

Slip Copy, 2010 WL 6744790 (S.D.Fla.)

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United States District Court,

S.D. Florida.

Luis Antonio Carrera GATICA, Petitioner,

v.

Brenda Ovalle MARTINEZ, Respondent.

No. 10-21750-CIV.

Oct. 13, 2010.

Rachel Holladay Leblanc, Shutts & Bowen, Fort Lauderdale, FL, for Petitioner.

Barbara Perez Munoz, Miami, FL, for Respondent.

#### REPORT AND RECOMMENDATION

EDWIN G. TORRES, United States Magistrate Judge.

\*1 This matter is before the Court on the Verified Petition for the Return of Child Pursuant to International Treaty and Federal Statute ("Petition") filed on June 15, 2010 [D.E. 1], which was referred to the undersigned Magistrate Judge by the Honorable Federico A. Moreno [D.E. 7]. The Court has considered Respondent's Opposition to the Verified Petition [D.E. 17-18, 27], the parties' testimony and exhibits offered at the evidentiary hearing on July 22, 2010, and the entire record in the case. For the reasons set forth below, we recommend that the petition be granted.

#### I. BACKGROUND

Luis Antonio Carrera Gatica ("Petitioner" or "Gatica") brings his Petition against Brenda Ovalle Martinez ("Respondent" or "Martinez") pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 ("Hague Convention" or "Convention"), T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, and the

International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. s 11601 et seq. Gatica seeks the return to Mexico of the parties' two daughters, nine year old X.C.O. and five year old F .C.O ("girls" or "children"). Petitioner claims that his children were taken to the United States by their mother without his consent and in violation of his custody rights. Respondent, on the other hand, claims that she was entitled to relocate the children to the United States because Gatica never had the type of "rights of custody" to the children that are protected by the Convention. In alternative, Martinez contends that, even if Gatica has established a prima facie case of an improper removal, the petition should not be granted because two "exceptions" under the Convention apply.

## II. ANALYSIS

### A. The Hague Convention and ICARA

Signed in 1980 and formally enacted in the United States in 1988 as the International Child Remedies Act, 42 U.S.C. ss 11601-11, the Hague Convention's objectives are: "(a) to secure the prompt return of children wrongfully removed to 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. Like the United States, Mexico is also a signatory to the Convention.

The enforcement mechanism behind the Convention's stated goals are Articles 3, 5, 12, and 13. These provisions establish the remedy of return of a child to his or her country of habitual residence and set forth the circumstances under which the return remedy is available. 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. *Lops v. Lops*, 140 F.3d 927, 936 (11th Cir.1998) (citing *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir.1996)).

In order to establish a prima facie case for wrongful retention or removal under the Convention, the petitioner must show by a preponderance of evidence that: 1) the habitual residence of the child immediately before the date of the alleged wrongful retention was in a foreign country; 2) the retention was 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 retention. *In re Ahumada Cabrera*, 323 F.Supp.2d 1303, 1310 (S.D.Fla.2004); *Bacquet v. Ouzid*, 225 F.Supp.2d 1337, 1340 (S.D.Fla.2002).

\*2 Once this burden is satisfied, the child must be returned to his or her State of habitual residence unless the respondent can establish one of the four affirmative defenses: 1) the proceeding was commenced more than one year after the removal of the child and the child has become settled in his or her new environment; 2) the person seeking return of the child consented to or subsequently acquiesced in the removal or retention; 3) there is a grave risk that the return of the child would expose it to physical

or psychological harm; or 4) the return of the child would not be permitted under the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. *Furnes v. Reeves*, 362 F.3d 702, 712 (11th Cir.2004). The first two affirmative defenses require a preponderance of the evidence, while the last two must be proven by clear and convincing evidence. *Id.* at 712 n. 8. Article 13 of the Convention also states that the judicial authority may "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." *Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir.2001) (internal quotations omitted). It is important to note, however, that these affirmative defenses have been defined as "narrow" and "a federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention." *Friedrich*, 78 F.3d at 1067.

## B. Facts and Procedural History

The Court makes the following factual findings based on the evidence and testimony adduced at the hearing. Mr. Gatica and Ms. Martinez are the biological parents of both X.C.O. and F.C.O. Both girls were born in Mexico City, Mexico and are lifelong residents of Mexico. Although the Petitioner and the Respondent initially resided together, their relationship started to deteriorate in late 2008. On or about February 2009, Martinez took the two minor daughters, moved out of their family house, and filed for divorce from the Petitioner.

On June, 2009, the Superior Court of Mexico City, Nineteenth Family Court, entered the final divorce decree. The judgement provides the following:

ONE: Both parties agree to retain parental authority [patria potestad ] over [the children].

TWO: Both parties agree that [the Respondent] will have a schedule of visitation and contact with their minor daughters ..., every two weeks starting on Friday at six o'clock p.m. and ending at five o'clock p.m. on Sunday, with said schedule beginning on June twenty-sixth, Two Thousand and Nine, for which [the Respondent] undertakes to deliver the minor [children] and pick them up ....

Moreover, both parties relate that [the Petitioner] may spend time with their minor daughters during an open schedule from Monday to Friday, to eat with them one day of the week, when the weekend visit does not take place, after having called the mother to make an arrangement with her. Finally, both parties agree that, with respect to vacation periods and long weekdays [sic], these are to be divided equally, for which the first half of those periods will be for the mother, when the year in which said period takes place is an odd number, where therefore the father will have the second half of said periods, with such periods reversing when the year is an even number, and in accordance therewith, compliance is given to Section II of Article 267 of the Civil Code.

\*3 See Final Judgment (emphasis added) Pet'r's Ex. 3. Thereafter, Petitioner attempted to exercise his visitation rights that were granted to him under the divorce judgment but was unsuccessful in locating his daughters in Mexico.

Subsequently, suspecting that his daughters might have been relocated to the United States, on July 13, 2009, Petitioner submitted a Return Application to the Central Authority of Mexico. Respondent, on the other hand, filed three separate judicial proceedings against the Petitioner. The first proceeding, filed in the Nineteenth Family Court, seeks modification of parties' custody agreement and is currently pending. The second proceeding, also filed in the Nineteenth Family Court as an ancillary to the first proceeding, alleged domestic violence against the Petitioner. [FN1] Finally, the third proceeding, filed in the Thirteenth Family Court, seeks the termination of Mr. Gatica's "patria potestad" rights and is also still pending.

FN1. The ancillary proceeding related to the allegations of domestic violence has been subsequently withdrawn by Ms. Martinez. See Pet'r's Exs. 7 and 8.

In early January 2010, Ms. Martinez informed the Nineteenth Family Court that she has permanently relocated with her two daughters to the United States. On January 14, 2010, the Mexican Court found that the Respondent's move to Florida with her children was a change of address "that contradicts the contents of the duly executed final decision, making the change of address for guardianship and custody of the parties two minor daughters in Doral, Florida United States of America, illegal" and ordered that the children "do not leave the country, and that [the Respondent] in the ancillary proceedings [pending in the Nineteenth Family Court] duly comply with the duly executed final judgment, specifically with clauses two and three." See Mexican Court January 14, 2010 Order Pet'r's Ex. 5. Nonetheless, it appears that the January 14 Order did not become effective until January 18. This in turn allowed Ms. Martinez to travel back to Miami with her children on January 16, 2010, after attending court hearings earlier that month. [FN2]

FN2. The January 14, 2010 Order expressly issued an immigration alert to the Mexican Immigration authorities and the Ministry of Interior mandating that the two children were not to leave the country and to remain in Mexico.

On June 15, 2010, this petition was filed.

## C. The Prima Facie Case of Wrongful Retention

### 1. Habitual Residence

The interpretation of "habitual residence" is essential to the Convention because it will dictate the arbiter of the custody dispute. Neither the Convention nor ICARA actually define the term "habitual residence." *Ruiz v. Tenorio*, 392 F.3d 1247, 1252 (11th Cir.2004). The courts, however, 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 ." *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir.1995). Any determination of "habitual residence" must focus on the child and "the parents ' present, shared intentions regarding their child's presence there." *Pesin v. Osorio Rodriguez*, 77 F.Supp.2d 1277, 1284 (S.D.Fla.1999) (quotation marks omitted) (quoting *Feder*, 63 F.3d at 224).

\*4 Courts have also noted that a young child does not usually have any "settled purpose" beyond the intentions of his or her parents. See, e.g., *Gitter v. Gitter*, No. 03-CV-3374(DGT), 2003 WL 22775375, at \*3 (E.D.N.Y. Nov.20, 2003). Because the goal of the Convention is to prevent one parent from unilaterally determining the country in which the child will live, the "habitual residence" of the child cannot be shifted without mutual agreement. *Id.* In addition, courts have generally refused to find that the changed intentions of one parent shifted the child's "habitual residence." *Mozes v. Mozes*, 239 F.3d 1067, 1077 (9th Cir.2001).

Here, it is undisputed that the children's "habitual residence" prior to moving to the United States was Mexico. Both girls were born in Mexico City, attended schools in Mexico, and are Mexican citizens. Although the girls have now spent over a year living in Doral, Florida, the Court cannot find that their "habitual residence" has been changed solely because of the unilateral actions of their mother. See, e.g., *In re Ahumada Cabrera*, 323 F.Supp.2d at 1311. Accordingly, the Court finds that the children's "habitual residence" prior to the alleged wrongful retention was Mexico.

## 2. Custody Rights

The Convention broadly defines "rights of custody" as including the "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. "Rights of access," on the other hand, is defined under the Convention as the right to take the child for a limited period of time to a place other than the child's habitual residence. *Id.*, art. 5(b). It is a violation of a "right to custody," not a "right of access," that triggers the Convention's remedy of returning the child to the country of habitual residence. The intention of the Convention is "to protect all the ways in which custody of children can be exercised, and the Convention favors a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." *Furnes*, 362, F.3d at 716 n. 12 (quotations and citations omitted) (emphasis in original).

"The existence of 'rights of custody' are determined by the law of the country in which the child habitually resides at the time of removal." *Hanley v. Roy*, 485 F.3d 641, 645 (11th Cir.2007). The Eleventh Circuit also emphasized that:

[i]t is crucial to note that the violation of a single custody right suffices to make removal of a child wrongful. That is, a parent need not have "custody" of the child to be entitled to return of his child under the Convention; rather, he need only have one right

of custody. Further, he need not have a sole or even primary right of custody.

Furnes, 362, F.3d at 714 (emphasis in original).

The Petitioner argues that his "right to custody" is established by the Mexican doctrine of "patria potestas" [FN3] that is expressly mentioned in the parties' divorce decree. Respondent, on the other hand, argues that "patria potestas" does not constitute "rights of custody" under both the Mexican law and the Convention.

FN3. The doctrine is found in judicial opinions under two spellings: "patria potestas" and "patria potestad." The former appears to be the Latin version while the latter derives from Spanish.

\*5 "Patria potestas" is a doctrine with ancient roots in Roman law. Whallon v. Lynn, 230 F.3d 450, 458 (1st Cir.2000). A father's children were viewed as his chattel. Lalo v. Malca, 318 F.Supp.2d 1152, 1154 (S.D.Fla.2004) (citing Joan B. Kelly, The Determination of Child Custody, 4 The Future of Children 121 (1994)). The father's rights in his children went beyond mere rights of custody, as it is presently understood, to encompass something akin to ownership. Id. Indeed, the Black's Law Dictionary defines it as "[t]he authority held by the male head of a family (the senior ascendant male) over his legitimate and adopted children, as well as further descendants in the male line, unless emancipated." Black's Law Dictionary 1287 (9th ed.2009).

From Roman times, the doctrine took different paths under the common law and civil law legal traditions. Lalo, 318 F.Supp.2d at 1154. In the common law legal tradition, "patria potestas" was eroded by the emergence of the conceptions of "parens patriae" [FN4] in the Chancery Courts of England. Id. In the civil law legal traditions, however, the "patria potestas" doctrine has survived and evolved into a generalized parental right that now includes such duties as support and affection. Id. at 1155 (citing Pesin, 77 F.Supp.2d at 1286).

FN4. With the adaption of "parens patriae," courts began to move from the paternalistic view of children as chattel to the more utilitarian notion that children are potential citizens that deserve the state's protection. Lalo, 318 F.2d at 1155 (citing Kathryn L. Mercer, A Content Analysis of Judicial Decision-Making: How Judges use the Primary Caretaker Standard to Make a Custody Determination, 5 Wm. & Mary J. Women & L. 1, 14 (1998)).

Today, the doctrine "represents a more generalized concept of parental authority," which is distinct from physical custody rights on the one hand, and mere visitation rights on the other. Whallon, 230 F.3d at 456-57. Under the law of the Federal District of Mexico, which governs the custody order entered in this case, "patria potestas" rights "refer[ ] to the parents' responsibilities and rights regarding the children, including the responsibility to care for the child, provide for the child's necessities and decision making rights over issues such as medical care and where the child will live." See

Affidavit of Guadalupe Salado Avila; see also *Código Civil Federal* [CC] [Federal Civil Code], arts. 413-14 & 416. Additionally, those exercising "patria potestas" must conduct themselves with "respect and mutual consideration" between each other and the child and must behave in a manner that sets a good example for the minor." *Id.*, arts. 411 & 423.

Thus, at first blush, it appears that "patria potestas" rights amount to more than mere visitation rights as they include specific child-rearing duties as administration of child's assets (art. 413) or responsibility for child's education (art. 422).

In addition, when faced with the question of whether "patria potestas" constitutes a "right of custody," most courts have concluded that the doctrine indeed confers such rights. See, e.g., *Whallon*, 230 F.3d at 458; *Garcia v. Angarita*, 440 F.Supp.2d 1364, 1379 (S.D.Fla.2006) (Retention by the Petitioner of "his patria potestas rights ... which provide for the joint exercise of parental authority, reinforce the determination that Petitioner has certain rights of custody."); *Lalo*, 318 F.Supp.2d at 1156; *Giampaolo v. Ernetta*, 390 F.Supp.2d 1269, 1277-78 (N.D.Ga.2004); *Mendez Lynch v. Mendez Lynch*, 220 F.Supp.2d 1347, 1358 (M.D.Fla.2002) ("The parties agree that the Patria Potestas (parental authority) in effect in Argentina ... granted Petitioner "rights of custody" within the meaning of the Hague Convention.").

\*6 Specifically, in *Whallon*, the First Circuit analyzed Mexico's concept of "patria potestas." The court explained that "patria potestas" or parental authority "is understood to mean the relationship of rights and obligations that are held reciprocally, on the one hand, by the father and mother or in some cases the grandparents and, on the other hand, the minor children who are not emancipated." [FN5] *Whallon*, 230 F.3d at 457.

FN5. The *Whallon* Court applied the Baja California Sur Civil Code, which may or may not be similar to the civil code of Mexico City. There is nothing in the record, however, that leads us to believe that the law of the doctrine of "patria potestas" differs materially between the two territories.

Respondent argues that *Whallon* is distinguishable from the facts of our case because the parties in *Whallon* were never married and never entered into a formal custody agreement. Thus, according to the Respondent, under the reasoning in *Whallon*, court can only rely on "patria potestas" rights in the absence of a custody agreement. See *Gonzalez v. Gutierrez*, 311 F.3d 942, 954 (9th Cir.2002) (holding that "patria potestas does not confer rights of custody upon the non- custodial parent where a competent Mexican court has already decided the rights and obligations of both parents"); *Ibarra v. Garcia*, 476 F.Supp.2d 630, 635 (S.D.Tex.2007) (holding "to the extent that Mexican law of patria potestad afforded plaintiff any right of custody of the child, plaintiff relinquished such rights in the agreed divorce decree").

The reasoning of both *Gonzalez* and *Ibarra*, however, are clearly inapplicable because, unlike those cases, the custody agreement here between the Petitioner and the

Respondent expressly incorporates and bestows the "patria potestas" rights upon both parents. The question in Gonzalez and Ibarra was whether the principle of "patria potestas" could be invoked to create a right of custody where a formally executed custody agreement made no mention of it. Contrary to Respondent's assertion, a fair reading of both cases actually supports a conclusion that "patria potestas" amounts to more than a mere right of access.

[FN6]

FN6. It is also important to note that during the pendency of this proceeding, the Nineteenth Family Court in Mexico issued an Order where it found that Respondent's change of domicile from Mexico to Florida was "illegal" and in violation of the second and third clauses of the custody agreement. See Final Court Order and Migratory Alert, Aug. 24, 2010 [D.E. 32-1].

Accordingly, we conclude that "patria potestas" rights under Mexican law, specifically incorporated into a custody agreement, amount to "rights of custody" under the Convention.

### 3. Exercising Custody Rights

The final element Mr. Gatica must establish is that he was actually exercising or would have been exercising custody rights over both girls at the time of their removal or retention. Petitioner need only meet a "minimal" burden for demonstrating he was exercising his parental rights in the form of "some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate." *Asvesta v. Petroutsas*, 580 F.3d 1000, 1018 (9th Cir.2009). In the absence of a ruling from a court in the country of habitual residence, a court should liberally find "exercise" where a parent keeps or seeks to keep any sort of regular contact with his or her child. *Mendez Lynch*, 220 F.Supp.2d at 1359.

Based on the evidence proffered, the Court finds that while the Respondent and the children were still in Mexico, the Petitioner clearly exercised his rights over both girls. Petitioner lived with the Respondent and the two girls in Mexico City and was involved in children's daily lives. It is also undisputed that, after the entry of the custody agreement, the Petitioner attempted to exercise his right of access to the girls but was unable to locate them. Accordingly, the Court finds that the Petitioner has established a prima facie case of wrongful retention and removal under the Hague Convention.

#### D. Affirmative Defenses

\*7 Having satisfied the burden of establishing a prima facie case of wrongful retention, the child must be returned to her State of habitual residence unless the Respondent can establish an affirmative defense. In the instant case, the Respondent argues that these proceedings were commenced more than one year after the retention of the

children and both girls are now settled in their new environment. The Respondent also argues that the oldest child objects to being returned to Mexico. [FN7]

FN7. During the hearing, counsel for the Respondent indicated that the "grave risk" defense may also be applicable here. This defense, however, was not subsequently raised in Respondent's Written Submission in Opposition. Therefore, the Court will not address the "grave risk" defense in this Report and Recommendation.

### 1. The One-Year Limitation Period

Article 12 of the Convention mandates the return of a child when he or she has been wrongfully retained, and at the date of the commencement of the proceedings before the judicial or administrative authority of the Contract state, a period of less than one year has elapsed. In the event that the proceedings were to be commenced after the expiration of the one-year period, the court shall return the child unless it is established that the child is now settled in its new environment. *Furnes*, 362, F.3d at 723.

Respondent argues that more than one year has elapsed since the allegedly wrongful retention because the Petitioner knew in April of 2002 that the children were residing with the Respondent in Florida. [FN8]

FN8. Petitioner filed his Verified Petition on June 15, 2009.

Respondent's retention becomes wrongful under the Convention when the Petitioner becomes aware of the Respondent's true intention not to return. In *re Ahumada Cabrera*, 323 F.Supp.2d at 1312-13. Here, the evidence suggests that although Mr. Gatica may have had reasons to suspect that, in April of 2009, his daughters were relocated to Florida, there is nothing in the record that can lead us to conclude that Petitioner was aware about Respondent's intention of staying in the United States and not returning to Mexico. Indeed, the parties participated in custody determination proceeding in the Mexican family court. The Mexican court then entered an order granting both parents various custody rights. Thus, at most, it was not until Petitioner's second unsuccessful attempt to exercise these custody rights in July, 2009 that he may have learned that Respondent had no intention of returning to Mexico.

Furthermore, even if the period of wrongful retention began in April of 2009, as the Respondent advocates, we conclude that the one-year period should be equitably tolled. The Eleventh Circuit has noted that unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations. *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir.1998). Likewise, the equitable tolling applies to ICARA petitions where the parent has secreted the child from the parent seeking return. *Furnes*, 362 F.3d at 723; *Mendez Lynch*, 220 F.Supp.2d at 1362-63 (noting that equitable tolling should apply because otherwise parents who abduct and conceal children for more than one year would be rewarded for their misconduct); *Antunez-Fernandes v. Connors-Fernandes*, 259 F.Supp.2d 800,

815 (N.D.Iowa 2003) (finding that a parent should not benefit from the effects of her actions and the barriers another parent faced in bringing the petition, and further, that those actions were exactly what the Hague Convention sought to remedy).

\*8 Here, from the period of February, 2009 to January 2010, Petitioner sought to resolve the situation without resorting to the Hague Convention. First he participated in the custody determination proceedings in the Nineteenth Family Court in Mexico City. Furthermore, in December 2009, Respondent represented to the Mexican court that she and the children were still residing in Mexico.

We, therefore, conclude that, at the earliest, in July of 2009, the Petitioner affirmatively became aware that the Respondent and his daughters were not returning to Mexico. Accordingly, the Verified Petition was filed timely. [FN9]

FN9. Because we conclude that the petition was timely filed, we do not address the issue of whether the children became settled in their new environment, the necessary second prong of an Article 12's defense.

## 2. Mature Child Objection

The Convention establishes that a court "may 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.

Convention, art. 13. The party opposing the child's return must establish the child's maturity by a preponderance of the evidence. 42 U.S.C. s 11603(e) (2)(B).

Like other exceptions, the "age and maturity" exception is to be applied narrowly. 42 U.S.C. s 11601(a)(4).

In this case, the eldest child is nine years old. During the evidentiary hearing, we accepted parties' stipulated proffer that the child's testimony, if she were interviewed in camera, would be "that she wants to stay in Miami, that she's afraid of her father, that she doesn't want to go back to Mexico and she loves it here." See Show Cause Hearing, T. 130:15-18 [D.E. 24].

There is no precise age at which a child will be deemed sufficiently mature under the Convention. Blodin, 238 F.3d at 166. Rather, the child's maturity is a question for the district court, to be determined upon the specific facts of each case. More importantly, this defense only requires the Court to take account of a child's views. The fact that he or she objects to return is not alone determinative.

In interpreting a child's wishes, the Court is permitted to take into account whether: 1) the child knows the difference between right and wrong; 2) understands the importance of telling the truth; 3) the child is credible and; 4) the child's expressed opinion is the product of manipulation or undue influence by one of the parents. Giampolao, 390 F.Supp.2d at 1285.

We take account of the child's views in this case but conclude that it should be given little weight and is not determinative. Here, the child is only nine year old and has been under Respondent's exclusive custody for over eighteen months. Naturally, she prefers to remain here in the United States with her mother instead of moving once again and changing her social environment. Thus, after taking the child's views into consideration, we decline to apply the narrow exception based on the child's objection.

### III. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, it is hereby RECOMMENDED that the Court:

\*9 1. GRANT Petitioner's Verified Petition for the Return of Child Pursuant to International Treaty and Federal Statute [D.E. 1].

2. ORDER that the minor children X.C.O. and F.C.O. to be returned to Mexico within ten (10) days from the entry of an Order so directing, unless otherwise agreed in writing. [FN10]

FN10. In light of the fact that this school semester is almost over, the parties may choose to wait until school is over before returning the children to Mexico.

4. ORDER that pending the removal, the children to remain in physical custody of the Respondent.

5. ORDER that the Respondent, upon her return to Mexico, continue to submit to the Mexican court with jurisdiction over the pending custody proceedings for resolution of custody, visitation, and related issues.

6. ORDER that the passports of X.C.O. and F.C.O. remain in the custody of the Court until such time as Respondent provides evidence that she has obtained an airline ticket to Mexico for herself and the two minor children, at which time the children's passports shall be released to her or her attorney for delivery to her.

Pursuant to Local Magistrate Rule 4(b), the parties have fourteen (14) days from the date of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to timely file objections shall bar the parties from a de novo determination by the District Judge of an issue covered in the report and bar the parties from attacking on appeal the factual findings contained herein. *R.T.C. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir.1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir.1988); *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc); 28 U.S.C. s 636(b)(1).

DONE AND ORDERED.

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