

Sealed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED by *gao* D.C.
DEC 04 2012
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S. D. of FLA. - MIAMI

FELICIANO LEDEZMA VALENCIA,

Petitioner,

v.

Case No. **12-24281**

YENISEY CAGIGAS REYES,

Respondent.

CIV-UNGARO

**MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION
FOR THE RETURN OF THE PARTIES' CHILD PURSUANT TO
INTERNATIONAL TREATY AND FEDERAL STATUTE**

Petitioner, Feliciano Ledezma Valencia (the "Petitioner"), by and through his undersigned counsel and pursuant to International Treaty and 42 U.S.C. § 11601 *et seq.*, submits this memorandum of law in support of his Verified Petition for the Return of the Parties' Child Pursuant to International Treaty and Federal Statute (the "Petition").

I. PRELIMINARY STATEMENT

1. This is a memorandum in support of a verified petition to enforce an International Treaty and Federal Law. The present action is not a child custody case. Specifically, the Petition is brought pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 (the "Convention"), and 42 U.S.C. § 11601 *et seq.*, the International Child Abduction Remedies Act ("ICARA"). The purpose of the Convention and ICARA are to secure the safe return of children wrongfully removed or retained outside of their country of habitual residence and to ensure that Contracting States respect each other's sovereignty. *See* Convention, art. 1; *see also* 42 U.S.C. § 11601. Under the Convention,

courts do not have jurisdiction to consider or try the underlying custody dispute. Convention, art. 16. Thus, courts can determine only where a child custody action should be tried. In the Petition, Petitioner seeks the return of his minor son, M.L.C., who is being wrongfully retained in Miami, Florida, by his Mother, Yenisey Cagigas Reyes (the “Respondent”).

II. FACTS

2. Petitioner is a Mexican citizen. His residence in Mexico is located at Carmen Serdan 38 San Jose, 4 Caminos, Puebla, Mexico.

3. Petitioner holds a valid Mexican passport and American visa to travel to the United States.

4. Respondent is a citizen of Cuba and a resident of Mexico, and holds valid passports under both nationalities. Petitioner does not know whether Respondent is a resident or citizen of the United States. According to information gathered from the Petitioner, Respondent has been located, and is currently residing in Miami, Florida, and M.L.C. is attending school at Glades Middle School in Miami, Florida.

5. Petitioner and Respondent were married on November 23, 2001, in La Habana, Cuba, and on December 3, 2001, in Puebla, Mexico. The Respondent filed a Petition for Divorce in the Sixth District Court, Family Court Division of Puebla, Mexico, and the parties obtained a final divorce decree on August 11, 2009 (the “Divorce Decree”). A true and correct copy of the Divorce Decree is attached to the Petition as **Exhibit “B.”**

6. Petitioner and Respondent have a son together, M.L.C., hereinafter referred to as the “Child.” The Child was born on November 17, 2005, in Puebla, Mexico. A true and correct copy of M.L.C.’s redacted birth certificate is attached to the Petition as **Exhibit “C.”**

7. From birth until on or about August 2009, the Child lived in the same household with both Petitioner and Respondent in Mexico.

8. Subsequent to August 2009, the Child lived with the Respondent because the final Divorce Decree for Petitioner and Respondent was entered. The Parties first filed a voluntary petition for divorce on March 26, 2009. Thereafter, and in conformance with Mexican law, the parties drafted an agreement as to all the terms and conditions of their divorce. These terms and conditions were memorialized on an agreement (the "Agreement"), created by the parties on April 23, 2009. Thereafter on April 28, 2009, a mediator heard the reasons behind the voluntary request for divorce, and reviewed the Agreement. The mediator therein ratified the Agreement and filed a recommendation that the divorce be granted by the Court (the "Recommendation"). A true and correct copy of the Recommendation is attached to the Petition as **Exhibit "D."**

9. After the Recommendation, on May 28, 2009, a final divorce hearing was held in the Sixth District Court, Family Court Division of Puebla, Mexico, and an order was entered making the parties' Agreement enforceable by law (the "Order"). A true and correct copy of the Order is attached to the Petition as **Exhibit "E."**

10. Pursuant to the terms of the Order:

- a. The Child would be under the parental authority of both parents, and under the physical custody of the Respondent;
- b. The Petitioner has the right to visit the Child every Sunday from 9:00 a.m. to 9:00 p.m., by picking him up at Respondent's home in the residential area in Puebla, Mexico, referred to commonly as "Casas Geo";
- c. The Petitioner will have the right to spend Christmas with the Child, and the parties will share custody during the Child's vacation period; further,
- d. **The Parties agreed that the Child will not be leaving the national territory of Mexico without mutual consent of the parents to be approved and granted by the Secretary of Foreign Relations of Mexico.**

See **Exhibit “E”** to the Petition (Emphasis added).

11. Petitioner visited the Child pursuant to his rights under the Order, purchased private health insurance for the Child, and paid – on a regular basis – for the Child’s tuition at a private school, for his school supplies, clothing, medical expenses, and other necessities for the Child’s health, education, and overall wellbeing. Further, pursuant to the Order the Petitioner was required to pay the weekly amount of \$400.00 Mexican pesos in child support for the Child, yet the Petitioner voluntarily paid three (3) times that weekly amount to guarantee that the Child had everything he could possibly need. The tripled child support payments paid on a weekly basis by the Petitioner were evidenced by a document created and executed by the Respondent (the “Child Support Log”). A true and correct copy of the Child Support Log attached to the Petition as **Exhibit “F.”**

12. During the parties’ marriage, Petitioner and Respondent would fly with the Child to Cuba, to visit Respondent’s family during the holiday season. After the divorce decree was entered the Respondent sought the Petitioner’s permission to take the Child to Cuba during the holidays, on several occasions. Petitioner denied all such requests due to his fear that Respondent would not return to Mexico with the Child and retain the Child in Cuba.

13. On August 15, 2012, Petitioner received a call from Respondent informing him that she had brought the Child to Miami, Florida, and would not be returning the Child to Mexico.

14. Petitioner never agreed to the Respondent bringing the Child to Miami, Florida, or retaining him in Miami, Florida.

15. Petitioner has no knowledge how the Respondent legally brought the Child into the United States, since the Petitioner is in possession of the Child’s original and only legal/valid

Mexican passport and visa. Petitioner has reason to believe, and does believe, that the Child is either (a) in the United States illegally, or (b) Respondent applied for legal/valid immigration or travel documents to the United States for the Child behind Petitioner's back.

16. Immediately, the Petitioner sought information from family and friends, and sought help from the Mexican government regarding the whereabouts of the Respondent and the Child.

17. Thereafter, the Petitioner flew to Miami, Florida, in an attempt to expedite the process of locating and having the Child returned to Mexico, by seeking help from the Mexican Consulate in Miami, Florida.

18. The Mexican Consulate in Miami, Florida, advised the Petitioner to return to Mexico and maintain no contact with the Respondent if given the opportunity to do so. Petitioner was also informed that he had to seek the assistance of the State Department in Mexico. Following these instructions, the Petitioner returned to Mexico and immediately filed the Application pursuant to the Hague Convention with the Mexican Department of State on September 10, 2012. A true and correct copy of Petitioner's Hague Convention Application is attached to the Petition as **Exhibit "G."**

19. Petitioner never consented or acquiesced to the Child moving to Miami, Florida, let alone traveling to the United States. The Respondent removed the Child from Mexico without any prior notice to the Petitioner.

20. At the time the Respondent wrongfully removed and retained the Child, Petitioner was exercising his custody rights to the Child. Although the Petitioner and Respondent had divorced prior to Respondent traveling with the Child to Miami, Florida, Petitioner complied with all the terms of the Order including compliance with his visitation rights, payment for the

Child's health insurance, school tuition, school supplies, clothing, medical expenses, and other necessities for the Child's health, education, and overall wellbeing. Further, Petitioner also complied with his child support obligations under the Order, and in fact tripled the amount of weekly child support payments. *See Exhibit "E"*.

21. Since Respondent's wrongful removal and retention of the Child, Petitioner has made numerous attempts to locate the Child and secure his return. Specifically, Petitioner contacted the Mexican Consulate in Miami, Florida, and in fact traveled to Miami, Florida, in an attempt to expedite the process. When he was advised by representatives of the Mexican Consulate in Miami, Florida, that his efforts should be focused on the governmental authorities in Mexico, Petitioner traveled back to Mexico and immediately contacted the Mexican Department of State and the Department of Foreign Affairs. Petitioner also requested and successfully obtained an attorney in Mexico to be assigned to his case.

22. Petitioner further requested a telephone number and an address of the Respondent and the Child in the United States. The Respondent did not provide him with a telephone number, but after a month after her move to the United States with the Child she provided the Petitioner with the requested information. The Respondent explained that she was providing the Petitioner with the address, so he could travel to United States and visit the Child, as the Child constantly missed the Petitioner. However, the Respondent gave no indication to Petitioner that she would return the Child to Mexico.

23. Since August 15, 2012, when the Respondent traveled with the Child to the United States, through the date of filing this Petition, the Respondent has called the Petitioner a total of 4 or 5 times. During these telephone calls the Respondent had mainly requested money for the Child's expenses, and allowed the Petitioner only a few minutes to speak with the Child.

24. Prior to instituting this proceeding, the Petitioner has been reluctant to visit the Child in the United States or establish scheduled communication with his Child, as he was concerned that such actions may be interpreted as inconsistent with the process of returning the Child to Mexico.

25. Prior to the wrongful removal and retention of the Child, the Petitioner paid for the Child's enrollment in private school from September 2012 to June 2013. The enrollment payment in the amount of more than \$16,500.00 Mexican pesos will allow the school to hold a place for the Child only for three (3) months after the commencement of the school year in September of 2012.

III. LEGAL ARGUMENT

A. Jurisdiction

26. This Court has jurisdiction over the present action pursuant to 42 U.S.C. §11603(a). This Court's jurisdiction, by the express terms of the Convention and ICARA, is limited to (i) determining the legal sufficiency of the Petitioner's wrongful removal and retention claim; and (ii) ensuring that the rights of custody and access to the Child to which the Petitioner is entitled under the laws of Mexico are respected in the courts of the United States. *See* Convention, Articles 1 and 16; *Lops v. Lops*, 140 F. 3d 927, 936 (11th Cir. 1998) ("A court considering an ICARA petition has jurisdiction to decide the merits only of the wrongful removal claim, not of any underlying custody dispute").

27. If the Petitioner states legally sufficient wrongful removal and/or retention claim, the Court must order the return of the wrongfully removed and/or retained child to Mexico, the country of the Child's habitual residence, because that country is the proper jurisdiction to determine child custody issues. *Leslie v. Noble*, 377 F. Supp. 2d 1232, 1238 (S.D. Fla. 2005)

(“The Convention’s underlying premise is that the child’s country of habitual residence is the proper forum with jurisdiction to issue custody orders. Hence, a court considering an ICARA petition may only address a wrongful removal or retention, but not a custody dispute”) (Citations omitted).

28. Because Petitioner has established a *prima facie* wrongful removal and retention claim under the Convention and ICARA, this Court should order the return of the Child to Mexico so that the proper tribunal can determine the parties’ child custody rights and/or the merits of any child custody disputes.

B. Purpose of the Convention and ICARA

29. The United States became a signatory to the Convention in 1981, and Congress enacted the ICARA to implement the Convention. 42 U.S.C. § 11601(b). The Convention expressly states that its dual objectives are to (a) secure the prompt return of children wrongfully removed or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States. Convention, art. 1. “The Convention is designed to restore the pre-abduction status quo and to deter parents from crossing international borders in search of a more sympathetic forum.” *Furnes v. Reeves*, 362 F. 3d 702, 710 (11th Cir. 2004).

30. Under the Convention, the retention of a child is wrongful when it is in breach of the custody rights attributed to a person under the law of the State in which the child was a habitual resident immediately before the retention and, at the time of the retention, those custody rights were actually being exercised or would have been exercised but for the removal or retention of the child. Convention, art. 3. A petitioner has the onus of proving by a preponderance of the evidence that the removal or retention of a child was wrongful within the

meaning of the Convention. 42 U.S.C. § 11603(e)(1)(A). Upon a finding of wrongful removal and/or retention, the court “shall order the return of the child forthwith,” unless the Respondent pleads affirmatively and proves one of the four affirmative defenses listed in the Convention. Convention, Arts. 12, 13.

1. Rights of Custody

31. The Convention applies to “any child who was a habitual resident in a Contracting State immediately before any breach of custody or access rights.” Convention, art. 4. “[C]ourts have defined habitual residence as ‘the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child’s perspective.’” *In Re Ahumada*, 323 F. Supp. 2d 1303, 1310 (S.D. Fla. 2004) (quoting *Feder v. Evans-Feder*, 63 F. 3d 217, 224 (3d Cir. 1995) (internal quotations omitted). Notably, a habitual residence does not include the place to where the child has been wrongfully removed or retained. *In Re Ahumada*, 323 F. Supp. 2d at 1311-12.

2. Return of the Child

32. Once a petitioner has established a *prima facie* case under the Convention and ICARA, the court must order the return of the child to the child’s place of habitual residence, unless (1) more than one year has elapsed since the wrongful retention of the child and the date of the commencement of proceedings, and the child has become settled; (2) the petitioner was not actually exercising custody rights at the time of the removal or retention, or consented to or subsequently acquiesced in the removal of the retention; (3) there is grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or (4) if the court finds that the child objects to being returned and has

attained an age and degree of maturity at which it is appropriate to take account of the child's views. Convention, arts. 12, 13.

C. Petition Process and Prima Facie Case

33. Each member country ("Contracting State") of the Convention designates a Central Authority, which carries out the duties of the Convention. Central Authorities among the Contracting States cooperate with each other to secure the prompt return of children and to discover the whereabouts of children who have been wrongfully removed or retained. Convention, art. 7. The Convention provides that "[a]ny person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child." Convention, art. 8. An application made to the Central Authority must contain the following:

- a. information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b. where available, the date of birth of the child;
- c. the grounds on which the applicant's claim for return of the child is based;
- d. all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

Convention, art. 8.

34. Under the Convention and ICARA, a petitioner states a *prima facie* claim where he demonstrates by a preponderance of the evidence that: (1) the habitual residence of the child immediately before the date of the alleged wrongful removal or retention was in a foreign country; (2) the removal or retention is in breach of custody rights under the foreign country's law; and (3) the petitioner was exercising custody rights at the time of the alleged wrongful

removal or retention. *In Re Ahumada*, 323 F. Supp. 2d at 1310, citing *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1340 (S.D. Fla. 2002).

35. Article 11 of the Convention requires the court to “act expeditiously in the proceedings for the return of children.” Thus, a court may treat a petition under the Convention as an application for a writ of *habeas corpus*, review the petition to determine whether the petitioner is entitled to relief, and order the respondent to appear for an immediate hearing to show cause why the retained or removed child should not be returned to his/her place of habitual residence. *Zajaczkowski v. Zajaczkowski*, 932 F. Supp. 128, 130 (D. Md. 1996). If a decision has not been made within six (6) weeks of filing, the petitioner or the United States Central Authority has the right to request a statement from the court regarding the reason for the delay. Convention, arts. 11, 12.

36. Further, pursuant to 42 U.S.C. § 11063(c), upon the filing of a petition, the respondent is entitled to notice of the action “given in accordance with the applicable law governing notice in interstate child custody proceedings.” In the United States, the relevant federal law is the Parental Kidnapping Prevention Act (“PKPA”), 28 U.S.C. § 1738, and the Uniform Child Custody Jurisdiction Act (“UCCJA”). *Brooke v. Williams*, 907 F. Supp. 57, 60 (S.D. NY. 1995). Both the PKPA and UCCJA require that reasonable notice and an opportunity to be heard be provided to the respondent. Personal service meets this requirement. *Id.*

IV. PETITIONER’S PRIMA FACIE CASE FOR WRONGFUL REMOVAL AND RETENTION

A. Mexico is the Child’s Country of Habitual Residence

37. Mexico is the Child’s country of habitual residence. The Child was born in Mexico and, pursuant to his parents’ shared intentions, resided in Mexico from his birth until the time the Respondent wrongfully retained the Child in the United States. The only reason that the

Child is not in Mexico today is because Respondent wrongfully, fraudulently and unilaterally removed the Child from his home in Mexico and has removed and retained him in the United States. The Child's presence in Mexico prior to the Respondent's wrongful removal and retention is sufficient time for him to be completely acclimatized there and to achieve a degree of settled purpose. *See In Re Ahumada*, 323 F. Supp. 3d at 1310.

38. Florida is not the Child's place of habitual residence because habitual residence does not include the place where a child is wrongfully retained. *In Re Ahumada*, 323 F. Supp. 3d at 1311-12. Like *Ahumada*, the Child was born and raised in a country other than the United States. On August 15, 2012, Respondent unilaterally, and without Petitioner's permission, removed the Child from Mexico and has since then retained him in the United States. Respondent's unilateral decision to retain the Child in the United States does not change the Child's state of habitual residence. Rather, the Respondent's unilateral actions actually support a final determination that Florida is not the Child's state of habitual residence.

B. Petitioner Has Custody Rights Over The Child, and Respondent's Unilateral Removal and Retention of the Child in the United States is in Direct Breach of Petitioner's Custody Rights

39. Child custody law in Michoacan, Mexico, is governed by the Mexican Federal Civil Code and the Michoacan Civil Code. Further, child custody law in Mexico is based on the concept of "patria potestas" or "patria potestad." *Rodriguez v. Sieler*, 2012 WL 5430369, *5 (D. Mont. 2012). Patria potestas is common to all of Mexico's states, including Michoacan, where Petitioner currently resides and where the Child was born and raised. *Id.*; *see also Ramirez v. Buyauskas*, 2012 WL 606746, *12-13 (E.D. Penn. 2012) (discussing the custody law of Jalisco, Mexico, recognizing the patria potestas right as a right of custody under the Hague Convention, and citing other cases that have done the same). In Mexico, "[p]atria potestas governs the

relationship between parents and their children, conferring upon both parents, jointly, the broadest possible right over their children's care, custody, and well-being. *Id.*; see also *Saldivar v. Rodela*, 2012 WL 2914833 (W.D. Tex. 2012).

40. The patria potestas right has consistently been recognized as a right of custody under the Convention. *Id.* The Convention defines “rights of custody” to include rights relating to the care of the person of the child, and in particular the right to determine the child's place of residence. Convention, art. 5(a). The term “right of custody” is construed broadly under the Convention (*Abbott v. Abbott*, 130 S. Ct 1983, 1990 (2010)), and in Michoacan the right of patria potestas clearly encompasses the right to care for a child and determine the child's residence (see the Michoacan Civil Code, art. 373, attached hereto as **Exhibit “1”**; see also *Avendano v. Smith*, 806 F. Supp. 2d 1149, 1173 (D.N.M. 2011) (even where the respondent fled Mexico because she was subjected to domestic violence there, which is not the case in the present action, she had no right to remove her children from Mexico and retain them in the United States pursuant to Article 421 of the Mexican Federal Civil Code and Section 373 of the Michoacan Civil Code)). Once custody rights are established, under the Convention it is presumed that a parent who has care of his child is exercising his custody rights, and it is the respondent's burden to prove otherwise. Convention, art. 13(a); see *Rodriguez*, 2012 WL 5430369 at *5.

41. Additionally, here, there is an Order from the Mexican Court which expressly states that “The **Child would be under the parental authority of both parents**, and under the custody of the Respondent.” See Petition, **Exhibit “E”**. (Emphasis added). Moreover, the Order of the Mexican Court prevents either parent from removing the Child from Mexico without the “**mutual consent of the parents** to be approved an granted by the Secretary of Foreign Relationship of Mexico.” *Id.*

42. As such, pursuant to Mexican law and the express terms of the Mexican Court's Order, Petitioner has rights of custody to the Child. At all times prior to the Child's wrongful removal and retention, Petitioner continually exercised his rights to custody over the Child. See *Friedrich v. Friedrich*, 78 F.3d 1060, 1065-66 (6th Cir. 1996) ("[I]f a person has valid custody rights to a child under the law of the child's habitual residence, that person cannot fail to 'exercise' those rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child"). The Child lived with the Petitioner until the divorce proceedings commenced, Petitioner was granted rights of custody and access in the Order, Petitioner exercised his rights of custody and access, and Petitioner continued to provide for the Child's needs by paying child support prior to the time the Respondent wrongfully removed and retained the Child.

43. Further, in the present case, the Petitioner never consented to the Child's removal from Mexico. In fact, "[t]he deliberate and secretive nature' of the [R]espondent's actions demonstrates that there was no consent." *Id.* at 1070 (Removal of a child which is "deliberately secretive" is strong evidence that the Father did not consent to the removal of the children). Additionally, no court order has been entered by a Mexican court expressly allowing the Respondent to remove the Child from Mexico.

44. Moreover, at all times prior to the Child's wrongful retention, Petitioner continually exercised his rights to custody over the Child. *Id.* at 1065-66 ("[I]f a person has valid custody rights to a child under the law of the child's habitual residence, that person cannot fail to 'exercise' those rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child"). Prior to Respondent's wrongful removal, the Petitioner routinely took the Child to his doctor's appointments and school, provided clothing and other

necessaries for the Child, spent time with the Child on a regular basis, and made decisions regarding the Child's welfare and travel.

45. Additionally, Petitioner has taken all legal steps available to him to secure the return of the Child to Mexico. Following Respondent's disclosure that she had unilaterally removed the Child from Mexico, the Petitioner flew to Miami, Florida, in an attempt to expedite the process of locating and having the Child returned to Mexico, by seeking help from the Mexican Consulate in Miami. The Mexican Consulate advised the Petitioner to return to Mexico and maintain no contact with the Respondent if given the opportunity to do so. Petitioner was also informed that he had to seek the assistance of the State Department in Mexico. Following these instructions the Petitioner returned to Mexico and immediately filed the Hague Application pursuant to the Hague Convention with the Mexican Department of State on September 10, 2012. Petitioner once again flew to Miami on November 12, 2012, to personally meet with his attorneys at Shutts & Bowen LLP in order to expedite the commencement of the present action.

46. The Child should be returned to Mexico under the custody of the Petitioner. In wrongfully removing and retaining the Child, Respondent violated Petitioner's right to custody and access over the Child. "[T]he violation of a single custody right suffices to make removal or retention wrongful." *Ahumada*, 323 F. Supp. 2d at 1311. Here, Respondent violated Petitioner's custody and access rights, which Petitioner continuously exercised. Petitioner has satisfied his burden to show that a wrongful removal and retention occurred. Accordingly, the Child must be returned to Mexico in the custody of the Petitioner unless Respondent can establish any of the Convention's affirmative defenses.

C. No Affirmative Defenses are Applicable Under the Facts of This Case

47. As established from the facts above, there are no affirmative defenses available to Respondent in this case. Petitioner filed the Petition on December 3, 2012, which is only three (3) months and twenty-eight (28) days after the Child was wrongfully retained, and well within the one (1) year period of limitation. As such, the Child has not become well-settled in his new environment (“well-settled defense”). “For the ‘well-settled’ exception to apply, the respondent must establish by a preponderance of the evidence that, as a threshold matter, one year or more elapsed between the wrongful retention and the date of the petition.” *Castillo v. Castillo*, 597 F. Supp. 2d 432, 439 (D. Del. 2009).

48. In addition, as set forth above, Petitioner did not consent or acquiesce to the retention of the Child in the United States. Further, as set forth in the Petition, Petitioner was exercising his custody rights at the time of the wrongful retention. Moreover, there is no grave risk to the Child returning to Mexico because Petitioner has never physically or verbally abused Respondent or the Child. “Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court’s determination.” Public Notice 957: Hague Internal Child Abduction Convention: Text and Legal Analysis, 51 Fed.Reg. 10494, 10510 (1986); *cf.*, *Van de Sande v. Van de Sande*, 431 F. 3d 567 (7th Cir. 2005) (the Court accepted the grave risk defense where the father frequently and seriously, physically and verbally, abused the mother in front of the children, threatened to kill the children, and grabbed a child by the throat and struck the child at least twice in the head).

49. Finally, the mature child objection is not applicable here. Under Article 13 of the Convention, a court has discretion “to refuse to order the return of the child if it finds that the

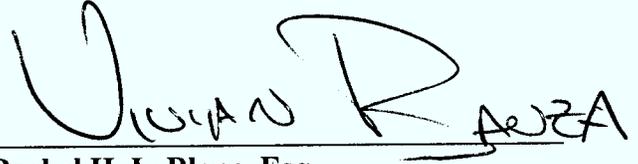
child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” (Emphasis added). Here, the Child is only seven (7) years old. Being seven (7) years old, even if mature, is still too young to take the Child’s views into account. See *Robinson v. Robinson*, 983 F. Supp. 1339, 1343-44 (D. Colo. 1997) (declining to give the child’s objection any weight because “a 10-year old with maturity beyond his chronological age is still very much a child.” In *Robinson*, the court stated “the ‘wishes of the child’ exception makes some sense if the child is approaching 16 years of age.” Further, the “wishes of the child” exception does not apply where the child’s wishes appear to be the product of undue influence.); *Tahan v. Duquette*, 613 A. 2d 486, 490 (N.J. Super. 1992) (holding that the failure of the trial judge to interview the child was not plain error because “an interview with the judge, under the circumstances before the court, could not have served a useful purpose. Article 13 of the Convention excuses the duty to return if a child of appropriate age and maturity objects. This standard simply does not apply to a nine-year old child.”).

V. CONCLUSION

50. Mexico is the Child’s country of habitual residence. Petitioner has a right of custody and rights of access to the Child within the meaning of the Convention. Moreover, Petitioner has at all times exercised his rights of custody and access over the Child and diligently sought the Child’s return since the time Respondent wrongfully removed the Child from Mexico. Based on the foregoing, Petitioner has established a *prima facie* case of wrongful retention under the Convention and ICARA. Accordingly, Petitioner respectfully requests that this Court enter an order requiring Respondent to appear with the Child for an immediate hearing to show cause why the Child should not be returned to Petitioner’s custody in Mexico forthwith.

Dated: December 4, 2012

Respectfully submitted,

A handwritten signature in black ink that reads "VIVIAN BAUZA". The signature is written in a cursive style with a horizontal line underneath the name.

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CIVIL CODE FOR THE STATE OF MICHIGAN



SECTION FIRST. ON PERSONS
TITLE FIFTH. ON MARRIAGE AND DOMESTIC VIOLENCE
CHAPTER VII. ON DIVORCE

Article 242. The divorce decree shall determine the situation of the children conclusively. To this end, the judge must rule on all things related to the rights and obligations inherent to parental authority/responsibility (*patria potestas*), including its termination, suspension or limitation according to the case, and especially on the custody and care of the children. By the court's initiative or at the request of the interested parties, the judge shall gather all the necessary elements and he or she must listen to both parents and the minors, in order to prevent domestic violence or other circumstances that may require measures, always considering the best interest of the minor. In any case, the judge shall protect and enforce the right of coexistence with the parents, unless it represents a danger to the minor.

Protection for the minor shall include all the necessary security measures, observation and therapy in order to prevent and correct acts of domestic violence, measures that may be suspended or modified in terms of article 1195¹ of the Code of Civil Procedures.

In the case of incapacitated adults subject to guardianship from ex-spouses, the divorce decree shall dictate the measure established in this article for their protection.

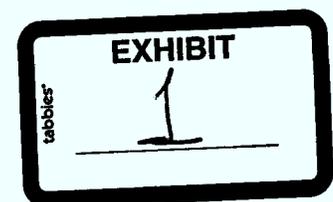
Article 243. Before ruling on parental authority/responsibility (*patria potestas*) or custody of the children, the judge may dictate any measure that he or she considers to be beneficial to the minor, at the request of grandparents, uncles, aunts or older siblings.

Article 244. The father and the mother are bound by all the obligations they have towards their children, even if they lose parental authority/responsibility (*patria potestas*).

TITLE EIGHTH: ON PARENTAL AUTHORITY/RESPONSIBILITY (*PATRIA POTESTAS*)

CHAPTER I: ON THE EFFECTS OF PARENTAL AUTHORITY/
RESPONSIBILITY (*PATRIA POTESTAS*) ON THE CHILDREN

¹ The unappealable judicial orders dictated in controversies related to alimony, exertion and suspension of parental authority/responsibility (*patria potestas*), incapacity, or cases of non-dispute jurisdiction as well as all others contemplated by law, can be altered and modified when the circumstances that affect the action of the corresponding judicial procedure change.



Article 365. Children must honor and respect their parents and other ancestors no matter their state, age or condition.

Article 366. Non –emancipated minors are under parental authority/responsibility (*patria potestas*) as long as the ancestors that must exert it according to the Law subsist.

Parental authority/responsibility (*patria potestas*) is to be exerted over the children themselves as well as over their assets.

Article 367. Parental authority/responsibility (*patria potestas*) over the children will be exerted:

- I. By the father and mother
- II. By the paternal grandfather and grandmother or by the maternal grandfather and grandmother, indistinctly, considering those with whom the children will have a better moral, educational, social, economical and family development.

Article 368. When both parents have recognized a child born out of wedlock and they live together, they will jointly exert parental authority/responsibility (*patria potestas*). If they do not live together, what is established by articles 335 and 336 will apply.²

Article 369. In the cases foreseen by articles 335 and 336, when due to any circumstance one of the parents ceases to exert parental authority/responsibility (*patria potestas*), it shall be exerted by the other one.

Article 370. When the parents of a child born out of wedlock that were living together, separate and in case the parents cannot agree on the matter, the judge will designate which parent will exert parental authority/ responsibility (*patria potestas*), always considering the best interest of the child.

Article 371. In the absence of both parents of a recognized child, the ancestors listed in fractions II of article 367 shall indistinctly exert parental authority/responsibility (*patria potestas*), according to what is there established.

Parental authority/responsibility (*patria potestas*) over an adoptive child shall only be exerted by the persons who adopt him or her.

Article 372. Only by absence or impediment of those who are primarily called to exert parental authority/responsibility (*patria potestas*) shall those who follow exert it in the order

² Article 335. When the unmarried mother and father that do not live together formally recognize the child at the same time, they will agree on which one of them will hold custody of the child. In case of a disagreement, the local family judge will decide, hearing the parents and the social representative of the Attorney General's Office (Ministerio Publico), according to the best interest of the minor.

Article 336. When the recognition is made separately by unmarried parents who do not live together, custody will be granted by the first one to recognize the child, unless there is another agreement among the parents and as long as the local family judge does not deem it necessary to modify the agreement due to a serious cause, by means of a hearing with the interested parties and the social representative of the Attorney General's Office (Ministerio Publico).

established by the previous articles, under the rules thereby established. If only one of the two persons to whom it corresponds to exert parental authority/responsibility (*patria potestas*) is absent, the person remaining will continue in the exertion of this right.

Article 373. As long as the child is under parental authority/responsibility (*patria potestas*), he or she shall not leave the residence of those who exert it without their permission or by order emitted by an authority legally qualified to do so.

Article 374. The persons holding a minor under their parental authority/responsibility (*patria potestas*) or under their custody have the obligation to conveniently educate him or her.

Article 375. The persons exerting parental authority/responsibility (*patria potestas*), have the authority to moderately discipline and punish the minors subject to it.

When needed, the authorities are obligated to assist the parents by means of warnings and corrective measures.

Article 376. Minors under parental authority/responsibility (*patria potestas*) may not appear before court or contract any obligation without the previous explicit consent of those exerting parental authority/responsibility (*patria potestas*). If these should irrationally refuse, the judge shall rule on the matter.

CHAPTER III. ON THE WAYS PARENTAL AUTHORITY/RESPONSIBILITY (*PATRIA POTESTAS*) MAY BE TERMINATED OR SUSPENDED.

Article 394. Parental authority/responsibility (*patria potestas*) ceases:

- I. By death of the person who exerts it if there is no other person to whom it corresponds;
- II. By emancipation of the minor, due to marriage;
- III. When the child reaches the age in which he or she is no longer legally a minor.

Article 395. Parental authority/responsibility can be terminated:

- I. When the person exerting parental authority/responsibility (*patria potestas*) is expressly condemned to its loss; or when he or she is convicted twice or more of a severe criminal offense;
- II. In cases of divorce, according to what is established by article 242 (above);
- III. When, due to the corrupted morals of the parents, mistreatment or abandonment of their duties, the health, security or morals of the children may be at risk, even when these actions are not penalized under criminal law;
- IV. When the father or mother exposes the child or when the child is abandoned for more than six months³;

³ Exposure is when the child's origin is unknown and he or she has been left in a public or private place without being placed under the care of another person. Abandonment is when the child's origin is known and he or she is left in a public or private institution or under the care of another person.

Article 396. The mother or grandmother that contracts a second marriage shall not lose parental authority/responsibility (*patria potestas*) upon that fact.

Article 397. The new husband shall not exert parental authority/responsibility (*patria potestas*) over the children of the previous marriage.

Article 398. . Paternal authority/responsibility can be suspended;

- I. Due to a judicially pronounced lack of capacity;
- II. Due to judicially pronounced absence;
- III. Due to a guilty verdict that imposes the suspension as part of the sentence.

Article 399. Parental authority/responsibility is not waivable, however those that are called to exert it can be excused:

- I. When they are sixty-years-old or older;
- II. When due to a state of regular poor health, they are unable to properly carry out their duties.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 12-24281-CV-UNGARO/TORRES

FELICIANO LEDEZMA VALENCIA

Sealed

Petitioner,

vs.

YENISEY CAGIGAS REYES,

Respondent.

**ORDER GRANTING EMERGENCY MOTIONS
FOR *EX PARTE* TRO AND TO SEAL FILE¹**

This matter is before the Court on Petitioner Feliciano Ledezma Valencia's Verified Emergency Motion for *Ex Parte* Temporary Restraining Order and Motion to Seal the File in this Cause. [D.E. 3]. Having reviewed the motion and the related filings [D.E. 1 & 4], and being otherwise duly advised in the premises, we hereby Grant Petitioner's request for an *ex parte* TRO and further Order that the file remain sealed until Respondent Yenisey Cagigas Reyes ("Respondent") has been served with process in this action.

I. DISCUSSION

Petitioner filed a Verified Petition requesting the return of his son, M.L.C., pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 (the "Convention") and 42 U.S.C

¹ The Honorable Ursula Ungaro referred this matter to the undersigned Magistrate Judge for appropriate disposition. [D.E. 6].

§ 11601, the International Child Abduction Remedies Act (“ICARA”). [D.E. 1]. Petitioner alleges that on or about August 15, 2012, Respondent, the Child’s mother, wrongfully removed the Child from Mexico and has retained him in Miami, Florida, in violation of Petitioner’s custody rights under Mexican law, the Convention, and ICARA.

Rule 65(b) provides that “[t]he court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate or irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts made to give notice and the reason why it should not be required.” To obtain a temporary restraining order, a movant must demonstrate the following: “(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest.” *Schiavo v. Schiavo*, 403 F. 3d 1223, 1225-26 (11th Cir. 2005).

Based on the foregoing, the Court finds that Petitioner will suffer irreparable injury unless this Order is granted without notice. Given that Respondent brought the Child to the United States without obtaining Petitioner’s consent and the approval of the appropriate Mexican authorities, there exists a clear risk that Respondent will further secret the Child and herself in further violation of the Convention and ICARA, and not appear before this Court to resolve the claim presented by the Petitioner. The Court also finds that Petitioner has shown a substantial likelihood of success on the

merits, that the threatened injury outweighs the harm the relief would inflict upon Respondent as the temporary restraining order is simply maintaining the *status quo*, and that the entry of such a temporary restraining order would serve the public interest.

II. CONCLUSION

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner's Verified Emergency Motion for *Ex Parte* Temporary Restraining Order and Motion to Seal the File in this Cause [D.E. 3] is **GRANTED** as follows:

1. The Clerk of Court is directed to seal this file until such time as Respondent is served with process in this action.
3. The U.S. Marshals Service is directed to serve Respondent with a copy of the Verified Petition for the Return of the Parties' Child Pursuant to International Treaty and Federal Statute [D.E.1] and all other documents filed in this action.
3. Respondent is **ORDERED** to and **SHALL**, upon service of this Order, tender any and all travel documents in her possession for herself and the Child, including but not limited to Respondent's visa and passport as well as any visas and/or passports for the Child in her possession, to the U.S. Marshals Service which shall be tendered to the Court pending final resolution of this case on the merits.
4. Respondent shall remain with the Child in the Southern District of Florida pending the conclusion of this action. Respondent is **PROHIBITED** from removing the Child from the jurisdiction of this Court, and no person acting in concert

with the Respondent shall take any action to remove the Child from the jurisdiction of this Court, pending further Order of Court.

5. A Show Cause hearing shall take place before the undersigned Magistrate Judge in the James Lawrence King Federal Justice Building, 99 NE 4th Street, Tenth Floor, Courtroom 5, Miami, Florida, 33132, on **January 22, 2013, at 2:00 p.m.** Respondent should be prepared to show cause why Petitioner's Verified Petition for the Return of the Parties' Child Pursuant to International Treaty and Federal Statute [D.E.1] should not be granted. The Court will consider at that time whether a further restraining order should be entered pending resolution of this case.²

DONE AND ORDERED in Chambers at Miami, Florida this 2nd day of January, 2013.

/s/ Edwin G. Torres
EDWIN G. TORRES
United States Magistrate Judge

cc: U. S. Marshals Service (3 certified copies)

² If an evidentiary hearing is required, Petitioner should be prepared to provide certified translations of the Spanish-language documents filed in the case.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 12-24281-CV-UNGARO/TORRES

FELICIANO LEDEZMA VALENCIA

Petitioner,

vs.

YENISEY CAGIGAS REYES,

Respondent.

_____ /

**ORDER SETTING FINAL EVIDENTIARY HEARING AND OTHER
DEADLINES, AND ORDER TO UNSEAL CASE**

This matter came before the Court for a Show Cause hearing on January 22, 2013, on Petitioner Feliciano Ledezma Valencia's ("Petitioner") Verified Petition for the Return of the Parties' Child Pursuant to International Treaty and Federal Statute ("Petition"). [D.E. 1]. Petitioner and his counsel were present in court while Respondent Yenisey Cagigas Reyes ("Respondent") appeared *pro se* in response to our Order setting the Show Cause hearing. [D.E. 7].

1. In light of the fact that service of process on Respondent was accomplished only recently [D.E. 10] and Respondent has not had an opportunity to consult with counsel, we find good cause to continue the Show Cause hearing.

2. We hereby set the matter for a final evidentiary hearing on the Verified Petition on **March 15, 2013, at 1:00 p.m.** which will allow Respondent sufficient

opportunity to seek counsel and also give the parties a chance to discuss a possible resolution of the case or, barring resolution, to prepare for the evidentiary hearing.

3. We also find good cause to extend the existing Temporary Restraining Order [D.E. 7] through the date of the final hearing.

4. In addition, the following shall take place on or before February 21, 2013:

a. Respondent shall file and serve a written response setting forth her position regarding the Verified Petition; and

b. The parties shall serve initial disclosures as required by Federal Rule of Civil Procedure 26(a).

5. If Respondent continues to represent herself in this case, she shall file all documents with the Court by mailing them, or delivering them by hand, to the Clerk of the Court, United States District Court for the Southern District of Florida, 400 North Miami Avenue, 8th Floor, Miami, Florida 33128.

6. Petitioner shall forward a copy of this Order to Respondent.

7. The Clerk of the Court is directed to UNSEAL this case and all documents already filed in the case.

DONE AND ORDERED in Chambers at Miami, Florida this 22nd day of January, 2013.

/s/ Edwin G. Torres
EDWIN G. TORRES
United States Magistrate Judge

cc: Yenisey Cagigas Reyes, *pro se*
3631 SW 7th Street
Miami, FL 33135