



Court of Appeal, Fourth District, Division 3, California.

In re SHOSHANA B., a Person Coming Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent,

v.

SHELLEY B. et al., Defendants and Appellants.

G016007.

April 26, 1995.

Review Denied July 27, 1995. ^{FN*}

^{FN*} In denying review, the Supreme Court ordered that the opinion be not officially published. (See California Rules of Court-Rules 976 and 977).

In international custody dispute, the Superior Court, Orange County, No. J-429003, [David C. Velasquez, J.](#), declared minor child dependent child. The Court of Appeal, [Sonenshine, J.](#), held that issues on appeal, whether California court properly refused to return matter to country of child's habitual residence and exercised emergency jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA), were rendered moot by decision by federal district court during pendency of appeal.

Appeal dismissed.

[Sonenshine, J.](#), concurred and filed opinion.

***115** [Mary Elizabeth Handy](#), under appointment by the Court of Appeal, Escondido, for defendant and appellant, Shelley B.

Johnson and Flyer and [David R. Flyer](#), Costa Mesa, for defendant and appellant, John B.

[Terry C. Andrus](#), County Counsel, and Michelle Ben-Hur, Deputy County Counsel, for plaintiff and respondent.

[John L. Dodd](#), Tustin and [Harold La Flamme](#), under

appointment by the Court of Appeal, Santa Ana, for the minor.

OPINION

[SONENSHINE](#), Associate Justice.

Shelley B. appeals a judgment declaring her daughter, Shoshana B., a dependent child. She contends the court's exercise of jurisdiction violated the Uniform Child Custody Jurisdiction Act (UCCJA).^{FN1} She also contests the sufficiency of evidence supporting the jurisdictional, placement and visitation orders. In his cross-appeal, the father, John B., urges affirmance except as to the findings against him under [Welfare and Institutions Code section 300](#), subdivisions (c) and (d).^{FN2} The Orange County Social Services Agency (SSA) contends jurisdiction is improper under the UCCJA because the matters at issue were being litigated in a foreign court when the petition was filed and the criteria for dependency jurisdiction have not been met. An order of the federal district court during the pendency of this appeal has subsumed the UCCJA and dependency jurisdiction issues, leaving us without power to grant relief. Subsequent orders in the juvenile court render the placement and visitation orders moot. We dismiss the appeal.

^{FN1}. The Uniform Child Custody Jurisdiction Act is codified in California in [Family Code sections 3400](#) et seq.

^{FN2}. All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

Factual and Procedural Background

This case involves a bitter and relentless international custody war waged by Shoshana's parents, who met in 1986, when John, a citizen of Australia and resident of Austria, was in California on business. Shelley accompanied him to Vienna, where the couple ***116** married in July 1987. They separated in 1991 and Shelley, pregnant, returned to California for the

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birth of Shoshana, January 16, 1992.

The family reunited briefly in Vienna. In May, Shelley took a series of black and white photographs, some of which featured Shoshana, then five months old, naked and posed in highly suggestive and offensive juxtaposition with one or the other of two nude males.^{FN3} John, whose relationship with Shelley had been uneven for some time, found the photographs in September and showed them to his attorney, who told him to save them for a “surprise” advantage in anticipated dissolution proceedings. John therefore did nothing until November when, after he and Shelley had an altercation, he took Shoshana from the babysitter's house, crossed over into Germany, gave Vienna police copies of the photographs and fled to Australia with the child.

^{FN3}. Shelley at first denied any impropriety in the photographs, claiming, *inter alia*, they were taken accidentally or were an amateurish endeavor to contrast youth and old age. Eventually, she acknowledged they were “absolutely horrible, pornographic, just terrible, icky.”

Shelley obtained an *ex parte* order in Vienna for physical custody of the minor and initiated efforts to secure her return. In Sydney, John used the photographs once again to obtain temporary custody of Shoshana, but the Australian court eventually decided Austria had jurisdiction.

Shelley and Shoshana returned to Vienna, where they took residence under the scrutiny of Vienna's juvenile court.^{FN4} For the next year, Shelley's progress was monitored daily by the court's child welfare agency, the Youth and Family Authority (YFA). John's visits to Austria were described as infrequent and irregular.^{FN5} No dependency petition was filed in Vienna in light of Shelley's participation in the program and the strong mother/daughter bond.

^{FN4}. Apparently criminal proceedings were initiated in Australia and in Austria, but they came to nothing and are irrelevant here.

^{FN5}. During this approximate time period, John created a media circus over the case. He formed a foundation to protect children

from pornography and appeared on television talk shows to discuss Germany's pornography laws and Shoshana's custody. Articles appeared in tabloids, featuring interviews and photographs provided by John, who also apparently took a television crew to Shelley's apartment to film footage of the minor.

In December 1993, when Shoshana was almost two years old and the Vienna juvenile case was approaching final resolution, Shelley and the minor flew to California to spend the Christmas holidays with Shelley's parents. John followed close on their heels. Promptly upon his arrival, he filed an *ex parte* application for temporary custody of Shoshana and gave copies of the photographs to the police and the SSA. On January 5, 1994, Shoshana was taken from Shelley and placed in protective custody.

The SSA's dependency petition alleged the minor had been sexually abused by her mother and was at substantial risk of further abuse; it also alleged John knew or had reason to know of Shelley's acts and failed to protect Shoshana. (§ 300, subd. (d).) The court exercised emergency jurisdiction under the UCCJA. It ordered Shoshana detained on the basis of: (1) the photographs, (2) a medical examiner's finding of two tiny anal tears, described as “nonspecific for trauma,” (3) lack of adequate proof of foreign court proceedings, and (4) risk of flight. Shelley's motion to dismiss the petition for lack of jurisdiction under the UCCJA was denied on January 21, 1994. Later, the court again denied the motion and one filed by the SSA and proceeded to the jurisdictional hearing.

In February, the court granted John's request to place Shoshana with the paternal grandmother. Hostilities between the parents continued to escalate to the point that Shoshana's attorney sought—and all parties stipulated to—the addition of a count under [section 300](#), subdivision (c), alleging Shoshana's risk of suffering serious emotional damage due to her parents' “ongoing and continuous ... intense custody battle,” which by this time had sucked into its vortex the maternal and paternal relatives, whose animosity “centered around visitation of the minor.” The petition alleged, “The parents ['] custody battle has gone from country to country, progressively getting worse.”

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*117 On March 1, the court determined it had dependency jurisdiction and found the petition true as to both counts. On March 28, the Austrian juvenile court concluded its proceedings, finding it in Shoshana's best interest to remain with Shelley, who was awarded sole custody. On March 29, the disposition hearing commenced in juvenile court here. In April, reaching a conclusion contrary to that of the Austrian court, the court declared Shoshana a dependent child, removed her from Shelley's custody and placed her with John under the supervision of the SSA. Shelley was granted monitored visitation.

On May 11, Shelley filed a petition in the federal district court for return of Shoshana to Austria under the Hague Convention on the Civil Aspects of International Child Abduction (Convention). That court's order denying the petition was filed July 7, during the pendency of this appeal. In findings of fact and conclusions of law, the federal court took judicial notice of the juvenile court's reasons for declaring the minor a dependent child. It found the child should not be returned to Austria under the "grave risk" exception to the Convention, stating, in pertinent part, "Clear and convincing evidence has been presented to this court that the return of Shoshana [] to Austria would expose her to physical and psychological harm and otherwise place her in an intolerable situation." The evidence to which the court alluded included the photographs, the anal tears "which, while possibly innocent, may be the result of some form of sexual abuse," and Shelley's having permitted the minor to visit Shelley's sister, "who was required to register with the Child Abuse Registry for allowing her own [child] to be sexually molested by a male boarder." [FN6](#)

[FN6](#). The accusations did not directly implicate Shelley's sister, who had banished the boarder as soon as the child revealed the incident.

The case goes on. Shelley's appeal of the district court's order is pending in the Ninth Circuit. The juvenile court at its six-month review hearing in January 1995, found conditions still existed which would justify initial assumption of jurisdiction. The court's primary concern for Shoshana's welfare was John's and Shelley's "inability to resolve [their dispute]

without court intervention" and the risk "that one parent will interfere with [the] other's contact or custody of the minor." The court modified its physical custody order, giving Shelley custody during the week and John on weekends. Noting "[b]oth parents are obsessive," it directed John and Shelley to "continue individual counseling ... to address working together on issues affecting [Shoshana]." It ordered Shoshana and Shelley to undergo psychological evaluation, the latter to ascertain whether Shoshana would be at risk of sexual exploitation if supervision were to be terminated.

Discussion

We have no power to decide the merits of Shelley's contentions regarding jurisdiction under the UCCJA or under the dependency statutes. The federal court's order denying Shelley's petition to return Shoshana to Austria necessarily means (1) California is the proper forum to determine the child welfare issues, and (2) the juvenile court properly exercised dependency jurisdiction.

The Hague Convention, implemented by Congress in the International Child Abduction Remedies Act (ICARA), [42 U.S.C. sections 11601](#) et seq., " 'establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained....' " (*Application of Ponath (D.Utah 1993) 829 F.Supp. 363, 364.*) Under Article 3, retention of a child is wrongful when "it is in breach of the rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the ... retention; and [¶] [] at the time of ... retention those rights were actually exercised...." Here, the federal court found Shelley had custody rights in the child's habitual residence, Austria. It also found Shelley was exercising those rights when the child was placed in protective custody. Thus, by definition the minor was wrongfully retained by the SSA and the juvenile court.

Where a child has been wrongfully retained and less than a year has elapsed from *118 the retention date to the commencement of proceedings under the Convention, Article 12 directs the court to issue an order to "return [] the child forthwith." There is an exception, however, under Article 13(b). The court is not bound to order return if the opposing party proves a

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“grave risk that [] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” The classic grave risk exception exists where the minor has been sexually abused by the custodial parent: “If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child’s return under the Convention, the court may deny the petition.” ([51 Fed.Reg. 10494, 10510 \(1986\).](#))

The grave risk exception must be proved by clear and convincing evidence. ([42 U.S.C. § 11603\(e\)\(2\)\(A\).](#)) Here, the federal court denied Shelley’s petition, finding, by reference to the juvenile court’s records, clear and convincing evidence that returning the minor to Austria “would expose her to physical and psychological harm and otherwise place her in an intolerable situation.” ^{FN7}

^{FN7.} The federal court noted it was taking account of the reasons for Austria’s decision. It stated the Vienna juvenile court recognized Shelley had subjected Shoshana to sexual abuse by taking the photographs. But it observed that court “did not have before it subsequent evidence of potential continuing sexual abuse,” e.g., the visit with Shelley’s sister and the anal tears.

The court’s role in proceedings under the Convention “is to determine in what jurisdiction the child should be physically located, so that the proper jurisdiction can make custody decisions.” ([Loos v. Manuel \(1994\) 278 N.J.Super. 607, \[651 A.2d 1077, 1079\]](#); see also [Falls v. Downie \(D.Mass.1994\) 871 F.Supp. 100, 102](#) [“To say there was no wrongful retention ... says nothing about the ultimate issue of custody. This court’s decision simply signifies that a competent court of the Commonwealth of Massachusetts will be making the judgment with regard to custody.”].) If a court’s decision to return or not return a child to his or her habitual residence determines the proper jurisdiction for resolving *custody* issues, a fortiori, it determines the proper jurisdiction for resolving child *welfare* issues. Such is the case here, where the juvenile court noted the issue was not which parent should have custody, but “whether or not the minor needs to be protected against either or both parents from abuse.”

Questions of whether the UCCJA and California’s dependency statutes required dismissal of the petition have been subsumed by the federal court’s decision finding clear and convincing evidence Shoshana’s return to Austria would expose her to physical and psychological harm, placing her in an intolerable situation. It thereby declared California to be the proper forum for resolution of the child welfare issues.

We must defer to that decision, based, as it is, on a treaty of the United States. “The President of the United States, ‘by and with the Advice and Consent of the Senate’ has the power to make treaties. [Citation.] Treaties made under the authority of the United States ‘shall be the supreme Law of the Land.’ [Citations.] ‘A state law must yield when it is inconsistent with or impairs the policy or provision of a treaty.’ [Citation.] ... [[42 U.S.C. section 11603\(d\)](#)] requires that the court in which an action under the Convention is brought ‘shall decide the case in accordance with the Convention.’ ” ([Duquette v. Tahan \(1991\) 252 N.J.Super. 554, \[600 A.2d 472, 477.\]](#)) Any inquiry into proper disposition under the UCCJA or the dependency statutes would be purely academic. ^{FN8}

^{FN8.} We recognize that under Article 19, “[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.” As stated in [Currier v. Currier \(D.N.H.1994\) 845 F.Supp. 916, 920](#), “The Convention does not provide a structure for resolving disputes about legal custody....” Nonetheless, to the extent the court finds an “intolerable situation” and “grave risk” existing in the resident state under the Convention, it unavoidably determines the propriety of *dependency* jurisdiction in the retaining state. That is, were we to find under the Welfare and Institutions Code an *absence* of evidence that Shoshana was at risk in her mother’s custody, the determination would collide head-on with the federal court’s finding of grave risk. Thus, notwithstanding the admonition of Article 19, in a case involving the grave risk/intolerable situation issue, a finding of grave risk has an inescapable preclusive effect.

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*119 With the parents' challenges to jurisdiction under the UCCJA and California's dependency system removed from consideration, the issues concern the court's disposition and visitation orders. These have been rendered moot. While this appeal was pending, the juvenile court found Shoshana's separation from her mother was no longer justified and gave Shelley shared physical custody of the child.^{FN9}

FN9. Pursuant to our request at oral argument, the parties filed supplemental briefs on the effect, if any, of the pendency of the Ninth Circuit appeal and a bankruptcy court stay order. We conclude the stay, affecting only matters involving money judgments against the County of Orange, has no effect on our power to reach the issues before us. Nor does the pendency of the federal appeal diminish or negate the finality-and preclusive effect-of the district court's judgment. As stated in Calhoun v. Franchise Tax Bd. (1978) 20 Cal.3d 881, 887, 143 Cal.Rptr. 692, 574 P.2d 763: "The federal rule is that 'a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition.' [Citations.] [¶] A federal judgment is as final in California courts as it would be in federal courts [citation]...."

We have previously advised the parties we would decide certain motions in conjunction with this appeal. John's motion to augment the record on appeal, filed October 18, 1994, is denied (In re Daniel C.H. (1990) 220 Cal.App.3d 814, 830, 269 Cal.Rptr. 624); Shelley's motion to strike attachments to John's brief, filed November 18, 1994, is granted. (Cal.Rules of Court, rule 10(d).)

The appeal is dismissed.

SILLS, P.J., and WALLIN, J., concur.SONENSHINE, Associate Justice, concurring.

I concur separately, adapting an observation made by the presiding justice of this court in Gates v. Municipal Court (1992) 9 Cal.App.4th 45, 53, 11 Cal.Rptr.2d 439: "The single overriding fact here is [a] federal court order. It romps through this case like the proverbial 800 pound gorilla. Neither the [] judge

of the [juvenile court], nor we, nor even the California Supreme Court has any legal authority to affect that order. [Citation.] One may applaud the order; one may deplore it. It makes no difference. [It must be obeyed.]"

I deplore the order. The sad irony is it defeats the purposes the Convention and the UCCJA were designed to achieve and creates the problems they were intended to avoid.

I

The objective of the Convention is " 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State' and 'to insure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.' [Citation.]" (Application of Ponath (D.Utah, 1993) 829 F.Supp. 363, 364.) Here, rather than securing the prompt return of Shoshana to her state of residence, the order compels her to remain in the state which, as the federal court acknowledges, wrongfully retained her and has no long-term interest in her. Rather than insuring the rights of custody established after more than a year of proceedings in Austria, the order creates an irreconcilable dichotomy between the courts of California and the foreign nation.^{FN1}

FN1. Compare the juvenile court's finding of jurisdiction and substantial risk with Judge Zoellner's statement of decision: "There is no doubt that the Austrian Court continues to have jurisdiction. The place of residence of the child's mother and the minor has always been Vienna. The child's father had also resided there for years. When he was out of the country for professional reasons, he could always be reached through his attorney in Vienna. There can be no talk about a California residence for the minor and the parents of the child. The child's mother and the minor flew to California for the purpose of a Christmas visit, the child's father obviously for the purpose of engaging American courts. The child's mother and the minor continue to have their place of residence in Vienna. That they are still in California is solely due to the fact that the minor has been

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transferred to a [placement] home, that the California Court has not reached a decision and that the stay in America has therefore been extended out of necessity.” The court concluded that after more than a year of “constant surveillance,” “there was no evidence against the mother with the exception of the photos made in June 1992. The [court-appointed] expert established thoroughly and conclusively that these photos constituted an inappropriateness and a failure to estimate the consequences, and also that the minor had not suffered any damage and that no damage is to be expected. There is no evidence that further similar photos have been made subsequent to June 1992. Foster care of the minor solely based on one mistake which the child's mother made in June 1992, therefore appears to be absolutely unnecessary. Leaving the child in the continued care of the mother is in the child's best interest and therefore the Court's decision was based on that.”

*120 As for the UCCJA, its purposes “include avoiding competition and conflict for jurisdiction between courts of different states; promoting cooperation with courts of other states so that a custody decree is rendered in the state that can best decide the case in the interest of the child; assuring that litigation concerning child custody take place in the state with the closest connection to the child and child's family; discouraging continuing controversies over child custody; deterring abductions and other unilateral removals of children undertaken to obtain custody awards; avoiding relitigation of custody decisions of other states; facilitating enforcement of other states' custody decrees; and promoting the exchange of information and mutual assistance between courts concerned with the same child.” (*Brossoit v. Brossoit* (1995) 31 Cal.App.4th 361, 367, 36 Cal.Rptr.2d 919; Fam.Code, § 3401.) This order has accomplished the antithesis of each and every stated purpose. It has promoted competition and conflict, not cooperation, between the courts of California and Austria; it has assured continuing litigation in a state that has marginal, not meaningful, contact with the minor; it has encouraged further controversy over child custody, as well as relitigation of issues already decided in the state of the child's residence; it has defeated, not facilitated, enforcement of the Austrian decree; it has

completely frustrated the achievement of mutual assistance between courts concerned with the same child.

None of this was necessary. The federal court should have taken a closer look. The UCCJA is the exclusive means for determining the proper forum in all custody disputes (including those in the dependency system) involving different states or nations. (Fam.Code, §§ 3402, 3403, 3424; *In re Joseph D.* (1993) 19 Cal.App.4th 678, 686, 23 Cal.Rptr.2d 574.) The jurisdictional grounds of the UCCJA are set forth in Family Code section 3403. Subdivision (a)(3)(B) of that statute allows the court to exercise jurisdiction when, inter alia, “[t]he child is physically present in this state and ... it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse.” In such a case, the court may issue an interim custody order to protect a child pending a hearing on jurisdiction. (Fam.Code, § 3403, subd. (a)(3).) Emergency jurisdiction is reserved for extraordinary circumstances; it exists when a court determines “ ‘a child is in a situation requiring immediate protection.... Presence of the child in the state is the only prerequisite.’ ” (*In re Joseph D.*, supra, 19 Cal.App.4th 678, 688, 23 Cal.Rptr.2d 574.) If the validity of allegations is in doubt, “ ‘the very possibility that the allegations of immediate harm might be true is sufficient for a court to assume emergency jurisdiction in the best interests of the child under the [UCCJA]. States have a *parens patriae* duty to children within their borders which should not be abdicated.’ ” (*Ibid.*)

When the dependency petition was filed, Shoshana was physically present in California and there was evidence she had been subjected to sexual abuse and may have been in need of immediate protection. In its detention calendar memo, the SSA outlined the somewhat sketchy and often conflicting reports available to it and requested the court to order an investigation so the necessary documentation could be obtained from the Austrian court. It sought “protective orders due to the continued risk of exploitation of the child and the international custody dispute which this child has been traumatized by.” There were the photographs which, although more than 18 months old, gave stark testimony to sexual exploitation. There were medical findings of two small anal tears which, in combination of the photographs, provided cause for concern. A child abuse registry report

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involving sexual molestation of a minor at the residence of Shelley's sister was on file. There was uncertainty *121 regarding the nature of proceedings in Austria. And there was the obvious risk of flight by John,^{FN2} who had already fled with the child on one occasion, and Shelley, who had lived in Vienna for more than eight years and was in California only for a holiday. The juvenile court did not violate either the letter or the spirit of the UCCJA when it exercised emergency jurisdiction in the first instance.

FN2. Risk of flight is a factor in analysis of whether an emergency exists. (*People v. Beach* (1987) 194 Cal.App.3d 955, 970, 240 Cal.Rptr. 50.)

However, although the UCCJA authorizes the use of emergency powers “in cases of genuine, immediate, substantial, threatened physical harm to the child” (*Hafer v. Superior Court* (1981) 126 Cal.App.3d 856, 864-865, 179 Cal.Rptr. 132), those powers are not unlimited. They are properly exercised only as necessary to protect the child and preserve the status quo for the time required to place the matter in the proper forum; they do not exist for the duration of the dependency. (*In re Joseph D.*, *supra*, 19 Cal.App.4th 678, 692-693, 23 Cal.Rptr.2d 574.)

The SSA correctly concluded very early in the proceedings that the petition should be dismissed as ill-advised because jurisdiction was improper under the UCCJA. In a January 31, 1994 court report, the agency noted its contacts with Austrian officials. The minister of justice confirmed there had been a year-long investigation conducted by the Austrian juvenile court. The juvenile court judge, Dr. Christiane Zoellner, reported she had given Shelley temporary custody of Shoshana in November 1992 and intended to issue a judgment within a few weeks, awarding the mother permanent, sole custody and terminating the matter. No visitation orders had been issued for John because he had not contacted the court and had made no request for visits. Zoellner indicated the juvenile court's inquiry was directed solely to the child's welfare. It found no evidence Shoshana had suffered detriment resulting from an isolated incident occurring at such an early age. The SSA, concurring with that evaluation, opined the minor's victimization flowed from her parents' disgraceful intercontinental custody battle, their endless accusations against one another and their “childish behavior.” The SSA of-

fered testimony that “The child does not need the protection of the court.... There is nothing to indicate the minor has not been well care for, nor that she has been traumatized ... while she has been in the care of the mother.”

Despite the SSA's laudable change of position and its motion to dismiss the petition, the court continued to exercise emergency jurisdiction. It should not have. The true state of facts regarding the court proceedings in Austria had been ascertained. It was obvious no continuing jurisdiction was needed for the protection of the child. Shoshana was more than two years old; the photographs had been taken when she was five months old. The evidence was stale, and there was no evidence of a repeat incident, despite her having been in the sole physical custody of her mother at all times, save the period in which her father had fled to Australia with her. The “new” evidence of anal tears had led to no indication of ongoing abuse or danger of future harm. The fact that Shelley's sister's child had been molested in the past by a male boarder who was no longer on the premises was essentially irrelevant without evidence of existing danger. Shelley and John no longer posed a risk of flight, having turned in their own passports and Shoshana's as well.

II

The court declared as an additional basis for continuing jurisdiction Shoshana's best interest and her “significant connection” with California. (*Fam.Code, § 3403*, subd. (a)(2).) Under that test, a court may assume jurisdiction only if it is shown “the child and at least one parent have a significant connection with the state *and*... there is available in California substantial evidence concerning the child's care and relationships with others.” (*Plas v. Superior Court* (1984) 155 Cal.App.3d 1008, 1015, 202 Cal.Rptr. 490, original italics.) As the *Plas* court noted, citing the Commissioners' Note to the predecessor statute, *Civil Code section 5152* (continued in *Fam.Code, § 3403* without substantive *122 change), “ [T]he child's best interest/significant connection clause was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. *But its purpose is to limit jurisdiction rather than to proliferate it.* The first clause of the paragraph is important: jurisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding

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parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. *There must be maximum rather than minimum contact with the state.*" (*Plas v. Superior Court, supra*, 155 Cal.App.3d at p. 1016, 202 Cal.Rptr. 490, italics added in part, original in part.) The *Plas* court further observed that if minimum contacts were sufficient, "the absconding parent is encouraged purposely to delay a pending custody proceeding in order to gain time to establish significant contact with the state." (*Id.* at p. 1015, fn. 5, 202 Cal.Rptr. 490.) Such a result would clearly vitiate, rather than foster, the purposes of the UCCJA.

There was no evidence of Shoshana's maximum contacts with California. She was born here, but it was certainly not her "home state," as that term is defined in the UCCJA. (*Fam.Code, §§ 3403*, subd. (a)(1) & 3402, subd. (e).) She was being brought up in Vienna and had lived there exclusively. Austria was the only country where the parents and the minor had lived together as a family. It was where Shelley had maintained a continuous residence for more than eight years and John had resided until very shortly before the proceedings in California were initiated. Without question, the most substantial evidence concerning the child's care was in Vienna, where mother and child had resided since Shoshana's birth, where they had been under constant surveillance by the YFA and under the thumb of the juvenile court for more than a year, where social workers had accumulated records of Shelley's progress and Shoshana's well-being, and where court-appointed experts had performed examinations and made prognoses for the future. The juvenile court had no basis for exercising jurisdiction under *Family Code section 3403*, subdivision (a)(2).

III

Even had jurisdiction existed under the UCCJA, there was insufficient evidence to support a jurisdictional finding under this state's dependency statutes. Proper jurisdiction depends on the existence of circumstances showing a *present risk of harm* to the child. (See *In re Steve W. (1990) 217 Cal.App.3d 10, 20-21, 265 Cal.Rptr. 650*, and cases cited therein.) The photographs were remote in time. Shelley, who initially attempted to justify her conduct, acknowledged by the time of the jurisdictional hearing that they were appalling and pornographic. The minor had been in

her care for more than a year, and despite strict supervision under the direction of Vienna's juvenile court, there was no report of any untoward event subsequent to the photograph incident. Moreover, even assuming the parents' unrelenting hostilities were detrimental to the child, the court's exercise of dependency jurisdiction only exacerbated the problem, in addition to traumatizing Shoshana by removing her from the custody of her mother, the only person with whom she was "strongly bonded." ^{FN3} The court's exercise of dependency jurisdiction under California law is not supported by substantial evidence.

^{FN3}. The record is replete with references to the anxiety, behavior problems and tantrums exhibited by Shoshana when she was taken away from her mother, initially and following visits.

Conclusion

The federal court's order has resulted in an anomaly: two juvenile cases, essentially identical, have been litigated at the same time, and two different, conflicting decisions reached as to one family and one child. Any legal advantage gained by John in his intercontinental search to find a court willing to take the child away from her mother, even temporarily, has been dearly paid for by Shoshana, who nearly 18 months ago should have returned to Vienna and resumed her normal preschool routine in the familiar environment*123 of her home. Tragically, her parents and the system have both failed her.

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