdiction had to substantially conform with the UCCJEA for section 3426 to apply. (See, *Allison, supra,* 99 Cal.App.3d at p. 998.) The trial court misinterpreted section 3426 to mean neither the jurisdictional laws of Belarus, nor the analysis used by the Belarus in taking jurisdiction, had to substantially conform to the UCCJEA because, to do otherwise, would effectively require Belarus to adopt the Act. All that mattered in the trial court's view was whether Belarus *could have* taken jurisdiction in substantial conformity with the UCCJEA under the facts, even though Belarus *actually* asserted jurisdiction over baby L. in a way that did not substantially conform to the Act.[156] The trial court stated:

> Now, I do not agree with [Victoria] that the Belarus court applied UCCJEA principles when it made its decision. I don't think it did frankly. As I read the

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[154] 16 AA, pp. 3596 - 3597.

[155] 16 AA, p. 3595:9-13.

[156] 16 AA, p. 3595 - 3596.

> decision, it just can't do it. It may have talked about some of these jurisdictional principles in passing but that wasn't the basis of its decision.
>
> But having said that, I don't think it needs to -- I think the UCCJEA asks the question is there UCCJEA jurisdiction in Belarus. If they were to apply the UCCJEA, would they find jurisdiction? Not did they in fact apply the UCCJEA. I don't think they have to. I think the only question is whether or not if they did, would they have it?[157]

The trial court's reasoning was based on a misunderstanding of section 3246. When a child custody proceeding has been commenced in a foreign state before an action is filed here, the issue is whether the foreign state has jurisdiction in substantial conformity with the UCCJEA. The trial court acknowledged the Belarus court did not apply the principles underlying the UCCJEA when it took jurisdiction over the Belarus Residency Action.

The trial court, however, interpreted section 3426 as merely requiring there be a basis on which Belarus could have, hypothetically, asserted jurisdiction in conformity with the UCCJEA, even though the laws of Belarus were inconsistent with the Act and the manner in which jurisdiction was actually taken was contrary to the Act. The trial court's interpretation is incorrect because it defeats the purpose of the UCCJEA. There is no reason California must decline its jurisdiction over a child when the foreign state took jurisdiction not in conformity with the jurisdictional standards and procedural safeguards inherent

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[157] 9 RT, pp. 6756:21 - 6757:6.

in the UCCJEA. Section 3426, by its plain language, does not apply unless the foreign state has jurisdiction in substantial conformity with the UCCJEA. This requires the foreign state to have jurisdiction laws and procedures for taking jurisdiction over a child that are similar enough to the UCCJEA for California to defer to that state's jurisdiction. If the laws of the foreign state contradict the principles of the UCCJEA, then section 3426 is inapplicable.

In *Allison, supra,* 99 Cal.App.3d at p. 998, the Court of Appeal affirmed the trial court's refusal to recognize the prior Texas custody proceeding because the mother was not afforded due process by the Texas court. That was the proper result even though, hypothetically, the Texas court could have given more notice to the mother before terminating her visitation rights. The *Allison* court based its decision on what the Texas court did, not what it could have done.

Here, the trial court concluded that Belarus law does not substantially conform to the UCCJEA because the Belarus court, in deciding the residency action, applied a best interests standard to take jurisdiction (which is prohibited under the UCCJEA). Belarus courts will not surrender jurisdiction over a child to a foreign state, even when that forum is already exercising jurisdiction over custody (which is also contrary to the UCCJEA). Finally, the Belarus court decided the residency action without due process to William (which is a jurisdictional requirement of the UCCJEA). Therefore, the trial court erred as a matter of law

in surrendering its jurisdiction to Belarus under section 3426 because the requirements in section 3246 were not satisfied.

(E) <u>The error was prejudicial.</u>

Prejudicial error must be shown for reversal of a judgment or order. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) A miscarriage of justice occurs when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

The trial court found California has jurisdiction under section 3421, subdivision (a)(2). The only reason the trial court quashed William's action was due to its application of section 3426. The trial court clarified there was no other basis for its ruling. Had section 3426 not applied, the trial court stated it would have denied Victoria's motion to declare California as an inconvenient forum under section 3427 because California is the most appropriate forum to make a custody determination over baby L. The court stated:

> Weighing all of these factors together, the Court believes that if the issue were only one of inconvenient forum, on balance 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.[158]

[158] 16 AA, pp. 3621:21 - 3622:2.

Because the order quashing William's action took away his ability to have a California court determine custody, the error was prejudicial and resulted in a miscarriage of justice.

VII. CONCLUSION

The trial court found that California has jurisdiction to make a custody decision regarding baby L., but erred as a matter of law in surrendering its jurisdiction to Belarus under section 3426. Therefore, the order quashing William's action should be reversed and the matter remanded for the trial court to make an initial custody determination for baby L.

Dated: July 19, 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: July 19, 2018 WALZER MELCHER LLP

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

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On July 19, 2018, I served the foregoing document described as **APPELLANT'S OPENING BRIEF** upon the following by placing a true copy thereof in sealed envelopes addressed as follows:

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Annais Alba