

2015

Brooke Robinson, Petitioner - Appellant, vs. Juan Pablo Matas-Vidal, Respondent - Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

BROOKE ROBINSON,

Petitioner - Appellant,

vs.

JUAN PABLO MATAS-VIDAL,

Respondent - Appellee.

Case No. 20150418-CA

OPENING BRIEF OF APPELLANT

APPEAL FROM THE FINAL ORDER
OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
THE HONORABLE CHRISTINE S. JOHNSON

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UTAH APPELLATE COURTS

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JURISDICTIONAL STATEMENT

The trial court entered its Ruling and Order denying Brooke Robinson's (hereinafter "Mother") Rule 59 Motion to Amend Order on April 30, 2015. Rec. 1238. Mother timely filed her Notice of Appeal on May 21, 2015. Rec. 1241. This Court has jurisdiction pursuant to Utah Code § 78A-4-103(2)(h).

ISSUES PRESENTED FOR REVIEW

1. **Issue:** Did the trial court err in granting the Respondent's (hereinafter "Father") motion to dismiss Mother's petition and specifically, in finding that Utah's courts did not have jurisdiction under the Utah Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA"), Utah Code § 78B-13-101 *et seq.* (2008), to adjudicate the issues contained in Mother's petition?

a. **Standard of Review.** "Both jurisdictional questions and questions of statutory interpretation are questions of law that we review for correctness." *In re P.F.B.*, 2008 UT App 271, 191 P.3d 49; *Meyeres v. Meyeres*, 2008 UT App 364, 196 P.3d 604, 606.

b. **Preservation Below.** Mother contended throughout the proceeding that the court had jurisdiction to hear the Petition under the UCCJEA and that the order dismissing the case based upon the lack of jurisdiction was error. Rec. 272, 381, 386, 937 and 944.

2. **Issue:** Did the trial court err in concluding, without an evidentiary hearing and without communicating with the courts in Mexico, that at the time of the filing of the Petition in this case, there were existing orders and continuing child custody proceedings in

Mexico and that Mother had engaged in unjustifiable misconduct by leaving Mexico with the children and changing her name in response to mental and physical abuse by Father?

a. **Standard of Review.** “Both jurisdictional questions and questions of statutory interpretation are questions of law that we review for correctness.” *In re P.F.B.*, 2008 UT App 271, 191 P.3d 49; *Meyeres v. Meyeres*, 2008 UT App 364, 196 P.3d 604, 606. Only if it is clear that the claimant is not entitled to relief under any state of facts that could be proven to support the claim should a motion to dismiss be granted. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990); *Buckner v. Kennard*, 2004 UT 78, P9, 99 P.3d 842, 846, 508 Utah Adv. Rep. 26 (Utah 2004).

b. **Preservation Below.** Mother repeatedly contended that, at the time the petition was filed, there were no simultaneous custody proceedings pending in Mexico and that the previously entered orders issued in Mexico’s courts relating to the children had been rescinded and vacated by the issuing court. Rec. 272, 381, 386, 937 and 944.

3. **Issue:** Did the court err in failing to make sufficient findings of fact to support its conclusion that the provisions of the UUCCJEA precluded the exercise of jurisdiction in this matter, that there were simultaneous custody proceedings pending in Mexico and that Mother had engaged in unjustifiable misconduct?

a. **Standard of Review.** For findings of fact to be adequate, they “must show that the court’s judgment or decree ‘follows logically from, and is supported by, the evidence.’ The findings ‘should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.’”

Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987) (emphasis added) (citations omitted);
Armed Forces Ins. Exch. v. Harrison, 2003 UT 14, ¶ 28, 70 P.3d 35, 43.

b. **Preservation Below.** Mother argued that the court had failed to set out sufficient findings to identify the evidence upon which it was relying to establish that there were simultaneous custody proceedings pending in Mexico at the time Mother filed her Petition in this case. Rec. 937, 944.

DETERMINATIVE PROVISIONS OF LAW

The following sections of the UCCJEA are attached in Addendum G: Utah Code § 78B-13-102 (definitions); § 78B-13-110 (communication between courts), § 78B-13-112 (cooperation between courts); § 78B-13-201 (initial jurisdiction); § 78B-13-206 (simultaneous proceedings); § 78B-13-208 (jurisdiction declined by reason of conduct); and § 78B-13-209 (Information to be submitted to court).

STATEMENT OF THE CASE

A. Nature of the Case & Course of the Proceedings Below

Mother commenced this action seeking orders related to the custody, maintenance and support of the parties' two minor children. Although the parties have been separated since November 2007, there are no currently enforceable orders in place, either in Mexico or the United States, regarding the custody of the minor children or provisions thereof providing for their maintenance and support. Additionally, there are currently no orders in place protecting Mother and children from the psychological, physical and emotional misconduct of Father.

This appeal arises from a final order upholding the recommendation of the domestic relations commissioner dismissing the Mother's petition for custody related orders based upon a lack of jurisdiction under the provisions of the UUCCJEA. Specifically, the commissioner held that at the time the petition was filed in this case, there were pending custody proceedings in Mexico; and, even if Utah had jurisdiction, Mother had engaged in unjustifiable misconduct justifying Utah's refusal to exercise jurisdiction in the matter.

On November 18, 2013, Mother filed her petition requesting the entry of custody and related orders pertaining to the parties' minor children. Rec. 1-57.

In her petition, Mother alleged that the parties were married on June 26, 1999 and that as issue of the marriage, two children were born: S.M.L., born May 2001, and R.M.L, born November 2003. Rec. 1-57.

Mother alleged that Father, in November 2007, instituted an action for divorce in a court in Mexico which produced a number of orders related to custody, the last significant of which was the order of June 30, 2010, granting Mother sole custody or "custodia definitiva" (*See* Addendum A, pp. 4-6; Addendum E). Both parties appealed the June 30th order and while that original divorce/custody case was on appeal, Father filed a separate action with another court in Mexico, seeking only a no-fault divorce decree (*See* Addendum A, pp. 4-6; Addendum F). The court in which the no-fault action was filed granted a decree of divorce to the parties on November 25, 2010. Rec. 8-10, Addendum F; Rec. 86, 90. The decree did not adjudicate any other issues attendant to a divorce including rights with regard

to the custody of the children and did not reserve any right to do so. Rec. 8-10, 86, 90, Addendum F.

When the judge in the original divorce/custody action in Mexico was advised of the filing of the separate no-fault action that had circumvented the jurisdiction of the court in the original divorce/custody action, that judge entered an order on February 8, 2013, dismissing the original divorce/custody action in its entirety and rescinding and nullifying all prior orders relating to custody and visitation. Rec. 1-7, 11-16, Addendum E.

Mother, after she had been awarded sole custody in Mexico and believing that all restrictions against her leaving Mexico had been lifted, left Mexico and traveled with the children to Utah County, Utah in December 2010, where they have resided to this day. Rec. 1-6, 272-299, Addendum F (pp. 4-5 thereof). Mother left Mexico with the children, traveled to Utah and changed her name in response to emotional and physical abuse at the hands of Father. Rec. 54, 458-470, 481-190.

After the February 8, 2013 order dismissing the original divorce/custody case in Mexico, there were no other proceedings pending in Mexico. Accordingly Mother alleged in her petition that at the time of the filing of her petition in Utah (11/8/2013), there were no custody proceedings pending in any other court in the U.S. or Mexico and that Utah had been the home state of the children since December, 2010. Rec. 1-6. Accordingly Mother contended that Utah had jurisdiction to adjudicate the petition under the UUCCJEA. Rec. 1-6, 272-299, 381-85, 386-409.

On June 12, 2014, Father filed a motion to dismiss the petition alleging that “there are existing custody determinations in Mexico and ongoing proceedings there.” Rec. 81, 86, 98.

Yet Father acknowledged in his supporting memorandum:

The last custody determination entered by the Mexican family court on February 8, 2013, revoked each and every one of the prior orders that gave Mother any superior custody right to that of Father. . . .

Rec. 86, 99.

On July 17, 2014, Mother filed a comprehensive memorandum in opposition to Father’s motion to dismiss demonstrating, by the production of the actual orders from the courts in Mexico, that both actions in Mexico had been concluded or dismissed and that there were no active cases or enforceable custody orders issued therefrom. Rec. 272-332.

On October 15, 2014, Father filed a reply brief in support of his motion to dismiss essentially abandoning the allegation that either the original divorce/custody case or the no-fault proceeding were still pending or had produced any enforceable order relating to the custody of the children. Rec. 341-42. Father emphasized instead the theory that a criminal proceeding against Mother for allegedly abducting the children constituted a “child custody proceeding” under the UUCCJEA. Rec. 341, 343-44.

On October 20, 2014, Commissioner Thomas Patton heard oral arguments and recommended that the petition be dismissed for lack of jurisdiction. The commissioner, without specific findings or citations to particular orders or documents, found that there was an active proceeding in Mexico related to custody of the children and that the Mother had

engaged in unjustifiable misconduct. Rec. 377. An order embodying the recommendation was entered on December 5, 2014. Rec. 853.

Mother filed an objection to the commissioner's recommendation with supporting memorandum and filed a request for oral argument and hearing on November 3, 2014. Rec. 381-85, 386-492, 493-94.

On March 2, 2015, Mother filed a motion for the court to take judicial notice of the filing of an entirely new action by Father in Mexico in February 2014 (after the petition in this case had been filed (11/18/2013)) seeking a custody determination and supportive orders. Rec. 895-897, 898-913. The new filing by Father in Mexico clearly demonstrated that neither of the two previously filed actions in Mexico were active or could be used to facilitate adjudication of the custody of the parties' minor children. *Id.*

On March 5, 2015, Judge Christine Johnson conducted oral arguments on Mother's objection and upheld the Commissioner's recommendation. Rec. 916. An order reflecting the ruling was entered on March 17, 2015. Rec. 931.

Mother filed a motion under Rules 52 and 59 to amend the order on March 31, 2015. Rec. 937-943, 944-1110. Father filed a response on April 14, 2015. Rec. 1147. On April 30, 2015, the court entered its ruling and order denying the Mother's motion. Rec. 1238.

Mother filed a notice of appeal on May 21, 2015. Rec. 1241.

B. Statement of Facts

I. Facts Alleged in Verified Petition of the Mother.

Mother filed a verified petition alleging the facts required to invoke the court's jurisdiction under the UUCCJEA.

1. In her petition filed on November 18, 2013, Mother alleged that she and the parties two children had been residents of Utah County, State of Utah since December 2010 (nearly three years). Rec. 1-7.

2. The Mother and minor children are dual citizens of the United States and Mexico. Father is a citizen of Mexico. *Id.*

3. Mother and Father were married in Mexico on June 26, 1999 and had two children born as issue of the marriage, to wit: S.M.L., born May 2001; and, R.M.L, born November 2003. During the course of the marriage Mother was the primary caretaker of the children. *Id.*

4. There were two actions filed in Mexico that related to the marriage of the parties. The first or main action involved proceedings related to the divorce and the custody of the minor children. There were numerous hearings and orders issued by the court in that original divorce/custody action. Rec. 1-6, 272-332, Addendum A (pp. 4-6) and E.¹ The most significant order was dated June 30, 2010. It represented a final custody order, granting

¹A detailed summary of the facts relating to the original divorce/custody case in Mexico is set out below as part of the narrative relating to the Hague Convention proceeding initiated by Father.

Mother “custodia definitiva” or sole custody subject to Father’s limited supervised visitation rights. Rec. 272-332, Addendum A (pp. 4 -6). Father appealed the June 30, 2010 order. *Id.*

5. While that original divorce/custody action was proceeding, the law changed in Mexico and allowed the filing of a no-fault divorce. Because Father had been unable to establish grounds for divorce in the original divorce/custody case, he filed a separate divorce action in Mexico in another court invoking the no-fault law. That court granted the parties a divorce on November 25, 2010. Rec. 1-7, 8-10, Addendum A.²

6. When it became apparent that Father had circumvented the authority of the original divorce/custody case by seeking a no-fault decree in another court, the judge in the original divorce/custody case entered an order on February 8, 2013, dismissing the action and specifically rescinding all prior orders issued in the case relating to the divorce, custody and visitation. Rec. 1-7, 12-16, 272-332, 381-409, Addendum E.

7. Because Father had and continued to be physically, mentally and verbally abusive to Mother and the children, Mother left Mexico with the children and moved to Orem, Utah in December 2010 and they have resided in Utah since that time. Rec. 1-7, 54, 272-299, 458-70, 481-90. At the time Mother left Mexico she believed that all restrictions on her leaving Mexico had been lifted and that there was no legal prohibition from her leaving. *Id.*, Addendum A (p. 5).

²The Decree of Divorce recited that it was final and conclusive for all legal purposes and made no order relating to the custody of the children and did not provide any mechanism for such issues to be brought before that court in the future. *Id.*

8. Mother acknowledges that Father caused a criminal proceeding to be commenced in Mexico based upon her leaving the country with the children that resulted in extradition proceedings commenced in the United States. Rec. 1, 4, 272-299, 443-45. Mother is actively defending those accusations in Mexico and is in full compliance with the orders of the court handling the criminal allegations. *Id.* Importantly, Mother is not charged with taking the children out of Mexico in violation of a court order or court restriction emanating from the divorce action. Rather, she is charged with leaving Mexico with the children in violation of Father's general or common law custodial rights. Rec. 86, 139-148.

9. Father filed a Petition for Immediate Return of Children to pursuant to the Hague Convention and the International Child Abduction Remedies Act in the United States District Court for the District of Utah, Central Division, Case No. 2: 13CV422 DAK. Rec. 18-52, Addendum A. The petition was assigned to United States District Judge Dale A. Kimball. After extensive briefing and factual proceedings including interviews with the children, Judge Kimball entered extensive findings of fact and denied Father's petition by order dated August 5, 2013. Rec. 18-52, Addendum A.

II. Facts Alleged in Father's Motion to Dismiss.

10. Aside from including Judge Kimball's findings from the Hague Convention proceedings, Father does not dispute the material allegations made by Mother in her petition. Rec. 81, 86 (¶¶ 1-4, 6, 14, 21, 23-24).

11. Father acknowledges that the original divorce/custody action in Mexico was filed in October 2007. Rec. 86, ¶ 6. Father further acknowledges that while the original

divorce/custody was on appeal from the June 30, 2010 order granting Mother sole custody of the parties minor children, he filed a no-fault proceeding in another court seeking a decree of divorce. *Id.*, at ¶¶ 11-13.

12. Father claims however, that the Court in the no-fault case, when it entered the decree of divorce, reserved the right for further litigation of child custody. *Id.* Father cannot identify any language in the November 25, 2010 no-fault divorce decree reserving those issues or contemplating any further hearings *Id.* See also, Rec. 1, Addendum A.

13. Father does not allege that in the five years since the no-fault decree has been entered in Mexico, he has been able to reopen the proceedings in the no-fault case or the original divorce/custody action to seek further orders of the court regarding custody or enforcement of any of the prior orders that were rescinded and recalled. Rec. 81, 86.

14. As it relates to the original divorce/custody action filed in Mexico, Father does not contest Mother's allegation that the court, on February 8, 2013, upon hearing about the no-fault action, dismissed the entire case and rescinded all orders previously entered by that court. Rec. 86, ¶ 21, 110.

15. Further Father impliedly concedes that both the no-fault proceeding and the original divorce/custody case were concluded without continuing orders regarding custody and that they cannot be reopened, in disclosing that he had to file a new action in Mexico on

March 27, 2014 (after Mother's petition had been filed on 11/18/2013) to try and obtain a custody order in Mexico. Rec. 86, ¶ 29, 895, 898.³

16. Father has not produced any order under the Utah Foreign Judgment Act (UFJA), Utah Code §§ 78B-5-301 to 78B-5-307 (2012), demonstrating any on-going custody proceeding in Mexico that predated the filing of the petition in this case.

III. Facts Identified in the Hague Convention Proceedings.

Facts found by Judge Kimball in the Hague Convention⁴ case that relate to the subject matter of this action can be summarized as follows: Rec. 1, 17, 86, 110, 125, 139, Addendum A.

17. Father instituted an action under the Hague Convention on June 7, 2013, to obtain an order returning the parties' minor children to him. Addendum A (p.1). The court's role, in that proceeding, was not to make a traditional custody determination but "to determine in what jurisdiction the children should be physically located so that the proper jurisdiction can make those custody decisions." *Id.* at p. 2.

³The filing of the new action in Mexico on March 27, 2014, was four months after the petition was filed in this case by Mother and establishes that at the time the petition was filed in this case, there were no custody proceedings pending or orders in place in Mexico.

⁴The Hague Convention has been implemented in the United States by the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610. The Hague Convention was adopted to protect children from the adverse effects of being wrongfully removed to or retained in a foreign country and to establish procedures for their return. *See Matas-Vidal v. Libbey-Aguilera*, No. 2:13-cv-422 DAK, 2013 Dist. Lexis 110630, 2013 WL 3995300 (D. Utah Aug. 5, 2013).

18. There appears to have been significant discord in the marriage of the parties for many years. *Id.* at p. 4. Father filed for divorce in early October 2007 in Mexico City.⁵ An order was entered barring the removal of the children from Mexico on October 16, 2007. On December 14, 2007, Mother was granted physical custody of the children and Father was only given three hours a day of supervised visitation on alternate Saturdays and Sundays. *Id.*

19. On June 30, 2010, the court issued an order granting “custodia definitiva” or sole custody to Mother. The parties disputed whether the award was one of sole custody and whether the order dissolved any ban on leaving the country. *Id.* at p. 5. In August 2010, Father appealed the June 30, 2010 order. *Id.*

20. While the order of June 30, 2010 issued in the Thirty-Six Court was on appeal as described above, Father filed a **separate action** in the Superior Court of Justice for the Federal District, Domestic Affairs, Twenty-Fourth court, File No. 1529/2010. This action sought a no-fault divorce and was filed prior to September 20, 2010.⁶ *Id.*, *See also*, Rec. 1, 17.

21. On November 25, 2010, the court hearing the no-fault divorce, granted the parties a divorce. As it relates to the other issues in the divorce, the court’s order states:

⁵The action for divorce was filed by Father in Mexico City, in the Superior Court for the Federal District, Domestic Affairs, Thirty-Six Court, File No. 1472/2007.

⁶When the original divorce was filed by Father in Mexico, the law required him to allege and prove grounds for divorce. Father from 2007 to 2010 was unable to establish grounds for the granting of a divorce from Mother. Prior to the filing of the second action by Father, the law in Mexico changed and allowed for a no-fault divorce. Father filed the second action presumably to take advantage of the change in the law.

“with respect to the proposal and counterproposal of a settlement agreement submitted by the parties, their rights are left in tact so that, if any, they may exercise their rights by filing an ancillary proceeding.” Addendum A and F. The court did not enter any order relating to the minor children of the parties and did not leave the case open for subsequent action with regard to custody. *Id.*

22. No part of the November 25, 2010 no-fault decree dealt with or rendered orders relating to child custody or visitation. The no-fault decree was the final order in that case. *Id.*

23. In December 2010, Mother and the children left Mexico and went directly to Orem, Utah where the children were enrolled in school on December 21, 2010. Rec. 1-7, 458-470, 481-49, Addendum A. Mother believed that all prohibitions against her leaving Mexico with the children had been withdrawn. *Id.*

24. On February 8, 2013, the judge in the original divorce/custody case, 1472/2007, issued an order dismissing that action, citing the conduct of the Father in filing the ancillary no-fault divorce action. The judge in the 2007 filing set aside all prior orders in the original divorce/custody case and dismissed the original divorce/custody case in its entirety. Rec. 1-7, Addendum E. After the date of that order, there was no pending actions for divorce and no orders relating to custody of the children, alimony, property settlement or any other related issues in Mexico. Additionally, there were no orders of the two courts in Mexico restricting Mother’s right to take the children out of Mexico. Rec. 1-7.

25. In addition to the findings detailed above, the Judge Kimball court found:

- A. The Petitioner upon arriving in Utah in December 2010, enrolled the children in school on December 21, 2010 and that the children had been enrolled in the same school since that time. *Id.*, p. 5.
- B. Teachers and administrators at the children's school had repeatedly noted their good behavior and academic excellence. The children are both on a competitive swim team. SM-L was a cub scout and now participates regularly as a boy scout. He is also on a soccer team. RM-L is a cub scout. Both were baptized as members of the LDS faith. *Id.*
- C. Petitioner began working for the Provo School District on March 7, 2011 and she has remained gainfully employed with the district since that time.

Addendum A

26. Two psychological reports were prepared in Mexico, one in 2008 and one in 2010, but not filed until 2011. *Id.*, at pp. 5-6. The reports are at variance with one another, even though they were prepared by the same person. The first report recommends that Mother should have custody. The second report makes no recommendation as to custody. *Id.* Mother had already left Mexico by the time the second report was submitted to the court. *Id.*

27. Judge Kimball found that the Father's "patria potestas" or common law "parental authority" under general Mexican law are rights of custody under the Hague Convention and that the removal of the children in December 2010 from Mexico violated those rights of Father. *Id.* at pp. 7-8.

28. Judge Kimball made no findings as to whether any order of a court in Mexico was in place when the petition in this case was file or whether there was any pending action in Mexico where the custody issue was before a tribunal. *Id.*

29. In refusing to order the children of the parties to return to Mexico, Judge Kimball relied upon the “well-settled” exception, Article 12 of the Hague Convention. *Id.*, pp. 10-11). In applying this exception, Judge Kimball stated:

In the instant case, SM-L and RM-L have been in Utah since late December, 2010—for over two and one-half years. The court finds that they are both very well settled. And given the boys’ ages, 12 and 9 ½, respectively, these thirty-plus months have been meaningful to the boys. They have been consistently enrolled in school since January 2011. They have missed very few days during those two school years, and their academic success has been remarkable. Both boys have many friends, caring neighbors, and fellow LDS church members with whom they have formed close bonds. Their maternal grandmother also frequently cares for them. The children are active in their church, in boy scouts (or cub scouts for RM-L), and they are on a competitive swim team. SM-L is also on a soccer team. Many friends and neighbors have provided glowing letters about Respondent and the boys, and attesting to the boys’ happiness and stable environment. Their mother has also been consistently employed since March 2011 and appears to be financially stable. The boys both speak fluent English and appear to have adjusted well to their living situation. Given the outpouring of support for the boys and Respondent, both in terms of having friends and neighbors attend the two court hearings and in submitting letters to the court, the court has no question that these two boys are surrounded by a loving and supportive community and that the boys are thriving in their current environment. They are indeed settled in their new environment. . . .

FN 61: For example, their school principal has written a glowing review of both boys, stating, among other things, that “they both are among the very best behaved and well-mannered students I have known in school during my 13 years as a teacher and 15 years as a public school administrator. They have excellent attendance, including never being tardy to school the entire past year, and they have never required any attendant or behavior interventions from the school or their teachers.” In addition, he stated that both “regularly are recognized and receive awards in our quarterly recognition celebrations for going “above and beyond” in numerous ways, and in every way they are exemplary students and citizens.” He also notes that “they are thriving and happy in school, and they are well on their way to being happy, productive, and successful citizens. I have absolutely no concerns about them or their well-being. . . .”

Id.

30. Judge Kimball also relied on Article 13 of the Convention which provides that a court may also refuse to order the return of the children if it finds that the children object to being returned and have attained an age and degree of maturity at which it is appropriate to take account of their views. The children are now more than two years older and do not want to return to Mexico. The court made extensive findings on this issue:

In this case, SM-L is twelve-years old and will start seventh grade next month. RM-L will be ten-years old in three months and will soon start fourth grade. The court had the opportunity to observe the demeanor and maturity of both children during the court's *in camera* interview of each of them. Undoubtedly the task of meeting alone with a federal judge and his staff, with no parents or attorneys present, was a daunting one, but both boys faced the situation courageously. They both demonstrated a high level of maturity in answering the court's questions—answering the questions in an articulate, thoughtful, and respectful manner. They are both good students with strong academic records. They both expressed a strong desire to remain in Utah and had particular objections to returning to Mexico. They confirmed that they enjoy going to school here, they are involved in church and several sports activities, and they have many friends here. Indeed, both boys became visibly distraught when the court discussed the court's task of evaluating whether they should be returned to Mexico. The response of both boys appeared to be purely genuine—not concocted or rehearsed in any way. Additionally, the boys were adamant about not wanting to have a supervised visit their father while he was in town for the instant court proceeding.

Accordingly, the court finds, by a preponderance of the evidence, that the boys are of an appropriate age and maturity such that it is appropriate for the court to take into account their desire to not return to Mexico. . . .

Here, the court recognizes that the boys have spent the past two years solely with their mother and maternal grandmother, and that this circumstance has undoubtedly had an impact on their desire to stay with their mother in Utah. It is also possible that their mother has negatively colored the boys' view of their father. Here, while the children's objections to returning to Mexico could be due to the mother's possible undue influence over them, the court finds that this possible undue influence is not the only reason the children desire not to return to Mexico, and thus, the court declines to ignore their wishes. The children appear to be genuinely happy and thriving in their current situation.

The court has attempted to balance this possible undue influence against other reasons the boys desire to stay here and concludes that even though the mother has perhaps exerted some undue influence on the boys, the court should still take into account the children's wishes to remain in Utah and not be returned to Mexico. For this independent reason, the court declines to return them to Mexico.

Id., pp. 14-15.

31. Importantly, Judge Kimball concluded:

. . . The court, however, is convinced that the return of these children to Mexico City at this time and under these circumstances—however wrongfully the circumstances have arisen—would severely traumatize these children. The court emphasizes that this decision has a limited purpose and effect. It does not mean that Petitioner cannot exercise his visitation rights with his children. It merely establishes that the boys will not be returned to Mexico but will remain in Utah for any custody proceedings that are initiated here. In light of the pending Extradition proceedings against Respondent, however, the future remains uncertain for this family. (Emphasis added)

Id.

31. Father appealed the decision of Judge Kimball but the appeal was dismissed.

IV. Findings of the Lower Court.

32. The court's findings in the Order of Dismissal dated 12/5/2014 (Addendum B),

that are relevant to this appeal include:

9. The Court finds that Mexico had jurisdiction in October 2007 when child custody proceedings were initiated in the 36th Court of Family Matters in the Federal District of Mexico in case number 1427/2007 and that the subsequent bifurcation in the 24th Court of Family Matters in the Federal District of Mexico in case number 1529/2010 further confirmed that jurisdiction and reserved the parties custodial rights as subject to further litigation therein in November 2010.
10. Mexico reserved the right to enter additional order regarding the custody of these children, and no Mexico court has vacated that order or otherwise unreserved the right to conclude custody proceedings there. . .

12. Mexico had child custody jurisdiction. It had jurisdiction over both parties, it had home-state jurisdiction over the children, and it had jurisdiction of the child custody action pending before it. Such jurisdiction is continuing and exclusive in nature. Mexico never gave up or abandoned it [sic] jurisdiction over its prior orders or the various proceedings that remain pending there.
16. If Mother desires to modify the parties existing custodial rights, as articulated in the orders from Mexico, she must seek such modification in the courts in Mexico. . . Father continues to reside in Mexico, and the courts there retain continuing jurisdiction over modification of their orders. . .
18. Additionally, criminal charges of Child Trafficking have been pending against Mother Mother fails to acknowledge that the criminal case . . . is a further exercise and manifestation of Mexico's continuing exclusive jurisdiction to conduct custody proceedings under the UCCJEA, and therefore this Court lacks jurisdiction to entertain simultaneous proceedings until such criminal charges are resolved, pursuant to Utah Code 78-13-206.
19. If convicted of the pending criminal charges in Mexico, Mother's parental rights will be terminated Consequently, Utah lacks the authority to conduct simultaneous child custody proceedings until—at the very least—Mother's Child Trafficking criminal charges are resolved.
20. Alternatively, even if this Court had a basis to exercise jurisdiction it declines to do so as a result of Mother's unjustifiable conduct. . . It is uncontested that Mother fled the territorial jurisdiction of Mexico when proceedings and orders were still pending there, and that she has refused to return or otherwise engage in the judicial process there. This Court will not condone or otherwise overlook Mother's apparent attempts to evade and her unwillingness to engage in the judicial process in Mexico. Even if there were some arguable basis for jurisdiction herein, the Court will neither exercise emergency nor general child custody jurisdiction over these children because Mother has made every effort to avoid the jurisdiction of the courts in Mexico, and frustrated the ability of the courts in Mexico to conclude the custody proceedings there. In essence, Mother has engaged in unjustifiable conduct, and she asks this Court to exercise jurisdiction

over issues she has refused to address, but that she could have pursued and concluded in Mexico months ago. (Emphasis added)

Addendum B.

33. The court's findings in the Order Overruling Petitioner's Objection dated 3/17/2015 (Addendum C), that are relevant to this appeal include:

3. There are both civil and criminal proceedings in Mexico wherein the custody of the parties' minor children and the parties' parental rights remain at issue. This indicates to the Court that Mexico has not abandoned or otherwise continues to exercise jurisdiction over issues of child custody. Consequently, this Court is without and otherwise declines to assert child custody jurisdiction. . . . (Emphasis added).

Addendum C.

SUMMARY OF ARGUMENT

The parties were married on June 26, 1999, Two boys were born as issue of the marriage (ages 14 and 12). Two actions were commenced in Mexico by Father seeking the entry of a decree of divorce and related orders. The original divorce/custody case, commenced in October 2007, resulted in a number of orders relating to the parties and custody of the children. That action however was dismissed by the court in Mexico by order dated February 8, 2013. In that same order, all previous orders relating to the custody of the children were rescinded and nullified. There were no enforceable orders or pending proceedings after the entry of that order. The second action in Mexico, seeking a no-fault decree of divorce, terminated with the entry of a divorce decree on November 25, 2010. That decree explicitly did not make any orders relating to custody or visitation with the children.

Mother left Mexico with the children in December 2010 after she had obtained an order of custody in the original divorce/custody case in Mexico to escape the physical and psychological abuse inflicted on her and the children by Father. When Mother filed her petition in Utah on November 18, 2013, Utah had been the residence of the children for nearly three years and there were no proceedings in Mexico or enforceable orders from any prior proceedings. Under the clear provisions of the UUCCJEA, Utah had jurisdiction to hear Mother's petition and the court committed error in finding that Utah did not have jurisdiction. Further, the court committed error in finding that at the time the petition was filed there were proceedings regarding custody of the children pending in Mexico and/or that there were any enforceable orders from courts in Mexico relating to the children's custody.

The court, without following the requirements of the UUCCJEA to contact the courts in Mexico and conduct its own investigation, made inadequate and unsubstantiated factual findings concluding that there were pending proceedings in Mexico and/or enforceable orders therefrom.

The court misinterpreted the "simultaneous action" provision of the UUCCJEA and held that a criminal prosecution in Mexico against Mother constituted a simultaneous action establishing Mexico's jurisdiction.

Additionally, the court improperly concluded that Mother, who left Mexico and changed her name to escape abuse in 2010, was guilty of unjustifiable conduct in 2013, that allowed Utah courts to defer exercising jurisdiction.

Utah has jurisdiction to hear Mother's petition and enter orders relating to the custody and support of the minor children. No other state or country has jurisdiction under the UUCCJEA to hear matter related to the custody of the parties children.

ARGUMENT

I: THE RULING THAT UTAH COURTS DO NOT HAVE JURISDICTION UNDER THE UUCCJEA TO ADJUDICATE MOTHER'S PETITION IS CLEARLY ERRONEOUS.

A. The Required Predicate Facts to Establish Jurisdiction under the UUCCJEA are Undisputed in this Case.

The lower court, in each of its three relevant orders, concluded that Utah does not have subject matter jurisdiction to hear Mother's petition but failed to identify any legal or factual inadequacies in Mother's petition to support that conclusion (Addendum B, Order of Dismissal for Lack of Jurisdiction, 12/5/14; Addendum C, Order Overruling Petitioner's Objection to Commissioner's Recommendation, 3/17/15; Addendum D, Ruling and Order on Petitioner's Motion to Amend Order, 4/30/15).

The relevant undisputed facts established by the verified petition and Father's verified memorandum in support of motion to dismiss make out the statutory requirements for jurisdiction under the UUCCJEA. Specifically, that one of the parties and the children resided in Utah County, Utah for more than six months prior to the filing of the petition and that Utah was thus the "home state" of the children and that no other state or nation could make a similar claim.

Both the petition and Father's motion to dismiss established that Father and Mother were married in Mexico on June 26, 1999 and had two children born as issue of that

marriage, to wit: S.M.L., born May 2001; and, R.M.L., born November 2003. The parties were divorced by a decree entered in Mexico on November 25, 2010. Mother and the minor children have resided in Utah County, State of Utah continually from December 2010 to the present and Utah was unquestionably the home state of the minor children on November 18, 2013, the date Mother's petition was filed with the court. Statement of Facts, *supra*, ¶¶ 1-7 and 10.

The lower court conducted no evidentiary hearings and failed to make any findings of fact that contravened the factual allegations made in Mother's verified petition and Father's verified response. Generally, in adjudicating a motion to dismiss, the reviewing court accepts the factual allegations in the petition as true and considers all reasonable inferences to be drawn from those facts in a light most favorable to the petitioner. *Educators Mut. Ins. Ass'n v. Allied Property & Cas. Ins. Co.*, 890 P.2d 1029, 1029-30 (Utah 1995) (quoting *Prows v. State*, 822 P.2d 764, 766 (Utah 1991)); *see also Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669 (Utah 1989).

Accordingly, based upon the clear provisions of the UUCCJEA, Utah was undisputably the home state of the children when the petition was filed and Mexico could not establish jurisdiction based upon "home state" criteria. Utah Code § 78B-13-201 (2008 as Amended).

B. The Provisions of the UUCCJEA and Interpreting Case Law Establish Utah's Jurisdiction Under the Facts of this Case.

The case law establishes that both jurisdictional questions and questions of statutory interpretation are questions of law that the Court reviews for correctness. *In re P.F.B.*, 2008

UT App 271, ¶ 10, 191 P.3d 49. Under the jurisdictional sections of the UCCJEA, when determining whether a state court has subject matter jurisdiction to make an initial child custody determination, priority is given to the child's home state. *See* Utah Code § 78B-13-201(1). A child's home state is defined as,

... the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned.

Utah Code § 78B-13-102(7). *See also* *Meyeres v. Meyeres*, 2008 UT App 364, 196 P.3d 604.

The statute is clear that the court of the state that “is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement” has subject matter jurisdiction over the child custody proceeding. Utah Code § 78B-13-201(1)(a).

So long as there is a court that meets these home-state requirements and that court does not decline subject matter jurisdiction based on inconvenient forum, *see generally* Utah Code § 78B-13-207, or unjustifiable conduct, *see generally* Utah Code § 78B-13-208, no other state's court will have subject matter jurisdiction to make an initial custody determination. *See* Utah Code § 78B-13-201(1)(b)-(d); *see also* *Arjona v. Torres*, 941 So. 2d 451, 455 (Fla. Dist. Ct. App. 2006); *In re Brown*, 203 S.W.3d 888, 891 (Tex. App. 2006) (“[H]ome-state jurisdiction trumps all other possible bases of jurisdiction in an initial child custody action”); *Hatch v. Hatch (In re Kalbes)*, 2007 WI App 136, ¶ 12, 302 Wis. 2d

215, 733 N.W.2d 648 (“Under the Uniform Act, home state jurisdiction always receives priority, and other jurisdictional bases are available only when there is no home state, or where the home state declines jurisdiction.”).

The undisputed facts in this case establish the jurisdictional requirements of the statute—specifically that the minor children lived with Mother in Utah County, Utah for more than six months prior to the filing of the petition. The statute is clear: “[a] court of this state has jurisdiction to make an initial child custody determination only if: (a) this state is the home state on the date of the commencement of the proceeding” Utah Code § 78B-13-201(1)(a). Further, although Father’s briefing suggested that Mexico had some kind of continuing jurisdiction, Father failed to produce a single document wherein the courts of Mexico conducted proceedings after the February 8, 2013 order dismissing the original divorce/custody case in Mexico, or produce an order evidencing Mexico’s continuing jurisdiction over the custody of the parties’ children.

The trial court failed to review and adjudicate the issue of subject matter jurisdiction in accordance with the statute and interpreting case law and committed clear error in holding that Utah did not have jurisdiction under the UCCJEA. The courts made no findings as to home state and further made no findings as to what facts established that Mexico had issued a valid and enforceable original order regarding custody and/or was exercising some kind of continuing jurisdiction under the UCCJEA.

Accordingly, the orders of the lower court on jurisdiction should be reversed.

II: THE COURT ERRED IN CONCLUDING THAT, AT THE TIME THE PETITION WAS FILED, THERE WERE SIMULTANEOUS CUSTODY PROCEEDINGS IN MEXICO.

The court committed error in concluding that at the time Mother's petition was filed (11/18/2013), there were simultaneously occurring custody proceedings in Mexico, thus prohibiting Utah from exercising jurisdiction in the matter. Utah Code § 78B-13-206 (2008 as amended). *See*, Addendum B, C and D.

A. The Evidence That There were no Simultaneous Custody Proceedings in Mexico at the Time Mother's Petition was Filed is Clear and Convincing.

As established above, there is no evidence that, at the time of the filing of the petition in this case, there was an existing original order regarding the children in Mexico or that there were pending court proceedings in Mexico related to custody.

The UCCJEA imposes on the parties the duty of providing in their first pleading or, in an attached affidavit, under oath, a statement as to whether the party has participated, as a party or witness, in other proceedings concerning the custody of the children and if so, the party is required to provide the identity of the court, the case number of the proceeding and the date of the identified child custody proceeding.⁷ Utah Code § 78B-13-209 (1) - (4) (2008). The court has the power to stay an action until the relevant information relating to ancillary proceedings is provided. *Id.* Importantly, if a party responds in the affirmative to

⁷"Child custody proceeding" means a proceeding in which legal custody, physical custody, or parent-time with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear." Utah Code § 78B-13-102(4) (2008).

having information relating to another custody proceeding, the party is obligated to provide the court, under oath, any and all details pertinent to the court's jurisdiction. *Id.* Finally, each party has a continuing duty to inform the court of any proceeding in or out of the state that could affect the present proceeding. *Id.*

The evidence provided to the court, through the disclosures of the parties, is summarized as follows.

1. Main Mexico Divorce/Custody Action.

Father filed for divorce against Mother in Mexico City in early October 2007. The action was filed in the Superior Court for the Federal District, Domestic Affairs, Thirty-Six Court, File No. 1472/2007. That case produced multiple orders relating to the custody of the children including the orders of 10/17/2007, 12/11/2007, 6/30/2010. Statement of Facts, *supra*, ¶¶ 4-6, 10-16, Addendum A, pp. 4-6.

In the June 30, 2010 order, the court in Mexico entered a final custody order granting Mother sole custody or "custodia definitiva." *Id.* See also, Rec. 86, 88-89. Mother further contended that the same order dissolved any restrictions on her travel outside Mexico. Addendum Exhibit A, p. 5.

In August 2010, both Mother and Father appealed the June 30, 2010 order entered in the divorce action. While the original divorce/custody case was on appeal, Father filed the no-fault divorce case summarized below. Because the original divorce/custody case had adjudicated or was in the process of resolving all the other issues attendant to a divorce,

Father sought only a decree of divorce in the no-fault proceedings. A decree of divorce was entered in that no-fault separate action on November 25, 2010. Rec. 1-7, Addendum F.

On January 7, 2011, the Mexican appeals court reversed the June 30, 2010 order. Addendum A. When the judge in the original divorce/custody action learned that Father had filed a separate action for divorce under the newly adopted no-fault law, he entered the order of February 8, 2013. Addendum A, E. In that order, the court rescinded and nullified all the previously entered custody orders in the case and dismissed, with finality, the divorce action. Addendum E. Accordingly, after February 8, 2013, there were no existing court orders regarding custody and visitation in Mexico and there was no underlying actions relating to custody or visitation. Certainly at the time the petition was filed in this case, November 18, 2013, no action relating to custody existed in Mexico and all prior orders from the dismissed original divorce/custody case had been rescinded.

Although Father made references to the original divorce/custody action as somehow being a “simultaneous proceeding” under the UUCCJEA, no party has represented or contended that the original divorce/custody action was not dismissed. No party has asserted that there is any procedure to revive the divorce action or that the rescinded orders could be renewed and reissued. The best evidence relating to the dismissal of the original divorce/custody case in Mexico and the withdrawal of the prior orders is that Father has been unable to initiate any action in that case or initiate any proceeding to enforce any prior order since its dismissal on February 8, 2013. As discussed below, Father had to resort to filing a new action in Mexico after the petition in this case was filed. Father would not have filed

a new action if the prior divorce action could be revived and prior orders reissued. Further confirmation is found in the fact that Father failed to even attempt to file in Utah any order issued in the original divorce/custody case in Mexico under the Foreign Judgment Registry Act, Utah Code § 78B-13-305(1)(b).

2. No Fault Proceeding in Mexico.

As discussed above, while the original divorce/custody case in Mexico was on appeal, Father, trying to take advantage of newly enacted no-fault provisions, filed a separate action for divorce in another court in Mexico and sought to obtain only a decree of divorce. On November 25, 2010, the court signed a decree of divorce under the no-fault law and explicitly refused to deal with other issues in the divorce including custody of the children. Statement of Facts, *supra*, ¶¶ 4-6, 10-16; Addendum A, pp. 4-6; Addendum F; Rec. 1-7.

This action was filed only to get a no-fault divorce. No other issues relating to the divorce, including custody, were included because both parties knew that all such issues were litigated and, in fact, on appeal in the original divorce/custody case. Father did not assert or demonstrate that he can legally open the no-fault case or expand the issues originally addressed therein. Instead, Father instituted a new action in Mexico after the petition in this case was filed.

3. Newly Filed Case in Mexico

There can be no serious question that the original divorce/custody case in Mexico was dismissed and all orders entered therein rescinded and nullified by the February 8, 2013 order. Further, the plain language of the no-fault decree establishes that it is a final order that

attempted only to dissolve the marriage of the parties and did not attempt to resolve the other issues, including custody, pending in the original divorce/custody case. There is no evidence or legal citations that either the original divorce/custody case or the no-fault case could be revived to provide a forum to litigate custody in Mexico and somehow construed to maintain the original date of filing.

Mother therefore submits that there is simply no credible evidence of any kind that there was an existing proceeding or order relating to the custody of the parties' minor children on November 18, 2013, when the petition in this case was filed.

Father implicitly acknowledged the absence of any existing custody proceeding or enforceable order in Mexico at the time the petition was filed, when he filed a new action in Mexico on March 27, 2014 (128 days after the filing of the petition). Statement of Facts, *supra*, ¶ 15. Father would not have filed a new action post-petition if he could have resurrected either the original divorce or the no-fault ancillary proceeding.

B. The Lower Court Failed to Undertake the Investigation and Fact Finding Required by Statute as to the Existence of Simultaneous Proceedings in Another Jurisdiction.

The UCCJEA provides the procedure to be used by the court in determining if, at the time an action is filed, there was a simultaneous custody proceeding in another jurisdiction, and, if so, how to resolve the matter. Utah Code § 78B-13-206(1) provides that “a court of this state may not exercise its jurisdiction under this chapter if at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been

previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated”

The statute accordingly requires the court, before hearing a child custody proceeding, to examine the court documents and other information supplied by the parties pursuant relating to other custody proceedings. Utah Code § 78B-13-206(2). If that review reveals that a “child custody proceeding was previously commenced in a court in another state having jurisdiction substantially in accordance with this chapter,

. . . the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding. (Emphasis added)

A communication between the lower court in this case and the courts in Mexico could have been used to obtain other information relating to the cases in Mexico, judicial procedure in Mexico or to address any related concerns of either court. The process of communication could have been used to conduct evidentiary hearings, hold hearings, etc. Utah Code §§ 78B-13-110, 111 and 112 (2008). In this case, the court committed error in not staying the proceeding, carefully reviewing the materials supplied by the parties and then communicating with the court in Mexico that Father contended had jurisdiction in the matter.

The failure of the trial court to evaluate the material supplied by the parties as to the existence of other custody proceedings or enforceable orders and then communicate with the Mexico court was a breach and violation of the statutory mandate given to courts under the UUCCJEA. The Utah appellate courts have held that “[a] failure to exercise discretion is

generally encompassed within the meaning of abuse of discretion.” *State v. Montiel*, 2005 UT 48, ¶ 9, 122 P.3d 571, 575. “A district court’s mistake of law may constitute an abuse of its discretion.” *Snow, Christensen & Marteneau v. Lindberg*, 2013 UT 15, ¶ 17, 299 P.3d 1058, 1064 (citation, brackets, and internal quotation marks omitted). If this Court does not hold, as Mother advocates, that the evidence submitted to the court clearly dispels any notion that there were prior enforceable custody order or simultaneous proceedings at the time the petition was filed, the matter should be remanded with directions that the trial court communicate with the Mexico court in accordance with the statute.

C. *Summary.*

Mother respectfully submits that the documents and information supplied by the parties establish the original divorce/custody case in Mexico was dismissed by order dated February 8, 2013 (nine months before the petition in this case was filed) and all orders in that case rescinded by the same order. Further, that the no-fault divorce decree entered in Mexico only dissolved the marriage of the parties and did not attempt to adjudicate custody and did not reserve any right for the parties to continue litigating in that case. Finally, Mother submits that the best evidence of the validity of her arguments is that in the nearly 2 ½ years since the dismissal of the original divorce/custody case in Mexico, Father has not been able to reactivate the original divorce/custody case, the no-fault case, or have any orders therein reissued. Lastly, Father certainly would not have filed an entirely new action in Mexico after the petition in this case was filed, if he had any chance of reviving the previously filed actions in Mexico.

III: THE TRIAL COURT IMPROPERLY WEIGHED THE EVIDENCE AND FAILED TO ACCEPT THE ALLEGATIONS IN THE VERIFIED PETITION AS TRUE.

The orders entered by the lower court in this case holding that Utah does not have subject matter jurisdiction do not disclose the method by which the court reached that conclusion. The factual findings, included in the lower court's orders, are legally insufficient. Utah appellate courts have emphasized that a "trial court abuses its discretion when it fails to enter specific, detailed findings. Findings are adequate only if they are sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Hall v. Hall*, 858 P.2d 1018, 1021 (Utah Ct. App. 1993) (citation and internal quotation marks omitted).

This appeal follows the lower court's act in granting Father's motion to dismiss based upon the alleged absence of subject matter jurisdiction. Addendum B, C and D. A motion to dismiss based upon the absence of subject matter jurisdiction is controlled by Rule 12(b)(1) of the Utah Rules of Civil Procedure.

The Utah appellate courts have been clear that in adjudicating a motion to dismiss based upon the lack of subject matter jurisdiction, the court is to accept the factual allegations in the petition as true and to make all reasonable inferences therefrom. *Oakwood Vill. LLC v. Albertson, Inc.*, 2004 UT 101, PP 8-9, 104 P.3d 1226; *Peterson v. Delta Air Lines*, 2002 UT App 56, 42 P.3d 1253; *Atiya v. Salt Lake County*, 852 P.2d 1007 (Utah Ct. App. 1993); *Hurst v. Highway Dep't*, 16 Utah 2d 153, 397 P.2d 71, 72 (1964); *Girola v. Roussille*, 81 Nev. 661, 408 P.2d 918, 919 (1965) (motion to dismiss under Rule 12(b)(1) is only

appropriate when lack of jurisdiction over the subject matter appears on the face of the pleading). Importantly, uncertainty as to the facts relevant to assessing the court's subject matter jurisdiction will make it inappropriate to grant a motion to dismiss under Rule 12(b)(1). *Mallory v. Brigham Young Univ.*, 2012 UT App 242, 285 P.3d 1230; *rev. on other grounds*, *Mallory v. Brigham Young Univ.*, 2014 UT 27, 332 P.3d 922.

Mother's verified petition alleged all the specific facts required by the UGCCJEA to establish subject matter jurisdiction. Specifically the petition alleged the facts necessary to establish that Utah was the home state of the children at the time of the filing of the petition; that the prior original divorce/custody action in Mexico had been dismissed and orders issued therein rescinded; and that the no-fault proceeding did not undertake any action to dispose of custody related issues. Rec. 1, 8, 11, 17 and 53. Accordingly, the court should have denied the motion to dismiss based upon the presumptions afforded the verified petition and the failure to do so constitutes reversible error.

A. The Court's Weighing of the Evidence or Consideration of Evidence Outside the Pleadings Constituted Error.

The only reasonable explanation as to how the lower court could arrive at factual findings that contravene the specific allegations in the verified petition and admitted by Father's pleadings, is that the court conducted some kind of prohibited undisclosed fact finding process and weighing of evidence that resulted in the findings made by the court.

Rule 12(b)(6) of the Utah Rules of Civil Procedure allows a party to file a motion to dismiss for "failing to state a cause of action upon which relief can be granted." The rule then provides that if "matters outside the pleading are presented to and not excluded by the

court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . .” Although Rule 12(b)(1), which is the basis of Father’s motion in this case, does not provide a similar provision for the conversion to summary judgment when outside material are relied upon by the court in its decision, this court has consistently prohibited the weighing of evidence in adjudicating a motion to dismiss under Rule 12(b)(1).

Importantly, this Court has noted that the purpose of the Rule 12(b)(6) conversion provision is “to allow parties an adequate opportunity to rebut materials outside the pleadings.” *Spoons v. Lewis*, 1999 Ut 82, 987 P.2d 36; *see also Bekins Bar V Ranch v. Utah Farm Prod. Cred Ass’n*, 587 P.2d 151 (Utah 1978). Thus, while noting that the offering of affirmative evidence does not automatically convert a Rule 12(b)(1) motion in to one for summary judgment, “uncertainty as to the facts relevant to assessing the court’s subject matter jurisdiction will make it inappropriate to grant a motion to dismiss under rule 12(b)(1). . . .” *Mallory v. Brigham Young Univ.*, 2012 UT App 242, 285 P.3d 1230; *rev. on other grounds, Mallory v. Brigham Young Univ.*, 2014 UT 27, 332 P.3d 922.

In *Spoons, supra*, while the Utah Supreme Court rejected Spoon’s argument that the motion to dismiss under Rule 12(b)(1) had been converted to a summary judgment by the court’s acceptance of documents outside the pleadings, it reversed the dismissal of Spoon’s complaint for failure to file the required Governmental Immunity Act claim. *See Spoons*, 1999 UT 82, ¶ 7, 987 P.2d 36. The Supreme Court explained that the complaint alleged generally that the judge had engaged in a conspiracy but did not include enough factual detail to determine the context in which the judge allegedly did so. *Id.* The Court concluded that

the dismissal was premature because, if the plaintiff could “maintain any viable claims that [the judge] engaged in a conspiracy occurring outside the performance of her duties, not within the scope of her employment, and not under color of authority, the [UGIA’s] notice of claim provisions would not apply [and the district court would have jurisdiction to entertain the suit].” *Id.*

The reasoning of the Court is consistent with the general prohibition against a court weighing evidence when considering motions to dismiss or for summary judgment. The law is clear that the trial court cannot weigh contradictory evidence or determine credibility when deciding whether dismissal or summary judgment is appropriate. *See IHC Health Servs., Inc. v. D & K Mgmt.*, 2008 UT 73, ¶ 18, 196 P.3d 588; *Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17; *Andalex Res., Inc. v. Myers*, 871 P.2d 1041, 1046 (Utah Ct.App.1994).

B. The Findings and Conclusions Improperly Weigh the Evidence.

The relevant findings and conclusions in the court’s orders are set out in the Statement of Facts. Statement of Facts, *supra*, ¶¶ 32 and 33. A review of the contents of the Order of Dismissal dated 12/5/2014 illustrates Mother’s position. In paragraphs 9 and 10 of that order (Addendum B), the court finds the court in Mexico, hearing the original divorce/custody case, confirmed its jurisdiction over child custody proceedings and reserved the parties rights as subject to further litigation. *Id.* The problem with the finding is that it reflected the status of the case in November 2010. The findings and conclusions do not explain how that jurisdiction survived the order of February 8, 2013, where the judge in the original

divorce/custody case dismissed the entire case and rescinded all orders previously entered by that court. *Id.*, Rec. 1-7, Addendum E.

Paragraph 10 of the court's findings states that "no Mexico court has vacated the order" is contradicted by the order of February 8, 2013, supplied to the court by both parties. There is no finding or evidence that, as of the November 18, 2013, filing of the petition in this case, there was any standing order relating to custody in Mexico or any ongoing proceedings relating to custody in progress.

In paragraph 12, the court finds that Mexico has jurisdiction over both parties and home-state jurisdiction over the children. Further, the paragraph recites that the jurisdiction was continuing. *Id.* The paragraph fails to recognize that as of the date the petition was filed, Mexico did not have jurisdiction over Mother and that it no longer had "home-state" jurisdiction over the children. Further, the paragraph fails to mention the undisputed fact that the court in Mexico asserting jurisdiction had, on its own initiative, dismissed the action and rescinded all orders on February 8, 2013, nine months before the petition was filed in this case.

Paragraph 16 concludes that Mother has to modify the parties' custodial rights as articulated in Mexico and that Mexico has continuing jurisdiction over custody proceedings. *Id.* The paragraph is silent as to how Mother is to modify an order that was rescinded by the issuing court in Mexico and resurrect a proceeding in Mexico that the court, on its own initiative, dismissed.

Even if findings were permitted on a motion to dismiss, therefore, the findings and conclusions of the court are simply contrary to the undisputable evidence in the case. Utah was the home state of the children at the time the petition was filed. At the time of filing, Mexico had no existing child custody orders in place and no proceedings existed where child custody was an issue. As argued above, if Father had an enforceable custody order in Mexico or had access to an on-going proceeding, he certainly would have proceeded in one of the existing Mexico actions to obtain enforcement orders rather than filing, after Mother's petition was filed, a new action in Mexico. Mother submits that all the findings and conclusions of the court relating to jurisdiction must be rejected and reversed.

**IV: THE CRIMINAL ACTION FILED IN MEXICO IS NOT A
"SIMULTANEOUS PROCEEDING" REQUIRING UTAH
COURTS TO DEFER JURISDICTION.**

Contrary to the lower court's findings, the criminal case in Mexico is not a "simultaneous proceedings" under the UUCCJEA that can be used as a basis for Utah to defer jurisdiction because Mexico, in the criminal case, did not "have[] jurisdiction substantially in conformity with the [jurisdictional requirements of the UUCCJEA]." Utah Code § 78B-13-206 (2008). Statement of Facts, *supra*, ¶¶ 32-33.

By way of background, Father, in his original motion to dismiss, relied on the original divorce/custody action in Mexico and the separate no-fault proceeding to base his claim that jurisdiction under the UUCCJEA resided in Mexico. When Mother demonstrated, in her response, that at the time the petition was filed, the original divorce/custody action in Mexico had been dismissed and all orders vacated, Father evolved another strategy. That strategy

was based on the notion that Mexico had commenced a criminal proceeding against Mother for taking the children out of Mexico and that proceeding, according to Father, constituted a “simultaneous proceeding” under the UUCCJEA and required Utah to defer jurisdiction. That argument was incorporated in the contents of the Order of Dismissal dated 12/5/2014, paragraphs 18 and 19. Addendum B, Statement of Facts, *supra*, ¶¶ 32 and 33.

The facts relevant to understanding the criminal action can be summarized as follows. On June 30, 2010, the Mexican court in the original divorce/custody case issued an order granting Mother “custodia definitiva” over the minor children. Addendum A, pp. 4-6. Mother, who was represented by counsel, believed it was an order tantamount to a sole custody award and that she was now free to leave Mexico if she so desired. In August 2010, each of the parties appealed the June 30, 2010 order. On November 25, 2010, the court in which the separate no-fault case had been filed entered a no-fault divorce decree. *Id.*

In December 2010, Mother left Mexico with the minor children and went directly to Orem, Utah, where the Mother, maternal grandmother and the two children have resided ever since. The children have, by all accounts thrived. The children are excellent students, engaged in a wide array of extracurricular programs. The children are well entrenched in their lives and in the community that surrounds them. *Id.* Rec. 458-70, 481-90, 492.

Father filed a written criminal complaint with the prosecutor prompting the charges against Mother. Rec. 147. Mother is accused of removing the minor children from Mexico in December 2010 with the intent of changing the children’s customary domicile. Rec. 140, 144-45. The relevant provision is grouped under the “child trafficking” section of Mexico’s

Federal Criminal Code. *Id.* Mother has, at all times, fully cooperated in the matter and is represented by counsel in those proceedings. Mother and the children with the maternal grandmother continue to reside in their home in Orem, Utah. Rec. 458-470, 481-90.

The criminal prosecution of Mother cannot be characterized as a “simultaneous proceeding” under the UCCJEA and used as a basis for Utah to defer jurisdiction. Utah Code § 78B-13-206 (2008) established the required elements of a simultaneous proceeding:

(1) Except as otherwise provided in Section 78B-13-204 [temporary emergency jurisdiction], a court of this state may not exercise its jurisdiction under this chapter **if at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter**, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 78B-13-207. (Emphasis added)

These elements are not satisfied here. When the criminal case was commenced on September 27, 2012, Mexico did not have home state jurisdiction. Rec. 144. Nor was Mexico the home state of the children six months before filing. *See* Utah Code § 78B-13-201 (2008). The children have been out of Mexico since December 2010. The criminal court has no jurisdiction over Father or the minor children. Importantly, the criminal court has no jurisdiction generally to issue child custody orders. All a criminal court could do is affect the actions of Mother as it relates to the children in some degree.

The decision in *Meyeres v. Meyeres*, 2008 UT App 364, 196 P.3d 604, could not be clearer and the ruling more apposite to this case. This Court mandated that the Utah court must make the decision of whether another state’s court has jurisdiction. *Id.* ¶ 6, *citing* Utah Code § 78B-13-206(2). A claim by a court of another state of jurisdiction is not binding on

the Utah court determination. *Id.* This Court then cited cases where the challenging state did not have home state jurisdiction and therefore did not acquire jurisdiction in accordance with the UCCJEA. *Id.* See *Welch-Doden v. Roberts*, 202 Ariz. 201, 42 P.3d 1166, 1176 (Ariz. Ct. App. 2002); *Arjona v. Torres*, 941 So. 2d 451, 455 (Fla. Dist. Ct. App. 2006; *In re Burk*, 252 S.W.3d 736, 741 (Tex. App. 2008); *Hatch v. Hatch (In re Kalbes)*, 2007 WI App 136, 733 N.W.2d 648 (“[T]he Idaho court did not have jurisdiction to make an initial determination of [the child’s] custody because [the child’s] ‘home state’ was Wisconsin. The Idaho court therefore did not have jurisdiction ‘substantially in conformity with [the UCCJEA],’ and the Wisconsin court was not prohibited from exercising jurisdiction under [the simultaneous proceeding statute].” (footnote omitted)).

The court in *NB v. GA*, 133 Haw. 436, 329 P.3d 341 (Haw. Ct. App. 2014) noted that the comment to section 206 of the Uniform Act provides that “[u]nder this Act, the simultaneous proceedings problem will arise only when there is no home State, no State with exclusive, continuing jurisdiction and more than one significant connection State.” Uniform Act § 206 cmt. (1997).

When the criminal case was filed, September 27, 2013, Utah had been the home state of the children for nearly three years. Further the original divorce/custody case in Mexico was dismissed and all orders rescinded on February 8, 2013, more than seven months prior to the filing. The criminal court did not have jurisdiction over Father or the children and did not have authority to enter a custody order. The court in Mexico did not acquire jurisdiction in accordance with the UCCJEA and therefore cannot be a simultaneous proceeding. The

conclusion that the Mexico criminal case was a “simultaneous [custody] proceeding” should be reversed.

**V: MOTHER DID NOT ENGAGE IN UNJUSTIFIABLE CONDUCT
THUS ALLOWING UTAH TO DECLINE JURISDICTION.**

The court made a finding that Mother had engaged in unjustifiable conduct and that the misconduct justified Utah to decline jurisdiction. Findings of Fact, ¶¶ 32-33. The underlying statute is Utah Code § 78B-13-208 (2008). In relevant part, the statute states:

Jurisdiction declined by reason of conduct. (1) Except as otherwise provided in Section 78B-13-204 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person invoking the jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless: (a) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction; (b) a court of the state otherwise having jurisdiction under Sections 78B-13-201 through 78B-13-203 determines that this state is a more appropriate forum under Section 78B-13-207; or (c) no other state would have jurisdiction under Sections 78B-13-201 through 78B-13-203.

(2) If a court of this state declines to exercise its jurisdiction pursuant to Subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the wrongful conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Sections 78B-13-201 through 78B-13-203.

Id.

Mother alleged in her verified Petition the facts and circumstances that existed that prompted her to move the children to Utah. Rec. 1, ¶¶ 11, 12, 458-470, 481-90. The court conducted no hearing relating to the matter and accordingly, pursuant to the cases discussing Rule 12(b)(1) discussed above, the allegations in the Petition are sufficient to survive a motion to dismiss. Further, Judge Kimball found that there was significant discord in the

marriage for many years (*See* Addendum A, p. 4). While Judge Kimball did not make express findings relating to the verbal and emotional abuse that Father did or did not inflict on Mother, he analyzed the facts and made findings as to the abuse that Father was responsible for in relation to the minor children. *Id.* at pp. 8-9. As it related to the relationship between Mother and Father, Judge Kimball simply noted the contents of the psychological reports and then stated, that “[e]ven if some of the allegations are true [of abuse relating to Mother], they have not been proven by clear and convincing evidence *Id.* at 9.

Based upon the allegations in the Petition of physical, verbal and emotional abuse and the lack of any explicit findings by Judge Kimball that the spousal abuse did not occur, there is no basis under the statute to decline jurisdiction.

Additionally, even if there was serious misconduct on the part of the Petitioner, the exceptions contained in the statute would apply. As set out above, serious misconduct could be a basis to decline jurisdiction “unless: . . . (c) no other state would have jurisdiction under Sections 78B-13-201 through 78B-13-203.” *Id.* As argued above, there is no basis in the UCCJEA for a finding that Mexico has jurisdiction in this matter. There was no prior custody order that remained in effect that could be modified. There was no proceeding in place when the Petition was filed. Crucially, Mexico is no longer the home state of the children and has not held that designation since 2010, four years ago.

The trial court's finding that Mother engaged in unjustifiable conduct was improper on a motion to dismiss, and was contrary to the undisputable evidence. The judgment of the trial court should be reversed.

CONCLUSION

The order of the court dismissing this case based upon a lack of subject matter jurisdiction should be reversed and the matter remanded for further proceedings consistent with the UUCCJEA.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Utah R. App. P. 24(g)(5)(B). The brief contains 12,495 words.

DATED this 28th day of October, 2015.



DON R. PETERSEN and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN, P.C.
Attorneys for Petitioners

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 28th day of October, 2015.

DAVID S. DOLOWITZ
JAMES M. HUNNICUTT
SHANE A. MARX, for
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A handwritten signature in black ink, appearing to read "Shane A. Marx", is written over a horizontal line.

Addendum A

*Juan Pablo Matas-Vidal v. Susan Consuelo
Libbey-Aguilera*, Case No. 2:13-cv-422
DAK, 2013 U.S. Dist. LEXIS 110630, 2013
WL 3995300 (D. Utah Aug. 5, 2013)

Matas-Vidal v. Libbey-Aguilera

United States District Court for the District of Utah, Central Division

August 5, 2013, Decided; August 5, 2013, Filed

Case No. 2:13CV422 DAK

Reporter

2013 U.S. Dist. LEXIS 110630; 2013 WL 3995300

JUAN PABLO MATAS-VIDAL, Petitioner. v. SUSAN CONSUELO LIBBEY-AGUILERA (aka Brooke Robinson). Respondent.

Counsel: [*1] For Juan Pablo Matas-Vidal, Petitioner: David S. Dolowitz, LEAD ATTORNEY, James M. Hunnicutt, DOLOWITZ HUNNICUTT PLLC, SALT LAKE CITY, UT.

For Susan Consuelo Libbey-Aguilera, also known as Brook Robinson, Respondent: Clayton A. Simms, LEAD ATTORNEY, SALT LAKE CITY, UT.

For USA, Notice Party: Robert C. Lunnen, LEAD ATTORNEY, US ATTORNEY'S OFFICE (UT), SALT LAKE CITY, UT.

Judges: DALE A. KIMBALL, United States District Judge.

Opinion by: DALE A. KIMBALL

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

This matter is before the court on Juan Pablo Matas-Vidal's ("Petitioner" or "Mr. Matas-Vidal") Petition for Immediate Return of Children to Petitioner Pursuant to the Hague Convention and the International Child Abduction Remedies Act ("ICARA"). The court initially set a hearing on the Petition for June 18, 2013. At that hearing, however, Respondent Susan Consuelo Libbey-Aguilera, also known as Brooke Robinson ("Respondent" or "Ms.

Libbey-Aguilera"), who is the mother of the children, requested that the court continue the hearing to allow her to obtain counsel and to respond to the Petition. The court then rescheduled the hearing for June 28, 2013, and the hearing took place on that date. At the hearing, Petitioner [*2] was represented by David S. Dolowitz and James M. Hunnicutt. Respondent was represented by Clayton A. Simms and Staci Visser.

Prior to June 28, 2013 hearing, the court carefully reviewed the Petition, the Response to the Petition (the "Response Brief"), and all affidavits and exhibits that had been provided to the court. At the June 28, 2013 hearing, Petitioner requested an opportunity to reply to Ms. Libbey-Aguilera's Response, which had been filed the evening before the hearing. Petitioner's reply (the "Reply Brief") was filed on July 19, 2013.¹ The court has now carefully reviewed the Reply Brief, along with all exhibits accompanying the brief.² Now, having carefully considered all of the evidence submitted, along with the relevant authorities on the legal issues presented, the court renders the following Findings of Fact and Conclusions of Law and Order.

I. BACKGROUND

A. GENERAL FACTUAL BACKGROUND

Petitioner claims that his ex-wife wrongfully removed the parties' two minor children, SM-L and RM-L, from their habitual residence in Mexico City, Mexico, in December 2010 or January 2011. He contends that Respondent wilfully disobeyed the orders of the Mexican Court, which had given him custody rights and had prohibited Ms. Libbey-Aguilera from removing the couple's children from their habitual

¹ The court initially set a deadline of July 12, 2013, but the parties stipulated to a one-week extension, until July 19, 2013, and the court permitted the extension.

² The court has also considered Respondent's Corrections to Respondent's Exhibits (Docket No. 33), Petitioner's Response to the Corrections (Docket No. 34), and a letter [*3] from the social worker who has recently met with the children. See Sealed Docket No. 35.

residence in Mexico. Petitioner further argues that Respondent's allegations of domestic violence are untrue and were fabricated long after the divorce proceedings to alienate the children from him. He contends that Respondent, after removing the children to the United States, hid the children from him by having her name changed through a court proceeding in the state of Idaho and by changing the names of their minor children in their school records. Petitioner asks this court to return the children to Mexico City so that the custody issues may be resolved there.

Respondent, however, contends that the Mexican court had awarded her sole custody and had dissolved the [*4] orders preventing her from leaving Mexico. Therefore, she argues, she did not wrongfully remove the children from Mexico. She also claims that she and the children were victims of domestic violence at the hands of Petitioner, which is why she fled Mexico. She has asserted several reasons why the children should not be sent back to Mexico.

B. LEGAL BACKGROUND

This action has been brought pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention"), which has been implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610. The Hague Convention was adopted to protect children from the adverse effects of being wrongfully removed to or retained in a foreign country and to establish procedures for their return. *See Ohlander v. Larson*, 114 F.3d 1531, 1534 (10th Cir. 1997) (citing the Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, Preamble, 51 Fed. Reg. 10494, 10,498 (1986)). "The Convention is meant to provide for a child's prompt return once it has been established the child has been 'wrongfully removed' to or retained in [*5] any affiliated state." *Id.* (quoting Convention, art. 1). The court's role is not to make traditional custody decisions but to determine in what jurisdiction the children should be physically located so that the proper jurisdiction can make those custody decisions. *Loos v. Manuel*, 278 N.J. Super.

607, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994); *see also Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996).

II. HISTORY OF CASE

Petitioner filed the instant action on June 7, 2013. At the same time, he filed a Motion for a Temporary Restraining Order, Order to Show Cause, Writ of Assistance, and Request for Immediate Return of Minor Children (the "Motion for a TRO"). On June 7, 2013, the court granted the Motion for a TRO and entered an Order (the "June 7, 2013 Order"), which, among other things, prohibited Ms. Libbey-Aguilera from interfering with the children being taken into protective custody.³ The June 7, 2013 Order also stated that the court would hold an immediate hearing after the Order was served to determine whether the court should order the return of the children to Petitioner to allow him to immediately return with them to Mexico.⁴

On June 14, 2013, the United States [*6] of America filed an Emergency Motion to Intervene, Request for Stay of Temporary Restraining Order and Hearing.⁵ The reason for United States' motion was that the United States believed there was a conflict between this court's June 7, 2013 Order and a previous Order entered by a Magistrate Judge of this court in a criminal Extradition proceeding involving Respondent.⁶ In the motion, the United States explained that the Government of Mexico had asked the United States, through diplomatic channels, for the provisional arrest of Ms. Libbey-Aguilera for the purpose of extradition for her alleged perpetration of Child Trafficking under Mexican law. Pursuant to an arrest warrant signed by a Magistrate Judge on May 9, 2013, Ms. Libbey-Aguilera had been arrested, and an initial appearance had been held on May 10, 2013. The Magistrate Judge ordered, among other things, that (1) Ms. Libbey-Aguilera wear a GPS ankle monitor, report to pretrial services daily, and maintain her current residence; and (2) the two minor children were to remain with Ms. Libbey-Aguilera at her residence;⁷ and (3) the passports of Ms. Libbey-Aguilera and her children be turned over to pretrial services; and that [*7] (4) Ms. Libbey-Aguilera and the minor children were not to leave the state without the permission of the Court.⁸ Accordingly,

³ See Docket No. 5.

⁴ *Id.*

⁵ Docket No. 6.

⁶ The Extradition proceeding is Case No. 2:13MJ151. A probable cause hearing has been set for August 12, 2013.

⁷ The United States maintained that this court's June 7, 2013 Order directing the minor children to be taken into protective custody was in conflict with the Magistrate Judge's Order for the children to remain with Ms. Aguilera.

⁸ See Case No. 2:13MJ151, Docket No. 6, Order Setting Conditions of Release at 2.

the United States asked this court for permission to intervene in the instant case and also to stay the proceedings, including the court's Order dated June 7, 2013 until such time as the court could hold a hearing to address the apparent conflict in the two Orders. On June 17, 2013, the court set a hearing for June 18, 2013.

The apparent conflict in the two court Orders had prevented the Orem Police Department from contacting the Department of Child and Family Services ("DCSF"). Todd Gabler, a private investigator in the State of Utah Department of Public Safety, who was working with Petitioner, informed the court, through an affidavit [*8] filed on June 18, 2013, that, on June 13, 2013, he had served a copy of this Court's June 7, 2013 Order on the Orem Police Department.⁹ At that time, he had asked the officers to contact him when the Order was to be served on Ms. Libbey-Aguilera. He also served a copy of the Order on Ms. Libbey-Aguilera on June 16, 2013. He stated in his Affidavit that, moments after serving Ms. Libbey-Aguilera with the Order, the Orem Police Department responded to Ms. Libbey-Aguilera's residence, and he gave the officers another copy of the Order. According to Mr. Gabler, the officers refused to contact DCFS to pick up the children, as directed by the June 7 Order, because Ms. Libbey-Aguilera had produced the Magistrate Judge's Order, which she claimed required her to keep the children with her at her place of residence.¹⁰

During the June 18, 2013 hearing, the court permitted the United States to intervene for the purpose of pointing out the apparent conflict between this court's June 7 Order and the Magistrate Judge's Order Setting Conditions of Release in the Extradition proceeding. At the June 18, 2013 hearing, Ms. Libbey-Aguilera was not represented by counsel, but

counsel [*9] who had been appointed pursuant to the Criminal Justice Act ("CJA") to represent her in her criminal Extradition proceeding, Clayton Simms, appeared as a friend of the court. He explained that Ms. Libbey-Aguilera had just been served with the actual Petition on that day and that she had not had an opportunity to find counsel to represent her. Mr. Simms requested that the court continue the hearing to allow Ms. Libbey-Aguilera time to find counsel. The court granted the request and continued the hearing until June 28, 2013.

On June 21, 2013, Mr. Simms requested that, due to the time-sensitive nature of this proceeding and his familiarity with the facts and circumstances of this case, he be appointed as Ms. Libbey-Aguilera's counsel in the instant matter because it is ancillary to his CJA appointment in the Extradition matter.¹¹ The court granted the request.¹²

On June 24, 2013, Ms. Libbey-Aguilera filed a Motion to Appoint Guardian ad Litem ("GAL") for the two children involved in this matter.¹³ Mr. Matas-Vidal opposed the motion on June 25, 2013, and Ms. Libbey-Aguilera filed a Reply on June 26, 2013.¹⁴ The court issued an Order on June 26, 2013, deferring [*10] ruling on the motion until after the June 28, 2013 hearing.¹⁵ In the Order, the court explained that it intended to proceed with the scheduled June 28 hearing and that if it became apparent at the hearing that a GAL would be helpful to the court's determination, the court would appoint one and hold a subsequent hearing.¹⁶

At the June 28, 2013 hearing, the court heard argument from counsel on the merits of the Petition.¹⁷ At the hearing, the court also inquired about permitting Petitioner to see his

⁹ See Docket No. 8.

¹⁰ *Id.*

¹¹ Docket No. 13.

¹² Docket No. 14.

¹³ Docket No. 15.

¹⁴ Docket Nos. 18, 19, respectively.

¹⁵ Docket No. 21.

¹⁶ Ultimately, the court did not find that the appointment of a GAL would be helpful to the court's resolution of this matter and has therefore never ordered that a GAL be appointed.

¹⁷ At the hearing, Petitioner's counsel indicated that because Respondent's Response Brief and exhibits had been filed late on June 27, 2013, he had not had time to thoroughly review everything or to respond to Ms. Libbey-Aguilera's arguments. He asked for an opportunity to file a reply to her response, and the court set a deadline of July 12, 2013 for the Reply Brief, which deadline was later extended, with permission of the court, to July 19, 2013.

children.¹⁸ After some discussion among the parties, they agreed to arrange a time and place for a supervised visit within the next few days, while Mr. Matas-Vidal was still in the United States. Subsequently, because of the children's reluctance about seeing their father, the parties decided that the children should meet with a reunification therapist prior to their first meeting.¹⁹ As of the date of this Order, it appears that the children [*11] have met at least twice with a therapist but have not yet visited with their father.²⁰ At the June 28 hearing, the court also conducted an *in camera* interview of each of the minor children, without any attorneys present.

III. FINDINGS OF FACT

Petitioner [*12] and Respondent were married in Mexico City on June 26, 1999. Petitioner is a Mexican national, and Respondent has dual citizenship in Mexico and the United States, as her father was a United States citizen and her mother was a Mexican citizen. SM-L was born in Mexico City in May 2001, and RM-L was born in Mexico City in November 2003. At some point when the children were very young, the couple discussed the possibility of moving to the United States, but that possibility never came to fruition because Petitioner could not find adequate-paying work in the United States. The children were granted United States citizenship in 2005. In October 2006, Ms. Libbey-Aguilera purchased a condominium in San Antonio, Texas and sometimes visited there. For the duration of their marriage, however, Petitioner, Respondent, and their two children always lived in Mexico City. They lived there until the time Ms. Libbey-Aguilera removed the children from Mexico to Utah in December 2010.

There appears to have been significant discord in the marriage for many years. When Petitioner expressed his desire for a divorce in September 2007, Respondent took a

trip to Texas, taking the two children with her without [*13] seeking permission from their father. The circumstances of her return several days later are disputed but immaterial to the resolution of this matter. In any event, after her return to Mexico, Petitioner filed for divorce in early October 2007 in Mexico City.

On October 16, 2007, the Mexican court issued an Order barring the removal of the children from Mexico. Petitioner had sought such an Order because of the previous incident when Respondent had taken the children to Texas without his permission. On December 14, 2007, after a mediation on December 11, 2007, the court ordered that Ms. Libbey-Aguilera would be granted the provisional physical custody of the children at their marital domicile. Petitioner would have visits on Saturdays and Sundays every other week from 10:00 a.m. - 1:00 p.m. at the Supervised Visitation and Socialization Center. It was also ordered that Mr. Matas-Vidal may socialize with his children on holidays, the children's birthdays, and fifty percent of school vacations, with prior notice and mutual agreement of both parties.²¹ The December 14, 2007 Order again prohibited Respondent from taking the children out of Mexico.²²

On June 30, 2010, the Mexican court issued an order granting "*custodia definitiva*" to Respondent (the "June 30, 2010 Order").²³ Respondent argues that the Order granted her "sole custody" and dissolved any restrictions on her travel outside of Mexico. Petitioner, however, has provided evidence that the English translation of "*custodia definitiva*" is not "sole custody," as that term is understood in the United States, and he has also provided evidence that, because he still had custody rights, Respondent was still prohibited from leaving Mexico.²⁴ The June 30, 2010 Order provided that Mr. Matas-Vidal "has the obligation and essential human right to visit and go out with his children . . . on Saturdays and Sundays . . . every other weekend.

¹⁸ Petitioner had sought to see his children at the initial June 12 hearing, but the court declined to order a visitation at that time.

¹⁹ The parties had reached this agreement while the court was still conducting its *in camera* interviews of the children. After the interviews, the court praised this agreement by the parties and confirmed to counsel that the children were scared to see their father. *See* Transcript, Docket No. 25 pp. 44-46.

²⁰ *See* Sealed Docket No. 35, Letter from Paul W. Dawson, MSW, LCSW.

²¹ These visits would not have been at [*14] the Socialization Center, and it does not appear that Respondent ever permitted these visits.

²² *See* Docket No. 22-1, Respondent's Affidavit in Support to Objections to Petition for Immediate Return, p. 4; *see also* Docket No. 28-3, Ex. 5(b) Temporary Custody & Support Order, English Translation.

²³ Docket No. 28, Ex. 14(b). The Order was published on July 12, 2010. Respondent initially claimed that the Order was entered on July 12, 2009, but there is no dispute now that the Order was published on July 12, 2010, following proceedings on June 30, 2010.

²⁴ Docket No. 31, Ex. 2.

Visitations shall begin on Saturdays at 10 AM and end on Sundays at 6 PM.”²⁵ These visits were not ordered to take place at the Supervised Visitation and [*15] Socialization Center. Mr. Matas-Vidal was to “pick the children up at they place where they live with their mother and return them to the same place.”²⁶

In August 2010, each parent appealed the June 30, 2010 Order. Mr. Matas-Vidal appealed the Order because, among other things, he believed that Ms. Libbey-Aguilera was obstructing his ability to visit with the children and he thought further psychological testing would assist the court in its determination.²⁷ During 2010, new psychological examinations were in progress but were not filed with the court until February 2011—after Respondent had fled Mexico.

On November 25, 2010, a bifurcated decree of divorce was entered. Thus, the divorce had become final, but the issue of child custody [*16] and support were still being litigated. During the custody litigation, Petitioner exercised all visitation awarded to him by the Mexican court. He regularly exercised his right of access until the children were removed from Mexico. On January 8, 2011 and January 9, 2011, he went to the Supervised Family Interaction Center but Ms. Libbey-Aguilera and the boys did not show up. He then confirmed that they no longer lived at their marital home and was informed by the boys’ school that, as of December 16, 2010, the boys had stopped attending school.

In December 2010, Respondent surreptitiously removed the children from Mexico to the United States.²⁸ She came directly to Orem, Utah and enrolled the children in school on December 21, 2010. They have been continuously enrolled in the same school since January 2011. Teachers and administrators have repeatedly noted their good behavior

and academic excellence.²⁹ The children are both on a competitive swim team. SM-L was a cub scout and now participates regularly as a boy scout. He also is on a soccer team. RM-L is a cub scout. They were both baptized as members of the Church of Jesus Christ of Latter-day Saints and attend meetings regularly. [*17] SM-L received the Aaronic Priesthood when he turned twelve. They both spend substantial time with their maternal grandmother. Respondent began working for the Provo School District on March 7, 2011 and has remained gainfully employed with the district since that time.

On January 7, 2011, after Respondent had removed the children from Mexico, the Mexican appeals court revoked the June 30, 2010 Order. On February 4, 2011, the second set of psychological reports were issued.³⁰ While the English translations of these reports are somewhat difficult to analyze, it is clear that the psychological report on the children found that they did not have emotional indications that were consistent with a profile of a child that had suffered violence.³¹ In addition, while the boys both had a negative view of their father, the psychologist noted their perception was “without sustaining real or valid experiences” [*18] and that their attitudes “are determined by induction and manipulation which their mother has exercised upon them.”³²

The psychological report on Ms. Libbey-Aguilera found, among other things, that she had a “tendency to lie,” dysfunctional behavior patterns which may affect in a negative manner the interaction within her family and social environment,” that she “tends to carry out manipulation attitudes in particular with her children,” and that she had “aggressive or violent tendencies, especially of a verbal

²⁵ Docket No. 28, Ex. 14(b) at p. 14 (English Translation).

²⁶ *Id.*

²⁷ It is unclear why Ms. Libbey-Aguilera appealed, but she has not disputed that she appealed the June 30, 2010 Order.

²⁸ Respondent claims that she acted on the belief that the final custody order no longer restricted her from lawfully taking the children across the border to the United States. Docket No. 22-1, Respondent’s Aff. at p.6.

²⁹ See Docket No. 22-1, Respondent’s Aff. at pp.7-8 and attached exhibits.

³⁰ The findings in these second psychological reports do not vary significantly from the initial reports, prepared in 2008. See Docket No. 28, Ex. 11(b).

³¹ See Docket No. 4-1, Ex. 21-b, p. 7.

³² Docket No. 4-1, Ex. 21-b, pp.4-5. The psychologist noted that the dread the boys feel about their father is “more consistent with induction and manipulation attitudes to them than as a result of their own experiences.” *id.* p. 7, and that it “is inferred that they have been mostly induced or manipulated by their mother.” *Id.*

nature.³³ The report also noted that Ms. Libbey-Aguilera now reported taking the children to a private psychological evaluation to confirm the use of violence and sexual [*19] abuse, which was information Ms. Libbey-Aguilera "did not express in her first evaluation."³⁴ The psychological report on Mr. Matas-Vidal stated that there were no indications of aggressive or violent tendencies.³⁵ The psychologist found no reason why he should not live together with his children.³⁶ Petitioner suggests that Respondent fled before the reports were issued because she suspected that they would not be favorable to her.

On February 9, 2011, in the District Court for the Seventh Judicial District in the State of Idaho, Respondent had her name legally changed to Brooke Robinson, claiming that she needed to change her name because she was "divorcing her husband and am seeking to avoid being located by my husband for the reason he has threatened to kill me and my family."³⁷ Respondent and her two children had been living in Orem, Utah from December 2010 through the present time.

Petitioner [*20] had been looking for his children since he realized they were gone in January 2011. He had started to try to find Respondent in Texas, believing she was there because she had previously purchased a condominium there. Because she had changed her name to Brooke Robinson in early 2011, and because she had changed the boys' names in their school records in October 2011,³⁸ it took Petitioner until earlier this year to discover where his children were located. Law enforcement located Respondent in Utah in May 2013. The instant Petition was filed on June 7, 2013.³⁹

IV. CONCLUSIONS OF LAW

A. APPLICABILITY OF THE HAGUE CONVENTION

The court finds that the Convention applies to this dispute. SM-L and RM-L are both under 16 years old; they were

habitual residents of Mexico; and both Mexico and the United States are contracting states.⁴⁰ See 42 U.S.C. § 11603(c)(1)(A); Hague Conv., art. 3.

B. WHETHER THE REMOVAL WAS WRONGFUL

The first question the court must address is whether the children were "wrongfully removed" [*21] from Mexico, or, in other words, whether they were removed in violation of a right of custody. Once a petitioner establishes that removal was wrongful, the child must be returned unless an exception is applicable. *Abbott v. Abbott* 560 U.S. 1, 130 S. Ct. 1983, 1990, 176 L. Ed. 2d 789 (2010) (citing 42 U.S.C. § § 11603(a)); *Blondin v. Dubois*, 189 F.3d 240, 245 (2nd Cir. 1999); see also 42 U.S.C. § 11601(a)(4) ("Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies."). Moreover, "[e]ven where the grounds for one of these "narrow" exceptions have been established, the district court is not necessarily bound to allow the child to remain with the abducting parent." *Blondin*, 189 F.3d at 246 n.4 (quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1067) (6th Cir. 1996) ("[A] federal district 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.")).

Petitioner bears the burden of showing by a preponderance of the evidence that the removal or retention was wrongful. Accordingly, Petitioner [*22] must demonstrate that:

- (A) the child was habitually resident in a given state at the time of the removal or retention;
- (B) the removal or retention was in breach of petitioner's custody rights under the laws of that state; and
- (C) petitioner was exercising those rights at the time of removal or retention.

³³ Docket No. 4, Ex. 20-b, pp. 210-212.

³⁴ *Id.* p. 207.

³⁵ Docket No. 4, p. 183, 191.

³⁶ *Id.* at p. 183.

³⁷ Docket No. 30-7, Exhibit 7. As required by Idaho law, respondent represented in her name-change petition that she was a resident of Idaho, but Respondent admits now that she was never a resident of Idaho.

³⁸ See Docket No. 28, Ex. 23.

³⁹ Docket No. 1.

⁴⁰ The court finds unmeritorious Respondent's argument that the children's habitual residence had shifted to the United States at the time of removal.

Chafin v. Chafin, 133 S. Ct. 1017, 1021, 185 L. Ed. 2d 1 (2013) (quoting Hague Conv., art. 3).

Here, the court finds that Petitioner has met his burden of showing by a preponderance of the evidence that SM-L and RM-L were habitually resident in Mexico City at the time of the removal. The children were born in Mexico City and never lived anywhere other than Mexico until Respondent removed them to the United States in December 2010.

The court also concludes that the removal was in breach of Petitioner's custody rights under Mexican law and that Petitioner was exercising those rights at the time of removal. Although Respondent claims that she was awarded "sole custody" and that any restraints on her ability to take the children across the border were dissolved, the court does not agree. The July 9, 2010 Order states that Respondent was given "*custodia definitiva*," but that is not the same thing as "sole custody," [*23] as discussed below.⁴¹ It is unclear why Respondent believed that the Order gave her the right to leave Mexico with the children when the June 30, 2010 Order provided that Mr. Matas-Vidal could visit and socialize with his children on Saturdays and Sundays every two weeks from Saturday at 10:00 a.m. until Sunday at 6.00 p.m.⁴²

Moreover, both parties appealed that order in August 2010. Under Mexican law, the challenged order had no effect, so the *ne exeat* order from October 16, 2007 remained in effect.⁴³ In addition, even the bifurcated divorce decree, issued on November 25, 2010, provides that: "both parties stated that no settlement may be reached, since the legal status of their minor children whose names are [SM-L and RM-L] are subject [*24] to litigation with the 36th Mexico City Family Court."⁴⁴ Because the June 30, 2010 order was being appealed, and because custody was still subject to

litigation, the interim *ne exeat* order from October 16, 2007 continued to apply.⁴⁵

Regardless of which Order applied, however, Petitioner had intrinsic *ne exeat* rights barring the children's removal. If a petitioner only has "rights of access" rather than "rights of custody," then the petitioner cannot seek return of the child under the Convention. See, e.g., *Abbott*, 130 S. Ct. at 1989. The issue of "custody" must be [*25] addressed under the law of Mexico. See *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277, 1284 (S.D. Fla. 1999); *Ohlander v. Larson*, 114 F.3d 1531, 1541 (10th Cir. 1997). Pursuant to Mexico's Civil Code, both parents generally have "rights of custody" to their children at all times. See, e.g., *Asuncion Mota v. Rivera Castillo*, 692 F.3d 108 (2nd Cir. 2012); *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000); *Saldivar v. Rodela*, 879 F. Supp. 2d 610 (W.D. Tex. 2012). In these cases, the U.S. court accepted affidavits from Mexican lawyers describing rights of custody in Mexico.

In this case, Petitioner has provided a declaration by Petitioner's Mexican counsel, in which he provides an explanation of *patria potestas*, which means "parental authority" in Spanish, and is somewhat akin to the American notion of "legal custody," or decision-making authority for a minor child. In Spanish, "*custodia*" refers to what we in the United States would call "physical custody," which addresses which parent a child lives with. While a Mexican court may grant custody to one parent, that does not negate the other parent's rights of parental authority.⁴⁶

In *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010), [*26] the United States Supreme Court concluded that a *ne exeat* right is a right of custody under the Convention. See *id.* at 1990-91. A *ne exeat* right consists of the authority to consent before the other parent may take the child to another country. See *id.* at 1987.

Having considered the various cases cited by the parties, the court concludes that Petitioner's *patria potestas* rights are

⁴¹ The July 9, 2010 Order was ultimately revoked on January 10, 2011. See Docket No. 30, Ex. 5 (the Order is mistakenly identified as being published on January 10, 2010, but there is no dispute that it was published on January 10, 2011). Because Respondent had already left the country, the court cannot rely on the revocation of that Order in considering the status of custody rights as of the date of the wrongful removal.

⁴² Docket No. 28, Ex. 14(b).

⁴³ See Petitioner's Reply Memorandum, Docket No. 31, Ex. 2, which is a Declaration by Petitioner's Mexican attorney clarifying these points of Mexican law.

⁴⁴ Respondent's Opp'n, Exhibit 17(b) to Document No. 22, near end of first paragraph (emphasis added).

⁴⁵ The Mexican court reiterated in September 2011 that the *ne exeat* Order still applied. See Docket No. 4-1, Ex. 23(b). The court has not considered this fact in determining whether the removal was wrongful because Respondent had already fled Mexico by that time. The Order, however, lends credence to the legal explanations of Petitioner's attorney in Mexico, as noted below.

⁴⁶ See Docket No. 31, Ex. 2.

rights of custody under the Hague Convention. Accordingly, Respondent's removal of the children from Mexico violated Petitioner's rights of custody that arose under the laws of Mexico and therefore, the removal was wrongful.

As noted previously, once a petitioner establishes that removal was wrongful, the child must be returned unless an exception is applicable. *Abbott*, 130 S. Ct. at 1990 (citing 42 U.S.C. § 11603(a)). Respondent, has asserted several defenses available under the Hague Convention, which will be addressed in turn below

C. RESPONDENT'S DEFENSES

I. Article 13 "Grave Harm" Defense

Respondent contends that there is a grave risk that return of the children would expose them to physical and/or psychological harm. Pursuant to Article 13 of the Convention, a court is not bound to order the return of [*27] the child if the person who opposed the return establishes that "there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Art. 13(b). Respondent must establish the grave risk by "clear and convincing" evidence. 42. U.S.C. § 11603(e)(2).

A "grave risk" of harm from repatriation arises in two situations: (1) where returning the child means sending him to a zone of war, famine, or disease; or (2) in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

In addition, the potential harm to the child must be severe, and "[t]he level of risk and danger required to trigger this exception has consistently been held to be very high." *Norden—Powers v. Beveridge*, 125 F. Supp. 2d 634, 640 (E.D.N.Y. 2000) (citing cases). The grave risk involves not only the magnitude of the potential harm but also the probability that the harm will materialize. *Van de Sande v. Van de Sande*, 431 F.3d 567, 570 (7th Cir. 2005).

In this case, Respondent has not established [*28] by clear and convincing evidence that there is a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation. The children would not be returned to a zone of war, famine, or disease.

In addition, while Respondent has alleged that she and the children were victims of domestic violence, the court is not persuaded that these allegations are entirely true.⁴⁷ For example, Respondent did not raise any such concerns during her divorce proceedings. In fact, in her Answer to the Complaint for Divorce, she states "there was an exchange of insults, where today the plaintiff [Mr. Matas-Vidal] always acted in a mocking way and *although he had never physically assaulted me*, he did it with his attitudes."⁴⁸ This Answer is dated November 22, 2007, well after the parties separated on August 5, 2007. In addition, the psychological reports submitted in this case do not suggest that Petitioner was abusive toward his wife or children or that Respondent reported any abuse at that time. Indeed, the initial psychological report states that "with regard to the children, [Petitioner] was identified with an affective bond [*29] toward them, showing interest and concern for them, affective and normative toward them, so there are no problems for coexistence."⁴⁹ The final report reached the same conclusion.⁵⁰

Indeed, the supplemental reports suggest that Respondent had manipulated her children to dislike their father. Among other things, the psychologist stated:

From analysis of obtained information at applied instruments, there were not found significant data to establish that minor children show fear attitudes to any of their parents, becoming important the fact that even though they openly express feeling certain dread to their father, this results more consistent with induction and manipulation attitudes to them than as a result of their own experiences.⁵¹

Also, while Respondent initially submitted a translation of very negative comments the [*30] children allegedly made

⁴⁷ Even if some of the allegations are true, they have not been proven by clear and convincing evidence, and, in any event, the court does not find that they rise to a level of risk and danger that would justify applying this exception.

⁴⁸ Docket No. 28-2, Ex. 4 ¶ 9 (emphasis added).

⁴⁹ Docket No. 28-9, Ex. 11.

⁵⁰ Docket No. 4, pp. 183, 191.

⁵¹ Docket No. 4-1, Ex. 21(b) at p. 7.

during a mediation. Petitioner pointed out that the translation was completely inaccurate (and that it was a fraud upon the court).⁵² Respondent later filed Corrections, conceding that the translation submitted was not actually a translation of the mediation, but of other reports and hearings and that the inadvertent mistake had been made due to language barriers and time constraints.⁵³ During the mediation, no allegations of abuse were raised, and when SM-L was questioned, he declared he loved and wanted to visit with his father. His negative comment to the court was that his father lied to the boys by saying he would play with them, then did not.⁵⁴ The family pediatrician never noticed any type of evidence that would suggest any type of physical abuse.⁵⁵ The parties' marriage counselor has also provided an affidavit stating that she saw no issues of violence between them, and neither party mentioned any violence in the home.⁵⁶

The children's current [*31] fear of their father appears to be based primarily (but not exclusively) on one alleged "incident" involving each child. When SM-L was sixteen-months old, Respondent claims that Petitioner pushed him against a step in the bathroom, from which he sustained a cut above his right eye and was seen by a plastic surgeon. Petitioner claims that a shaky changing table gave way and SM-L fell to the floor.

When RM-L was 15 months old, Respondent claims that Petitioner pushed him into a chair resulting in eye injuries. Petitioner denies that this happened.⁵⁷ While the court cannot divine what actually happened in these various alleged incidents, what is clear is that both children discussed these events with the court as though they had clear

memories of the occurrences, which the court does not find to be plausible, given their ages at the time.⁵⁸ They also appear to have general recollections of their father choking or spanking them, along with other instances of violence, but these allegations have not been proven by clear and convincing evidence.

Moreover, the records submitted from the Supervised Visitation Center suggest that, at first, the children did not exhibit any fear or reluctance to see their father. Indeed, they appeared to demonstrate a warm, loving, and playful interaction.⁵⁹ Over time, however, they seemed to develop more hesitation about [*33] seeing him, which he blames on Ms. Libbey-Aguilera's efforts to alienate the children from him. The reason the children most often gave to the supervisors about their reluctance to visit with their father was that his breath was bad. It seems unlikely that the children would provide such an answer if they were actually subjected to physical or psychological abuse, and it is puzzling that the children did not appear to have any reluctance to see their father during the beginning weeks or months of their supervised visits. Indeed, even the Mexican Court Order from June 30, 2010, upon which Respondent relies to argue that she was awarded sole custody, states that "there is no danger" in "any of the parents exercising custody" and stated that Mr. Matas- Vidal had "the obligation and essential human right to visit and out with his minor children" every other weekend.⁶⁰

It is not the function of this court, however, to determine whether any domestic violence actually occurred. This court must determine, in cases where "serious abuse or neglect"

⁵² Docket Nos. 30, 31.

⁵³ Docket 33, Corrections to Respondent's Exhibits. The court has no doubt that the incorrect translation was inadvertently submitted.

⁵⁴ Docket No. 30, Ex. 1, 2.

⁵⁵ Docket No. 30, Ex. 9.

⁵⁶ *Id.*

⁵⁷ He also denies another incident alleged by Respondent—that he slammed a piano cover shut, thereby injuring RM-L's face. In fact, Petitioner claims [*32] that they never even had a piano.

⁵⁸ Respondent also claims that Petitioner pushed RM-L into a pipe in the yard at the Supervision Center, splitting his lip. Petitioner denies that this happened, and the Center Report from June 14, 2008 reported that Petitioner was playing with the children in the garden, where they were playing ball and that RM-L accidentally struck his elbow on a tube serving as a garden fence. There is also a note stating that when Petitioner noticed it, he washed it with soap and water. *See* Docket No. 30, Ex. 10. Given that the visits were supervised and that there is a contemporaneous note stating what happened, the court does not give any credence to Respondent's version of this incident. The court also does not give credence to Respondent's claim that Petitioner's brother arrived at the Visitation Center in October 2009 to attempt to kidnap the children.

⁵⁹ *See* Docket 30, Ex. 10.

⁶⁰ Docket No. 28-13, Ex. 14(b) at page 38 of 40.

has been proven by clear and convincing evidence, whether Mexico would be [*34] incapable or unwilling to provide protection to the children. The court finds that Respondent has not demonstrated by clear and convincing evidence that there is evidence of "serious abuse or neglect," and that even if there were, she has not demonstrated that Mexican courts would be incapable of providing adequate protection. Thus, the court concludes that Article 13 "grave risk" defense does not apply in this case.

ii. Article 20 "Public Policy" Defense

Article 20 of the Convention states, "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." This is an affirmative defense that Respondent must prove by clear and convincing evidence. 42 U.S.C. § 11603(e)(2)(A). This is often referred to as the "public policy" defense. The defense is to be invoked only on "the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process." *Souratgar v. Fair*, 720 F.3d 96, 2013 U.S. App. LEXIS 11875, 2013 WL 2631375 at *8 (2nd Cir. June 13, 2013) (quoting U.S. State Dep't, Hague International Child Abduction Convention: [*35] Text and Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986)). "We note that this defense has yet to be used by a federal court to deny a petition for repatriation." *Id.* (citing Fed. Jud. Ctr., The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 85 (2012)). The court finds no merit to this defense and summarily denies it.

iii. Article 12 "Well-Settled" Defense

Article 12 provides, in relevant part:

Where a child has been wrongfully removed . . . and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned *shall* order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the proceeding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Art. 12 (emphasis added). Accordingly, the default

presumption under [*36] the Convention is that a child shall be returned to the state from which he originally was wrongfully removed unless both of two conditions are met: (1) one year has elapsed between the date of wrongful removal and the date proceedings commence; and (2) the child is found to be "now settled in its new environment." *Lozano v. Alvarez*, 697 F.3d 41, 51 (2nd Cir. 2012). In other words, if more than one year has elapsed since the date of wrongful removal *and* the child is now settled in his new environment, the court *may* — but need not— refuse to order repatriation. *See Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001). Put differently, "if more than one year has passed, a 'demonstra[tion] that the child is now settled in its new environment' may be a sufficient ground for refusing to order repatriation." *Id.* The standard under Article 12 does not call for determining in which location the child is relatively better settled, but rather for determining whether the child has become so settled in a new environment that repatriation would be against the child's best interest. *Id.*

In determining whether a child is settled within the meaning of Article 12, a court considers a number of factors [*37] that bear on whether the child has "significant connections to the new country." 51 Fed. Reg. at 10509. These factors include: (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability. In some circumstances, we will also consider the immigration status of the child and the respondent. In general, this consideration will be relevant only if there is an immediate, concrete threat of deportation. Although all of these factors, when applicable, may be considered in the "settled" analysis, ordinarily the most important is the length and stability of the child's residence in the new environment. *In Re B. Del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009)

In the instant case, SM-L and RM-L have been in Utah since late December, 2010— for over two and one-half years. The court finds that they are both very well settled. And given the boys' [*38] ages, 12 and 9 ½, respectively, these thirty-plus months have been meaningful to the boys. They have been consistently enrolled in school since January 2011. They have missed very few days during those two school years, and their academic success has been

remarkable.⁶¹ Both boys have many friends, caring neighbors, and fellow LDS church members with whom they have formed close bonds. Their maternal grandmother also frequently cares for them. The children are active in their church, in boy scouts (or cub scouts for RM-L), and they are on a competitive swim team. SM-L is also on a soccer team. Many friends and neighbors have provided glowing letters about Respondent and the boys, and attesting to the boys' happiness and stable environment.⁶² Their mother has also been consistently employed since March 2011 and appears to be financially stable.⁶³ The boys both speak fluent English and appear to have adjusted well to their living situation. Given the outpouring of support for the boys and Respondent, both in terms of having friends and neighbors attend the two court hearings and in submitting letters to the court, the court has no question that these two boys are surrounded by a loving [*39] and supportive community and that the boys are thriving in their current environment. They are indeed settled in their new environment.

a. Equitable Tolling

Petitioner argues [*40] that he is entitled to equitable tolling of the one-year period for the filing of his Hague petition and that the Article 12 defense is therefore inapplicable. Article 12 of the Convention requires the return of a child, whether or not he is "settled," if the non-abducting parent files his Hague petition within one year of the child's wrongful removal or retention. *See* Hague Convention, art. 12.

Some courts have held that equitable principles may be applied to toll the one-year period when circumstances suggest that the abducting parent took steps to conceal the whereabouts of the child from the parent seeking return and such concealment delayed the filing of the petition for return." *See, e.g., Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008). Relying on this holding, Petitioner contends that,

even if the court finds the boys to be "now settled," the court should nevertheless order their return because Respondent concealed the boys and because Petitioner filed his petition within one year of learning of their location. While the court agrees that Respondent concealed the boys, that such concealment delayed Petitioner's ability to file a petition, and that he filed his petition [*41] within one year after he finally learned of their location, the court declines to apply equitable tolling to the one-year mandatory return period.

The United States Circuit Courts of Appeals are divided on the issue of equitable tolling in this situation. The Fifth, Ninth, and Eleventh Circuit Courts of Appeals have found that equitable tolling may apply in certain circumstances, such as when circumstances suggest that the abducting parent took steps to conceal the whereabouts of the children and the concealment caused the petitioning parent's filing delay. *See Dietz v. Dietz*, 349 Fed. Appx. 930, 2009 WL 3378590 (5th Cir. Oct. 20, 2009); *In re B. Del C.S.B.*, 559 F.3d at 1014; *Duarte*, 526 F.3d at 570 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004). The Second Circuit Court of Appeals, however, has concluded that equitable tolling found that it does not apply. *See Lozano v. Alvarez*, 697 F.3d 41, 51 (2nd Cir. 2012), *cert. granted in part*, 133 S. Ct. 2851, 186 L. Ed. 2d 907 (June 24, 2013). The Tenth Circuit has not addressed the issue. Because of the split among the Circuits, the United States Supreme Court recently granted certiorari on the issue, and thus the issue will be decided within the next [*42] term.⁶⁴

In the meantime, however, this court agrees with the Second Circuit and other district courts that have found that the purpose of the one-year mandatory return period is not to provide a deadline for a petitioner to assert a claim but rather is to put a limit on the uprooting of a settled child. As one district court explained, "the evident import of [Article 12's one-year period] is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitations does, but rather to put some limit on

⁶¹ For example, their school principal has written a glowing review of both boys, stating, among other things, that "they both are among the very best behaved and well-mannered students I have known in school during my 13 years as a teacher and 15 years as a public school administrator. They have excellent attendance, including never being tardy to school the entire past year, and they have never required any attendant or behavior interventions from the school or their teachers." In addition, he stated that both "regularly are recognized and receive awards in our quarterly recognition celebrations for going 'above and beyond' in numerous ways, and in every way they are exemplary students and citizens." He also notes that "they are thriving and happy in school, and they are well on their way to being happy, productive, and successful citizens. I have absolutely no concerns about them or their well-being." *See* Docket No. 28, Ex. 21J, Letter from School Principal, dated June 26, 2013.

⁶² *See* Docket No. 28, Ex. 26.

⁶³ *Id.*

⁶⁴ *Lozano v. Alvarez*, 133 S. Ct. 2851, 186 L. Ed. 2d 907 (June 24, 2013).

the uprooting of a settled child.” *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass.1998), *opinion vacated on other grounds by Toren v. Toren*, 191 F.3d 23 (1st Cir.1999); *see also* Perez-Vera Report ¶ 107.

The district court in *Lozano* found that, unlike a statute of limitations prohibiting a parent from filing a return petition after a year has expired, the “settled” defense merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency. *See Lozano*, 809 F. Supp. 2d at 227–28 [*43] (reasoning that the one-year period in Article 12 is not analogous to a statute of limitations); *see also Aranda v. Serna*, 911 F. Supp. 2d 601, 613 (M.D. Tenn. 2013) (finding the reasoning of the Fifth, Ninth, and Eleventh Circuits unpersuasive and agreeing with Second Circuit that equitable tolling does not apply to equitably toll the one-year period based on concealment); *Yaman v. Yaman*, 919 F. Supp. 2d 189, 2013 U.S. Dist. LEXIS 10960, 2013 WL 322204 (D. N.H. Jan. 28, 2013) (same); *Matovski v. Matovski*, 2007 U.S. Dist. LEXIS 65519, 2007 WL 2600862, at *12 (S.D.N.Y. Aug. 31, 2007) (concluding that one-year period is not analogous to a statute of limitations); *Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002) (same); *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass.1998) (same), *vacated on other grounds*, 191 F.3d 23 (1st Cir.1999).

Even the Ninth Circuit, while still applying equitable tolling, recognized that “[t]he rationale behind Article 12’s “now settled” defense is that when a child has become settled and adjusted in his new environment, a forced return might only serve to cause him further distress and accentuate the harm caused by the wrongful relocation.” *In re B. Del C. S. B.*, 559 F.3d 999, 1003 (9th Cir. 2009) (quoting Beaumont & McEleavy, [*44] The Hague Convention on International Child Abduction 203 (1999)).

The Second Circuit, in a well-researched and well-reasoned opinion, rejected the petitioner’s argument on appeal that the district court should have equitably tolled the one-year filing period until the date he reasonably could determine that his daughter had been removed from the United Kingdom and taken to the United States. *Lozano*, 697 F.3d at 50-51. The Second Circuit recognized that:

While the text of the Convention does not explicitly address the issue, we note that the text does provide one clue that tolling was not anticipated. The language of Article 12 expressly starts the running of the one-year period “from the date of the wrongful removal or retention.” It would have been a simple matter, if the state parties to the Convention wished to take account of the possibility that an abducting parent might make it difficult for the petitioning parent to discover the child’s whereabouts, to run the period “from the date that the petitioning parent learned [or, could reasonably have learned] of the child’s whereabouts.” But the drafters did not adopt such language. . . . [T]he drafting history demonstrates that this [*45] was a conscious choice, and that the drafters specifically rejected a proposal to have a different date trigger the start of the one-year period when the child’s whereabouts had been concealed.

Lozano v. Alvarez, 697 F.3d 41, 51 n. 8 (2nd Cir. 2012) (internal citations omitted). The *Lozano* court also found that this interpretation of Article 12 “is further bolstered by Article 18, which provides that none of the provisions in the Convention “limit the power of a judicial or administrative authority to order the return of the child at any time.” *Lozano*, 697 F.3d at 52 n.10 (citing Convention, art. 18). Moreover, the *Lozano* court also relied on the Pérez—Vera Report⁶⁵ and concluded that:

Simply put, the Convention is not intended to promote the return of a child to his or her country of habitual residency irrespective of that child’s best interests; rather, the Convention embodies the judgment that in most instances, a child’s welfare is best served by a prompt return to that country. The signatory states, however, were aware that there are situations where “the removal of the child can ... be justified by objective reasons which have to do either with [the child’s] person, or with the [*46] environment with which [the child] is most closely connected.” Pérez—Vera Report at 432 ¶ 25. Accordingly, the Convention “recognizes the need for certain exceptions” to the signatory states’ “general obligation[] . . . to secure the prompt return of children who have been unlawfully removed or retained.” *Id.* Pérez—Vera describes these “exceptions”

⁶⁵ As noted by the Second Circuit, Elisa Pérez—Vera was “the official Hague Conference reporter for the Convention.” *Lozano*, 697 F.3d at 52 n.11 (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,503). “Her explanatory report [was] recognized by the Conference as the official history and commentary [*47] on the Convention.” *id.*, and we have previously held that “it is an authoritative source for interpreting the Convention’s provisions.” *id.* (citing *Croll v. Croll*, 229 F.3d 133, 137 n. 3 (2d Cir.2000)) (citation omitted). *abrogated on other grounds by Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 176 L. Ed. 2d 789; *see also Gitter*, 396 F.3d at 129 & n. 4.

as "concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area."

Id. at 53-54; *see also Blondin v. DuBois*, 238 F.3d 153, 164 (2d Cir. 2001) ("*Blondin II*") (noting that the Convention's drafters recognized that, despite the general aim of "ensur[ing] the return of abducted children," there "could come a point at which a child would become so settled in a new environment that repatriation might not be in its best interest.").

In sum, the Second Circuit determined that the Convention's drafting history "strongly supports the position that the one-year period in Article 12 was designed to allow courts to take into account a child's interest in remaining in the country to which he has been abducted after a certain amount of time has passed." 697 F.3d at 54. The court concluded that, [i]f this understanding of the second paragraph of Article 12 is correct, allowing equitable tolling of the one-year period would undermine its purpose. A child may develop an interest in remaining in a country in which she has lived for a substantial amount of time regardless of her parents' efforts to conceal or locate her." *See Lozano*, 697 F.3d at 54. This court agrees.

While the court acknowledges that it may seem unfair and inequitable to Petitioner that the Respondent has essentially been "rewarded" for successfully [*48] hiding her children, the alternative determination—to uproot these two boys after they have become so well settled in their new environment in which they have spent the past two and one-half years—seems even more reprehensible and contrary to the ultimate purpose of the Hague Convention. Thus, the court declines to apply the doctrine of equitable tolling to the Article 12 "well-settled" defense.

iv. The Article 13 "Age and Maturity" Exception

The Hague Convention provides that "[t]he judicial or administrative authority [considering a petition] may also 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." Hague Convention, art. 13. The age and maturity exception is to be narrowly construed and must be shown by a preponderance of the evidence. *England v. England*, 234 F.3d 268, 272 (5th Cir.2000) (citing §§ 11601(a)(4), 11603(c)(2)(A)).

In applying the "age and maturity" exception, a court must not focus solely on the general goal of the Convention—to

protect children from the harmful effects of wrongful removal—but must also carefully determine [*49] that the particular child "has obtained an age and degree of maturity at which it is appropriate to take account of its views." *Blondin v. Dubois*, 189 F.3d 240, 247 (2d Cir.1999) (quoting Convention, art. 13). The Convention contains no age limit for applying the exception. *Blondin II*, 238 F.3d at 167; *Rajmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953, 957 (E. D. Mich.2001).

In this case, SM-L is twelve-years old and will start seventh grade next month. RM-L will be ten-years old in three months and will soon start fourth grade. The court had the opportunity to observe the demeanor and maturity of both children during the court's *in camera* interview of each of them. Undoubtedly the task of meeting alone with a federal judge and his staff, with no parents or attorneys present, was a daunting one, but both boys faced the situation courageously. They both demonstrated a high level of maturity in answering the court's questions—answering the questions in an articulate, thoughtful, and respectful manner. They are both good students with strong academic records. They both expressed a strong desire to remain in Utah and had particular objections to returning to Mexico. They confirmed that [*50] they enjoy going to school here, they are involved in church and several sports activities, and they have many friends here. Indeed, both boys became visibly distraught when the court discussed the court's task of evaluating whether they should be returned to Mexico. The response of both boys appeared to be purely genuine—not concocted or rehearsed in any way. Additionally, the boys were adamant about not wanting to have a supervised visit their father while he was in town for the instant court proceeding.

Accordingly, the court finds, by a preponderance of the evidence, that the boys are of an appropriate age and maturity such that it is appropriate for the court to take into account their desire to not return to Mexico.

If a court determines, however, that the youngster's opinion is the product of undue influence, the child's wishes are not taken into account. *Desilva*, 481 F.3d at 1286. Here, the court recognizes that the boys have spent the past two years solely with their mother and maternal grandmother, and that this circumstance has undoubtedly had an impact on their desire to stay with their mother in Utah. It is also possible that their mother has negatively colored the boys' [*51] view of their father. Here, while the children's objections to returning to Mexico could be due to the mother's possible undue influence over them, the court finds that this possible undue influence is not the only reason the children desire

not to return to Mexico, and thus, the court declines to ignore their wishes. The children appear to be genuinely happy and thriving in their current situation. The court has attempted to balance this possible undue influence against other reasons the boys desire to stay here and concludes that even though the mother has perhaps exerted some undue influence on the boys, the court should still take into account the children's wishes to remain in Utah and not be returned to Mexico. For this independent reason, the court declines to return them to Mexico.

The court's decision in this case is not based in any way on a belief that the courts of Utah will do a better job than the courts of Mexico City in addressing this unfortunate custody situation. To the contrary, the court is certain that the courts of Mexico City would be fully capable of handling this litigation. In addition, the court has no doubt that Petitioner genuinely wants to see his children [*52] and have a relationship with them, and the court hopes such a relationship can develop in the future. The court, however, is convinced that the return of these children to Mexico City at this time and under these circumstances—however wrongfully the circumstances have arisen—would severely traumatize these children. The court emphasizes that this decision has a limited purpose and effect. It does not mean

that Petitioner cannot exercise his visitation rights with his children. It merely establishes that the boys will not be returned to Mexico but will remain in Utah for any custody proceedings that are initiated here. In light of the pending Extradition proceedings against Respondent, however, the future remains uncertain for this family.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that the Petition for Immediate Return of Children to Petitioner Pursuant to the Hague Convention and the International Child Abduction Remedies Act is DENIED. The Clerk of the Court is directed to enter judgment in favor of Respondent.

DATED this 5th day of August, 2013.

BY THE COURT:

/s/ Dale A. Kimball

DALE A. KIMBALL

United States District Judge

Addendum B

Order of Dismissal for Lack of Jurisdiction
Dated 12/5/2014

The Order of Court is stated below:

Dated: December 05, 2014 /s/ THOMAS PATTON
09:56:19 AM District Court Commissioner



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Attorneys for Respondent

**IN THE FOURTH JUDICIAL DISTRICT COURT
AMERICAN FORK DEPARTMENT, UTAH COUNTY, STATE OF UTAH**

BROOKE ROBINSON
(a.k.a. SUSAN CONSUELO LIBBEY-
AGUILERA),

Petitioner,

v.

JUAN PABLO MATAS-VIDAL,

Respondent.

**ORDER OF DISMISSAL FOR LACK OF
JURISDICTION**

CASE No. 134100249

JUDGE CHRISTINE JOHNSON
COMMISSIONER THOMAS PATTON

THIS MATTER came before the Court on October 20, 2014, for hearing on the Respondent's Motion to Dismiss for Lack of Jurisdiction. Respondent Juan Pablo Matas-Vidal ("Father") was not present, but was represented by counsel of record, David S. Dolowitz and Shane A. Marx of the law firm DOLOWITZ HUNNICUTT, PLLC. Petition Brooke Robinson, a.k.a. Susan Consuelo Libbey-Aguilera ("Mother"), was not present, but was represented by counsel of

record, Don R. Petersen of the law firm HOWARD, LEWIS & PETERSEN, P.C.. Having received the parties' pleadings and heard their respective arguments, upon the basis of record herein and for good cause otherwise appearing, **THE COURT HEREBY FINDS, CONCLUDES, AND ORDERS**, as follows:

1. Mother's oral motion to continue the hearing is DENIED.

2. All motions in domestic cases come before commissioners pursuant to URCP 101, and the deadlines therein govern the timeliness of the parties' pleadings. Contrary to Mother's assertions, the deadlines of URCP 7 do not apply at this stage of proceedings. Father's reply was timely filed under URCP 101. Moreover, Mother's absence due to her recent incarceration does not warrant a continuance. The issue of jurisdiction is a matter of law, and Mother's presence is not necessary for the Court's determination on the matter.

3. Father's *Motion to Dismiss for Lack of Jurisdiction* is GRANTED.

4. The Court is concerned by the suggestion of the federal court in the proceedings it conducted with respect to this family under the Hague Convention and the International Child Abduction Remedies Act that "the boys will not be returned to Mexico but will remain in Utah for any custody proceedings initiated here." *Matas-Vidal v. Libbey-Aguilera*, No. 2:13CV422DAK, 2013 U.S. Dist. Lexis 110630 at *52 (D. Utah Aug. 5, 2013).

5. A federal court cannot confer jurisdiction on Utah to conduct child custody proceedings and a federal district court judge cannot determine what jurisdiction Utah has or can maintain. Only Utah state-court judges can make a binding determination of their own jurisdiction.

6. Utah's jurisdiction for custody proceedings is determined by the Utah Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Utah Code §§ 78B-13-101 et. seq.

7. The doctrine of *res judicata* does not apply to the federal court's suggestion that this Court has jurisdiction to conduct child custody proceedings, and the federal court's statement is that regard is not binding on this Court. This Court's jurisdiction pursuant to the UCCJEA was not an issue, was not litigated, and was not adjudicated in the proceedings held by federal court. The federal court's stated assumption that this Court had jurisdiction is not entitled to any deference.

8. The federal court's ruling is valid except to the extent that it implies this Court has jurisdiction to conduct child custody proceedings.

9. The Court finds that Mexico had jurisdiction in October 2007 when child custody proceedings were initiated in the 36th Court of Family Matters in the Federal District of Mexico in case number 1427/2007 and that the subsequent bifurcation in the 24th Court of Family Matters in the Federal District of Mexico in case number 1529/2010 further confirmed that jurisdiction and reserved the parties custodial rights as subject to further litigation therein in November 2010.

10. Mexico reserved the right to enter additional order regarding the custody of these children, and no Mexico court has vacated that order or otherwise unreserved the right to conclude custody proceedings there.

11. The fact that Mother thereafter fled the jurisdiction—even if she believed she was

authorized to do so—does not change the fact that there were pending child custody proceedings in Mexico at the time.

12. Mexico had child custody jurisdiction. It had jurisdiction over both parties, it had home-state jurisdiction over the children, and it had jurisdiction of the child custody action pending before it. Such jurisdiction is continuing and exclusive in nature. Mexico never gave up or abandoned its jurisdiction over its prior orders or the various proceedings that remain pending there.

13. Pursuant to Utah Code § 78B-13-105(1), "A court of this state shall treat a foreign country as a state of the United States for purposes of applying [the UCCJEA]." The Court does not find that this case is significantly different than if this was a New York case. If this happened in New York and temporary orders were entered there, and then, for whatever reason, one of the parents left the State of New York and the courts of New York delayed proceeding on custody issues because that party had absconded, but the New York courts otherwise reserved the right to enter additional orders and reserved its jurisdiction until the absconding party could be found, there is no basis to assume that New York had given up or otherwise abandoned its jurisdiction.

14. In such a case, the New York court is perfectly within its discretion to delay proceedings or enforcement of existing orders until the absconding party reappears before it. The fact that the party may have absconded to Utah from New York and stayed here, regardless of how long, does not change the continuing and exclusive nature of New York's jurisdiction over any child custody proceedings.

15. Pursuant to Utah Code § 78B-13-206(1), "a court of this state may not exercise its

jurisdiction ... at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with [the UCCJEA]." If Mother wants to address the parties' custodial rights with regard to these children, her remedy is to return to Mexico and participate in the child custody proceedings pending there.

16. If Mother desires to modify the parties existing custodial rights, as articulated in the orders from Mexico, she must seek such modification in the courts of Mexico. "[A] court of this state may not modify a child custody determination made by a court of another state unless ... neither the child, nor a parent, nor any person acting as a parent presently resides in the other state." Utah Code § 78B-13-203(2). Father continues to reside in Mexico, and the courts there retain continuing exclusive jurisdiction over modification of their orders.

17. The Court would certainly never find that judges or commissioners in Utah are smarter than judges or commissioners in New York. But that is exactly what Mother is asking this Court to do. Mother is asking the Court to declare that because we are dealing with Mexico, that the courts there do not have exclusive ongoing jurisdiction. This Court is not willing to rule that it is smarter or better than the judges and courts in Mexico, which routinely deal with Mexican issues, Mexican children, and a Mexican divorces. It appears to this Court, in every way, shape, and form that Mexico has never given up its ongoing exclusive jurisdiction. Therefore, this Court must recognize Mexico's ongoing exclusive jurisdiction over custody proceedings and orders with respect to these children.

18. Additionally, criminal charges of Child Trafficking have been pending against

Mother in the Thirteenth District Court of Federal Penal Process for the Federal District in case number 85/2012, since she fled Mexico with the children. Mother fails to acknowledge that the criminal case for Child Trafficking is a further exercise and manifestation of Mexico's continuing exclusive jurisdiction to conduct custody proceedings under the UCCJEA, and therefore this Court lacks jurisdiction to entertain simultaneous proceedings until such criminal charges are resolved, pursuant to Utah Code § 78B-13-206.

19. If convicted of the pending criminal charges in Mexico, Mother's parental rights will be terminated. The UCCJEA defines "child custody proceeding" to include any proceedings in which "termination of parental rights" is at issue. *Id.* § 78B-13-102(4). Furthermore, the determination of Mother's legal and physical custody rights over the parties' minor children and the extent to which her actions were justified are at the very heart of the Child Trafficking criminal case. Under the UCCJEA, these are all child custody determination reached through child custody proceedings. *See also, In re Baby E.Z.*, 2011 UT 38, ¶¶ 16-17 (defining "custody proceeding" under UCCJEA's federal parallel, the Parental Kidnapping Prevention Act, as broadly including any proceeding regarding "actual possession and control of a child" or that "divests a natural parent of all parental rights, including the rights of custody"). This Court cannot exercise its jurisdiction to create a new legal defense for Mother or to otherwise allow her to evade the judicial processes in Mexico that she seeks to avoid. Consequently, Utah lacks the authority to conduct simultaneous child custody proceedings until—at the very least—Mother's Child Trafficking criminal charges are resolved.

20. Moreover, Mother's actions have eliminated any claim that this situation warrants

the exercise of emergency jurisdiction under Utah Code § 78B-13-204. Under subsection 204(3), this Court's exercise of any emergency jurisdiction is limited, and "any order issued by a court of this state under this section shall specify in the order a period of time which the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction." Further, "[t]he order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires." *Id.* § 78B-13-204(3). This Court likely would have exercised such jurisdiction to allow Mother to return to Mexico to address the orders and proceedings pending there. However, this action was filed on November 18, 2013. We are now 11 months down the road, and more than a year past the time when the federal court made its order. There no longer exists any basis for the exercise of emergency jurisdiction. We are well past that point, and the Court cannot excuse the fact that Mother has not returned to the Court of original ongoing jurisdiction and addressed the pending proceedings or otherwise obtained a new order there.

21. Alternatively, even if this Court had a basis to exercise jurisdiction it declines to do so as a result of Mother's unjustifiable conduct. Pursuant to Utah Code § 78B-13-208(1), "if a court of this state has jurisdiction under this chapter because a person invoking the jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction." It is uncontested that Mother fled the territorial jurisdiction of Mexico when proceedings and orders were still pending there, and that she has refused to return or otherwise engage in the judicial process there. This Court will not condone or otherwise overlook Mother's apparent attempts to evade and her unwillingness to engage in the judicial processes in Mexico. Even if there were

some arguable basis for jurisdiction herein, the Court will neither exercise emergency nor general child custody jurisdiction over these children because Mother has made every effort to avoid the jurisdiction of the courts in Mexico, and frustrated the ability of the courts of Mexico to conclude the custody proceedings there. In essence, Mother has engaged in unjustifiable conduct, and she asks this Court to exercise jurisdiction over issues she has refused to address, but that she could have and should have pursued and concluded in Mexico months ago.

*This Order is signed and entered when electronically stamped and dated
by the Court at the top of the first page.*

Approved as to form:

Date: _____

Don R. Petersen
Attorney for Petitioner

RULE 7(f) NOTICE

Pursuant to Rule 7(f) of the Utah Rules of Civil Procedure, I hereby certify that a true and correct copy of the above form of *Order of Dismissal for Lack of Jurisdiction* was served on **November 10, 2014**, by the means and to the parties indicated in the following *Certificate of Service*. Notice of objections as to the form of this order must be submitted to the Court and counsel within seven (7) days after service. Should no objections to this order be submitted to the Court and counsel within seven (7) days after service, this form of order shall be presented to the Court for entry and signature.

/s/ Shane A. Marx

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **November 10, 2014** I caused the foregoing to be served, pursuant to UTAH R. CIV. P. 5(b), on the following person(s), by the means indicated herein.

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<u> </u>	U.S. Regular Mail
<u> </u>	Hand Delivery
<u> </u>	Facsimile Transmission
<u> </u>	E-Mail
<u> X </u>	E-Filing

/s/ Shane A. Marx

Addendum C

Order Overruling Petitioner's Objection to
Commissioner's Recommendation Dated
3/17/2015



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**IN THE FOURTH JUDICIAL DISTRICT COURT
AMERICAN FORK DEPARTMENT, UTAH COUNTY, STATE OF UTAH**

BROOKE ROBINSON
(a.k.a. SUSAN CONSUELO LIBBEY-
AGUILERA),

Petitioner,

v.

JUAN PABLO MATAS-VIDAL,

Respondent.

**ORDER OVERRULING PETITIONER'S
OBJECTION TO COMMISSIONER'S
RECOMMENDATION**

CASE No. 134100249

JUDGE CHRISTINE JOHNSON
COMMISSIONER THOMAS PATTON

THIS MATTER came before the Honorable Christine Johnson on March 5, 2015 for hearing on *Petitioner's Objection to Commissioner's Recommendation Re: Respondent's Motion to Dismiss for Lack of Jurisdiction (Hearing October 20, 2014)*, filed on November 3, 2014 pursuant to Utah Rule of Civil Procedure 108. Petitioner Brooke Robinson, also known as Susan Consuelo Libbey-Aguilera, was present and represented by counsel of record, Don R. Petersen of

the law firm Howard, Lewis & Petersen, PC. Respondent Juan Pablo Matas-Vidal was not present, but was represented by counsel of record, David S. Dolowitz and Shane A. Marx of the law firm Dolowitz Hunnicutt, PLLC. Having heard argument, upon the basis of record herein, and for good cause otherwise appearing, **THE COURT HEREBY FINDS, CONCLUDES, AND ORDERS THAT:**

1. Petitioner's objection to the Commissioner's recommendation, announced after hearing on October 20, 2014, and *Order of Dismissal for Lack of Jurisdiction*, entered on December 5, 2014, is **OVERRULED** or otherwise **DENIED**.

2. The Commissioner's recommendation contained in the *Order of Dismissal for Lack of Jurisdiction*, entered on December 5, 2014, is accurate and appropriate, and the Court hereby adopts the analysis contained therein.

3. There are both civil and criminal proceedings pending in Mexico wherein the custody of the parties' minor children and the parties' parental rights remain at issue. This indicates to the Court that Mexico has not abandoned and otherwise continues to exercise jurisdiction over issues of child custody. Consequently, this Court is without and otherwise declines to assert child custody jurisdiction. This determination is informed by the Court's reading of the Utah Uniform Child Custody Jurisdiction Enforcement Act, Utah Code §§ 78B-13-101 et seq., the Parental Kidnaping Prevention Act of 1980, 28 U.S.C.A. § 1738A, and *Crump v. Crump*, 821 P.2d 1172 (Utah Ct. App. 1991).

4. The *Verified Petition to Establish Custody of Minor Children, Payment of Child*

Support and Alimony, Entry of Restraining Order, and for Attorney Fees, filed on November 18, 2013 by Petitioner Brooke Robinson, also known as Susan Consuelo Libbey-Aguilera, is hereby **DISMISSED** for lack of jurisdiction.

This Order is signed and entered when electronically stamped and dated by the Court at the top of the first page.

Approved as to form:

Date: _____

Don R. Petersen
Attorney for Petitioner

RULE 7(f) NOTICE

Pursuant to Rule 7(f) of the Utah Rules of Civil Procedure, I hereby certify that a true and correct copy of the above form of order was served on **March 6, 2015**, by the means and to the parties indicated in the following *Certificate of Service*. Notice of objections as to the form of this order must be submitted to the Court and counsel within seven (7) days after service. Should no objections to this order be submitted to the Court and counsel within seven (7) days after service, this form of order shall be presented to the Court for entry and signature.

/s/ Shane A. Marx

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **March 6, 2015**, I caused the foregoing to be served, pursuant to UTAH R. CIV. P. 5(b), on the following person(s), by the means indicated herein.

Don R. Petersen
HOWARD, LEWIS & PETERSEN, PC
Attorney for Petitioner
120 E. 300 North Street
P.O. Box 1248
Provo, UT 84603
Tel: (801) 373-6345
Fax: (801) 377-4991
Email: petersend@provolawyers.com

 U.S. Regular Mail
 Hand Delivery
 Facsimile Transmission
 X E-Mail
 X E-Filing

/s/ Shane A. Marx

Addendum D

Ruling and Order on Petitioner's Motion to
Amend Order Dated 4/30/2015

FILED

APR 30 2015

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

**FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

BROOKE ROBINSON, Petitioner, vs. JUAN PABLO MATAS-VIDAL, Respondent.	RULING AND ORDER ON PETITIONER'S MOTION TO AMEND ORDER Case No. 134100249 Date: April 28, 2015 Judge Christine S. Johnson
--	---

This matter is before the Court on Petitioner's Motion to Amend, filed together with a supporting memorandum on March 31, 2015. Respondent filed his Opposition on April 14, 2015. There was no reply. Neither party having requested a hearing, Respondent submitted the motion for decision on April 22, 2015. Having reviewed the submissions of the parties, and being advised of the applicable rules and the governing law, the Court denies the motion, based upon the following:

The Court entered its Order Overruling Objection to Commissioner's Recommendation on March 17, 2015. Petitioner filed her present motion within 14 days, as required. Petitioner seeks relief pursuant to Rule 59, which allows for an amendment to judgment under specified grounds: to correct irregularity in the proceedings, misconduct by the jury, accident or surprise, newly

discovered evidence, excessive or inadequate damages, insufficiency of the evidence, or error. *See* URCP 59(a). Additionally, Petitioner cites to Rule 52, which permits the court to "amend its findings or make additional findings and may amend the judgment accordingly." URCP 52(b). A decision to alter or amend judgment lies within the sound discretion of the trial court. *See College Irr. Co. v. Logan River & Blacksmith Fork Irr. Co.*, 780 P.2d 1241, 1245 (Utah 1989).

In Petitioner's memorandum, she devotes significant time to restating facts which have been previously presented. She then argues that the Court should amend its prior judgment, relying upon prior error as grounds for amending judgment under Rule 59. However, the arguments asserted are not new and are no more persuasive now than they were when presented initially. Because Petitioner's objection to the Commissioner and this Court's decision regarding jurisdiction has been fully heard and considered, this Court declines to exercise its discretion to amend judgment under Rule 59.


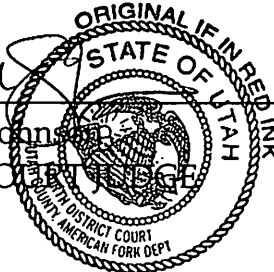
Based upon the foregoing, Petitioner's motion to amend judgment is DENIED.

SO ORDERED.

This Ruling shall stand as the Order of the Court. Pursuant to Rule 7, no further order is required.

DATED this 28 day of April, 2015.

BY THE COURT:


Christine S. Johnson
DISTRICT COURT


certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 134100249 by the method and on the date specified.

EMAIL: DAVID S DOLOWITZ sandy@dolowitzhunnicuttt.com

EMAIL: JAMES M HUNNICUTT jim@dolowitzhunnicuttt.com

EMAIL: SHANE A MARX shane@dolowitzhunnicuttt.com

EMAIL: DON R PETERSEN petersend@provolawyers.com

04/30/2015

/s/ LEISHA MEDINA

Date: _____

Deputy Court Clerk

Addendum E

Order Dated 2/8/2013 Dismissing Main
Action in Mexico and Rescinding Prior
Orders

SUPERIOR

SUPERIOR COURT OF JUSTICE OF THE FEDERAL DISTRICT

COURT

[ILLEGIBLE]

OF JUSTICE

[ILLEGIBLE]

OF THE FEDERAL DISTRICT

THIRTY-SIXTH OF THE FAMILIAR

Mexico, Federal District the eight of February of two thousand thirteen.

Given new account in the present case, and taking into consideration that justice must be prompt and expeditious, and in order to comply fully with the principle of congruence that must prevail with the judicial charges, in the sense that once you notice any involuntary error, you must be corrected, to not prevail in the same, so that in such tessitura and in response to that of records of the case warns, that Mr. JUAN PABLO MATAS VIDAL through writing submitted the eleven of October in the year two thousand and seven, in the Oficialia Common Civil-Familiar , sued SUSAN CONSUELO LIBBEY AGUILERA in the ordinary civil route, as main action the necessary divorce as well as various benefits notwithstanding the foregoing, Mr. JUAN PABLO MATAS VIDAL, again instituted divorce uncaused proceedings against SUSAN CONSUELO LIBBEY AGUILERA which settled under the number 1529/2010, in the Familiar Court Twenty-Fourth In this H. Court, according to/and consists of the certified copies that were sent by the holder of the said Court of which even in addition warns that on the hearing dated twenty-fifth day of November of the year two thousand ten, was issued the resolution that proceeded in accordance with the law, in which it dissolved the marriage bond and in addition they were separated except their rights to that in the corresponding life incidental to assert what appropriate to its right in relation to the proposal and counter proposal of convention, so in that vein and in response to that as it was pointed out in previous lines the main action of the trial that we are dealing with it was the necessary divorce, so that when being demonstrated that such action was exercised by the same plaintiff and even executed by diverse Judge, because it does not have to pass unnoticed that the sworn statement of marriage that work in performances (Page 435) comprises the relevant entry to the dissolution of the marriage bond in which case we have to the object of his action was precisely to dissolve the marriage bond that unites them, Therefore it is left **WITHOUT EFFECTS EACH AND EVERY ONE OF THE PROVISIONAL MEASURES** ordered during the aftermath procedural, such as **GUARDIANSHIP AND PROVISIONAL CUSTODY** of the minor **SANTIAGO** and **RODRIGO** surname **MATAS-LIBBEY** in favor of **SUSAN CONSUELO LIBBEY AGUILERA**; as well as the **PROVISIONAL ALIMONY** decreed in favor of **SUSAN CONSUELO LIBBEY AGUILERA** and minors **SANTIAGO** and **RODRIGO** surname **MATAS-LIBBEY** in charge of **JUAN PABLO MATAS VIDAL**; the **REGIME OF PROVISIONAL VISITS** in favor of **JUAN PABLO MATAS VIDAL** with their minor children **SANTIAGO** and **RODRIGO** surname **MATAS -LIBBEY**; and the use of the family home in favor of Mrs. **SUSAN CONSUELO LIBBEY AGUILERA** and its above mentioned minor children, which were decreed in an

Interlocutory judgment the fourteenth day of December of two thousand seven, as amended in the judgment of the seventh of May of two thousand eight, By the H Third Family Room of this H. Court, as well as the diverse variation dated twenty-two of October two thousand eight, carried out by the same authority in compliance with the judgment pronounced by the Judge of the ninth district in Civil Matters in the Federal District.

However, with the understanding that such privileges will be able to be asserted in the track and in right way to proceed before the competent authority to do so, and before the appropriate C. Judge, with the understanding that at any time you must safeguard the best interests of their minor children, any time that in accordance with the provisions of article 4 Constitutional Convention of the rights of the Child, the Law for the Protection of Children and Adolescents, and the Law of the rights of children, the children have the right to a family life in harmony, to be loved and respected by their parents and to a healthy co-existence with both, especially since that is where it should be the preferred application of the law, understood by preference the circumstance that exalts the interest of children above all else, and given the importance of the interests that save this type of subjective right, that is precisely the relationship between parents and children, generator of reciprocal rights and duties, always conceived of the protection in function of the children, subjective right that has the features to be a duty an obligation which could not be excused and the same must be done personally, because it represents a positive duty to continued treatment which requires a constant and effective deployment of a conduct which has the responsibility to the parental authority, where the parents have an obligation to ensure their children and keep them in your company, support them, educate them and give them an integral formation as parental authority, involves not only rights, but also duties on all the interest and the protection of minors, thus, it is necessary to mention the Decree [illegible] on the right of the child, published in the Official Journal of the Federation on the twenty-fifth day of January one thousand nine hundred and ninety-one, that of any [illegible] signed expected to arrive to understand both sides, as sound people that are and can analyze taking awareness, of the harm it is causing their minor children, emphasizing that the "family" as the fundamental group of the society and the natural environment for the growth and welfare of all its members and in particular their children should receive the necessary protection and assistance to fully assume its responsibilities within the community, recognizing also that the child for the full and harmonious development of his personality must grow up in a family environment in an atmosphere of happiness, love and understanding and considering that the child should be fully prepared for an independent life in society and be educated in the spirit of the ideals" ... also bearing in mind that as indicated in the Declaration of the Rights of the Child the child by its lack of physical and mental maturity you need special attention and care, including appropriate legal protection, both before and after birth is agreed at the above Convention situations that come precisely to protect the best interests of the children in the must lie the preferential application of the law, convention in which a child means every human being below the age of eighteen years of age according to deals with the article 1, it also emerges that the numeral following the rights set forth in the Convention in question its application to ensure each child subject to their jurisdiction, without distinction, regardless of race, color, sex, language, religion, political or other opinion, national, ethnic or

social origin, economic position, physical impediments, the birth or any other condition of the child, his/her parents or legal representatives taking states parties all appropriate measures to ensure the protection of the child, against any form of discrimination or punishment for cause of the condition, activities, the opinions expressed or beliefs of their parents, guardians or family members, and thus a series of articles whose content eminently search for all lights and without a doubt safeguard the development of children in their physical aspects, mental and emotional in a harmonious way and integral, but the most important thing is it is precisely within the entire body of rights that the less you corresponds, is established in article 12 and 13 of the Convention already cited above.

By virtue of the foregoing, the occupied the documents exhibited upon reason that by its receipt thereof in the facts and in its opportunity filed the present case, as total and definitively closed. And in compliance with the circular 23/2010 of the twenty-three of March of this year and general arrangements 10-07/2005, 31-35/2009 and 5-32/20009 issued by the Plenary Session of the Council of the Judiciary of the Federal District and in terms of article 28 of the Regulation of the Institutional system of files of the Superior Court of Justice and the Council of the Judiciary of the Federal District; it is also brought to the attention of the parties that this dossier and documents that are in the same and which have been exhibited as a basis the action and as evidence are susceptible to destruction; the above once the end of this procedure by which the parties must go to this Court to request the return of their documents within the term of SIX MONTHS from that takes effect this provided, leaving because of their receipt. Please contact the above to the parties and to interested parties by judicial Bulletin in terms of article 114 last part of the Code of Civil Procedure. NOTIFIED. As well as provided and signing the C Judge thirty-sixth of the Family, Mr. JORGE RODRIGUEZ MURILLO assisted by the Secretariat of Agreements "B" Martha Melida Rodriguez Mendoza that authorizes and attests to what occurred.

Translator Certification

June 24, 2013

Elizabeth M Robles
Provo UT 84601
lizmrobles@gmail.com

To Whom It May Concern:

This certificate hereby verifies that the accompanying translation has been prepared by a certified translator. I, Elizabeth M Robles, am the Certified Translator. I am fluent in both English and Spanish and I certify that the English language translation of the attached document is a true and correct translation of the Spanish language portion of the document. This certificate is signed attesting to the translation having been undertaken with quality and attention. It accurately represents the meaning of the source text, to the best of my ability.

Signature: 

Printed Name: Elizabeth M Robles

Translator Certification

June 24, 2013

Elizabeth M Robles
Provo UT 84601
lizmrobles@gmail.com

To Whom It May Concern:

This certificate hereby verifies that the accompanying translation has been prepared by a certified translator. I, Elizabeth M Robles, am the Certified Translator. I am fluent in both English and Spanish and I certify that the English language translation of the attached document is a true and correct translation of the Spanish language portion of the document. This certificate is signed attesting to the translation having been undertaken with quality and attention. It accurately represents the meaning of the source text, to the best of my ability.

Signature:

Printed Name: Elizabeth M Robles

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Superior Court of Justice for the Federal District
"Judicial City and Consolidation of Oral Suits."
Resolving for Social Order and Peace"
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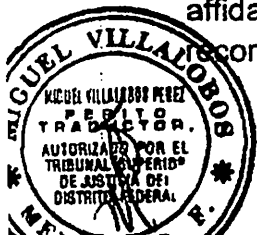
(TRANSLATION)

At left margin appear two (2) rubber seals reading:
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The United Mexican States (National Emblem)
Domestic Affairs Thirty-Sixth Court

- Electronic signature SICOR/TSJDF beginning—Instance: Domestic Affairs Thirty-Sixth Court. File: 1472/2007. Clerk: "B". Deed: resolution published on February 8, 2013. Signatory: JF36SB. NAS:... (illegible text).
- Electronic signature SICOR/TSJDF beginning—Instance: Domestic Affairs Thirty-Sixth Court. File: 1472/2007. Clerk: "B". Deed: resolution published on February 8, 2013. Signatory: JF36J. NAS: 5109-30... (illegible text).

Mexico City, Federal District, February 08, 2013.

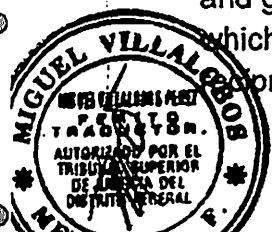
With these records, note is given again, and taking into consideration that Justice must be prompt and expeditious, and in order to duly fulfill with congruence principle to prevail in court procedures, within the sense that once be noted any unwillingness error, it must be corrected, in order to not prevail in it; therefore, in such circumstance and attending that in evidence within records it is seen, that Mr. JUAN-PABLO MATAS-VIDAL, in brief filed on October 11 2007 at Civil-Domestic Common Parties Clerkship, sued from SUSAN-CONSUELO LIBBEY-AGUILERA within Ordinary Proceedings, Necessary Divorce as main action, as well several considerations; notwithstanding the foregoing, Mr. JUAN-PABLO MATAS-VIDAL, again brought a No-Fault Divorce versus SUSAN-CONSUELO LIBBEY-AGUILERA, which was established under number 1529/2010, at Domestic Affairs Twenty-Fourth Court of this Honorable Court, as contained in certified copies which were sent to the Head of this Court, wherein is further noticed that at hearing held on November 25, 2010, it was pronounced resolution that proceeded according to the Law, wherein there were dissolved marriage bonds and further there were left in safe their rights so that within corresponding incidental means they may enforced whatever may correspond in his rights related to commitment motion and counter-motion; therefore, in such circumstance and attending to what is was mentioned in previous lines, the main suit action subject matter herein was the necessary divorce, by proving that such action was exercised by said plaintiff and further executed by another Judge, since it must not be unaware that marriage affidavit which is contained at the records (page 435), there is the corresponding according to marriage bonds dissolution, in such event we have that the action



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subject matter was precisely dissolving marriage bonds joining them, since upon having upheld the main action in another court, what proceeds is to **SET ASIDE THE ACTING SUIT** since even though Plaintiff demanded several accessory considerations, we must not lose sight that said attached considerations are consequence of main action; therefore, they have same procedural chance than main action, thereto joined that this Judge is legally hindered to amend litis and decree or resolve related to issues that are merely accessory, he intended to enforce them as autonomous rights, circumstance which does not hinder that, subsequently, he may claim as autonomous rights with final kind; as a result, **EACH AND ALL TEMPORARY MEASURES ARE SET WITH NO LONGER EFFECTS** pronounced during procedural implications, such as: **TEMPORARY GUARD AND CUSTODY** for minor children **SANTIAGO** and **RODRIGO** surnamed **MATAS-LIBBEY** in favor of **SUSAN-CONSUELO LIBBEY-AGUILERA**; as well **TEMPORARY ALIMONY** decreed in favor of **SUSAN-CONSUELO LIBBEY-AGUILERA** and for minors **SANTIAGO** and **RODRIGO** surnamed **MATAS-LIBBEY** in charge of **JUAN-PABLO MATAS-VIDAL**; **TEMPORARY REGIME FOR VISITS AND LIVING-TOGETHER** in favor of **JUAN-PABLO MATAS-VIDAL** with his minors children **SANTIAGO** and **RODRIGO** surnamed **MATAS-LIBBEY**; and **USE OF FAMILY DWELLING** in favor of Mrs. **SUSAN-CONSUELO LIBBEY-AGUILERA** and her mentioned children, which were decreed on interlocutory judgment dated December 14, 2007, modified in judgment dated May 7, 2008, by H. Third Domestic Chamber of this H. Court, as well several variations dated October 22, 2008, pronounced by same authority upon fulfillment to enforceable judgment pronounced by Ninth District Judge for Civil Affairs at the Federal District. Now, with the understanding that said prerogative may be enforceable at means and manners in accordance with the Law as it may proceed before competent authority therefore, and before Citizen Judge as might it may correspond by shift, with the understanding that at any time it should be safe kept the superior interest of their minor children, since in accordance with provisions contained in Article 4th of the Constitution, the Convention on the Rights of the Child, the Law for Protection of Boys, Girls, and Teenagers, and the Law on the Rights of Boys and Girls, children are entitled to a family life in harmony, to be loved and respected by their parents and to a healthy living-together with both, maximum that is in them wherein it should fall preferential application of the law, understanding for preference the circumstance in which it is exalted minors interest upon any other, and given the importance of interests which this kind of subjective right safeguards, which it is precisely, the relationship between parents and children, generator of reciprocal rights and duties, always conceived in function of children coverage;



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subjective right which has as a characteristic to be a duty and an obligation from which cannot be excused and the same should be personally performed, since it represents a positive duty of continuous lapse, who demands and requires an efficient and constant deployment of a behavior which should fill the patria potestas commitment, wherein parents are bound to look after their children, to have them in their company, to nourish them, to educate them and to procure them an integral formation, since "patria potestas" not only implies rights, but also duties, over all, interest and protection for minor children, therefore, it is necessary to refer to Enacted Decree upon Rights of the Child, published at the Official Gazette of the Federation on January 25, 1991, which in some manner, the Undersigned expects that both parties may understand, as thinking and rational parties as they are, and analyze it taking conscious of damage which they are causing to their minor children, mainly outstanding that: "... the family, as society's fundamental group and natural means for growth and welfare of all of its members and in special their children, should receive necessary protection and attendance in order to plainly assume their responsibility within community; also acknowledging that, for plain and harmonic personality development, the child should grow within family sinus in a happiness, love and understanding environment; and taking into consideration that child should be plainly prepared for an independent life within society and be educated under ideals spirit,...;" furthermore, having present that, as set forth in the Statement on the Rights of the Child, "the child due to his lack of physical and mental wisdom, needs special attention and care, including duly legal protection as before as after birth;" It is resolved in said Convention situations which precisely come to protect superior interest of minor children in whom should fall the preferential application of the law, Convention in which it is understood as child any human being minor of eighteen years old as provides for Article 1, furthermore, is seen from next number that included rights at said Convention assure its application to each child subject to its jurisdiction without distinction, independently of race, color, sex, language, religion, political opinion or of any other kind, national, ethnic or social origin, economical position, physical impediments, birth or any other condition if the child, his parents or legal representatives, States Parties taking all proper measures to secure minor protection, against any discrimination or punishment manner because of condition reason, activities, expressed opinions or believes of their parents, guardianships or relatives, and so a series of articles whose content eminently seek in every respect and without any discussion to safeguard development of said minor children in their physical, mental and emotional aspect in an integral and harmonic manner, but the most important is



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precisely within all rights pile that may correspond to minor child, is the content established in Articles 12 and 13 of the aforementioned Convention.

In view of the foregoing, be returned produced documents, previous receipt which should be in the records, and in its proper time be **archived this present issue as entirely and finally concluded**. And in fulfillment of circular number **23/2010** dated March 23 of this year and in general resolutions numbers **10-07/2005, 31-35/2009 and 5-32/2009**, issued by Plenum of Judicature Board for the Federal District and under provisions contained in **Article 28 of Rulings for Institutional System of Archives of the Superior Court of Justice and Judicature Board for the Federal District**; it is hereby informed to the parties, that this file and deeds in it and that have been produced as action basis and as evidence, are susceptible of destruction, the foregoing, once these proceedings be over, the interested parties should appear at this Court to apply for devolution of their documents within a **SIX-MONTH** term, counted as of the date wherein becomes **enforceable this interlocutory judgment**, leaving the corresponding acknowledgment receipt. The foregoing be communicated to the parties or interested ones through Judicial Bulletin under provisions contained in Article 114 last part of the Code of Civil Procedures. **BE NOTIFIED**. It was decreed and signs the Citizen Thirty-Sixth Judge for Domestic Affairs, **JORGE RODRIGUEZ-MURILLO, ATTORNEY**, with attendance of **Resolutions Clerk "B", Martha-Melida Rodriguez-Mendoza, Attorney**, who authorizes and attests of the act.

On the left and superior margin appear two (2) rubber seals reading:
Superior Court of Justice for the Federal District – Mexico
The United Mexican States (National Emblem)
Domestic Affairs Thirty-Sixth Court

On the inferior margin appear two illegible signatures.



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- Electronic signature SICOR/TSJDF ending--- (An electronic chain)

On Judicial Bulletin No. 24 corresponding to February 08, 2013 it was made publication by Law. For the records. On February 11, 2013 previous summons became enforceable.

On the right inferior margin appear two (2) rubber seals reading:
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- Electronic signature SICOR/TSJDF beginning---Instance: Domestic Affairs Thirty-Sixth Court. File: 1472/2007. Clerk: "B". Deed: resolution published on March 05 2013. Signatory: JF36SB. NAS: 5109-3158-5415-1963-464.
- Electronic signature SICOR/TSJDF beginning---Instance: Domestic Affairs Thirty-Sixth Court. File: 1472/2007. Clerk: "B". Deed: resolution published on February 8, 2013. Signatory: JF36SB. NAS: 5109-3158-5415-1963-464.

**INCAUSED DIVORCE, MODIFICATIONS, TEMPORARY MEASURES, CHANGE
OF GUARDIANSHIP AND CUSTODY (By its abbreviations)**

FILE: 1472/07

THE CLERK HEREBY CERTIFIES AND ATTESTS: That the **EIGHT-DAY** granted term to appeal the resolution dated February 08 of this year, runs from the **TWELVE THROUGH THE TWENTY-ONE DAY OF FEBRUARY 2013.** I CERTIFY. Mexico City, Federal District, March 04, 2013.

(An illegible signature)

Mexico City, Federal District, March 04, 2013. Seen previous certification, it is hereby decreed that at writ dated February 08 of this year has remain firm, for all legal purposes as deemed advisable, certified copies be issued of the records as set forth, previous payment of fees and reason to be transcribed upon receiving



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them. Be notified. Issued and signed by Citizen Thirty-Sixth Judge for Domestic Affairs, with attendance of Resolutions Clerk "B", who authorizes and attests.

(Two illegible signatures)

- Electronic signature SICOR/TSJDF ending— (An electronic chain)
- Electronic signature SICOR/TSJDF ending— (An electronic chain)

On Judicial Bulletin No. 41 corresponding to March 05, 2013 it was made publication by Law. For the records. On March 06, 2013 previous summons became enforceable. For the records.

On the right inferior and left margin appear two (2) rubber seals reading:
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CITIZEN **MARTHA-MELIDA RODRIGUEZ-MENDOZA**, ATTORNEY,
RESOLUTIONS CLERK "B" FOR THIRTY-SIXTH COURT FOR DOMESTIC
AFFAIRS FOR THE FEDERAL DISTRICT, HEREBY

C E R T I F I E S

THESE PHOTOCOPIES FAITHFULLY AGREE TO EACH AND ALL OF ITS
PARTS WHICH ARE AT NECESSARY DIVORCE CIVIL ORDINARY SUIT, FILED
BY MATAS-VIDAL JUAN-PABLO VERSUS LIBBEY-AGUILERA SUSAN-
CONSUELO, WITH FILE NUMBER 1472/2007, ARE ISSUED IN FULFILLMENT
OF DECREED IN WRIT DATED MARCH 04, 2013, COMPRISED OF FIVE
USEFUL PAGES, DULY SEALED, COMPARED AND SIGNED. ISSUED IN
MEXICO CITY, FEDERAL DISTRICT, ON APRIL 23, 2013.

CITIZEN RESOLUTIONS CLERK "B"

(An illegible signature)

MARTHA-MELIDA RODRIGUEZ-MENDOZA, ATTORNEY

On the right inferior and left margin appear two (2) rubber seals reading:
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The United Mexican States (National Emblem)
Domestic Affairs Thirty-Sixth Court

I, Miguel Villalobos, Expert Translator, hereby **C E R T I F Y**: That the foregoing is
a true and accurate translation into English of the document in Spanish language
produced to me: *Judgment issued by Thirty-Sixth Court for Domestic Affairs,
related to file 1472/2007 in connection with Necessary Divorce Proceedings filed
by JPMV Vs SCLA, as well certification issued by Resolutions Clerk "B" of Thirty-
Sixth Court for Domestic Affairs for the Federal District, to the best of my
knowledge.*

AND FOR ALL LEGAL PURPOSES AS INTERESTED PARTIES MAY DEEM
ADVISABLE, I HEREBY ISSUE THIS CERTIFICATION IN MEXICO CITY,
FEDERAL DISTRICT, ON MAY 17, 2013.



[Handwritten signature]
Miguel Villalobos

- Firma electrónica SICORIT/TSJDF Inicio - Instancia: Trigésimo Sexto de lo Familiar Expediente: 1472/2017 Seco - cas: 8 Documento: acuerdo p... JAC: 2013-01-04
Firmante: JF33J MAS: 1109-3087-021

- Firma electrónica SICORIT/TSJDF Inicio - Instancia: Trigésimo Sexto de lo Familiar Expediente: 1472/17 Seco - cas: 8 Documento: acuerdo p... JAC: 2013-01-04
Firmante: JF33J MAS: 1109-3087-021

México, Distrito Federal a ocho de febrero del año dos mil trece.

--- Dada nueva cuenta con los presentes autos, y tomando en consideración que la Justicia debe ser pronta y expedita, y a fin de cumplir cabalmente con el principio de congruencia que debe prevalecer en actuaciones judiciales, en el sentido de que una vez que se advierte algún error involuntario, debe corregirse, para no prevalecer en el mismo, por lo que en tal tesitura y atendiendo a que de constancias de autos se advierte, que el señor JUAN PABLO MATAS VIDAL, mediante escrito presentado el once de octubre de dos mil siete, en la Oficialía de Partes Común Civil-Familiar, demandó de SUSAN CONSUELO LIBBEY AGUILERA, en la vía Ordinaria Civil, como acción principal el Divorcio Necesario así como diversas prestaciones; no obstante lo anterior, el señor JUAN PABLO MATAS VIDAL, nuevamente instauró juicio de Divorcio Incausado en contra de SUSAN CONSUELO LIBBEY AGUILERA, el cual se radicó bajo el numero 1529/2010, en el Juzgado Vigésimo Cuarto de lo Familiar de este H. Tribunal, según consta de las copias certificadas que fueron remitidas por el Titular de dicho Juzgado, de las que incluso además se advierte que en audiencia de fecha veinticinco de noviembre del año dos mil diez, se dictó la resolución que conforme a derecho procedió, en la cual se disolvió el vínculo matrimonial y además se dejaron a salvo sus derechos para que en la vía incidental correspondiente hicieran valer lo que a su derecho correspondiera en relación a la propuesta y contrapropuesta de convenio, por lo que en tal tesitura y atendiendo a que como se puntualizó en líneas anteriores la acción principal del juicio que nos ocupa lo fue el divorcio necesario, por lo que al estar demostrado que dicha acción fue ejercitada por el mismo actor e incluso ejecutada por diverso Juzgador, pues no debe pasar desapercibido que del atestado de matrimonio que obra en actuaciones (foja 435), consta la inscripción correspondiente a la disolución del vínculo matrimonial, en cuyo caso tenemos que el objeto de su acción era precisamente la de disolver el vínculo matrimonial que los une, pues al haber prosperado la acción principal en diverso juzgado, lo procedente es DEJAR SIN MATERIA EL JUICIO EN QUE SE ACTÚA, pues aún y cuando el actor demandó diversas prestaciones accesorias, no debemos perder de vista que dichas pretensiones anexas son consecuencia de la acción principal por ende corren la misma suerte procesal que la acción primigenia, ello aunado a que este Juzgador se encuentra jurídicamente impedido para variar la litis y decretar o resolver respecto de cuestiones que son meramente accesorias, pretendió hacerlas valer como derechos autónomos, circunstancia que no impide que posteriormente pueda reclamar como derechos autónomos con carácter de definitivo; por consiguiente **SE DEJAN SIN EFECTOS TODAS Y CADA UNA DE LAS MEDIDAS PROVISIONALES** dictadas durante la secuela procesal, tales como: la GUARDA Y CUSTODIA PROVISIONAL de los menores SANTIAGO y



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JUZGADO



JUZGADO

RODRIGO de apellidos **MATAS LIBBEY** a favor de **SUSAN CONSUELO LIBBEY AGUILERA**; así como la **PENSION ALIMENTICIA PROVISIONAL** decretada a favor de **SUSAN CONSUELO LIBBEY AGUILERA** y de los menores **SANTIAGO y RODRIGO** de apellidos **MATAS LIBBEY** a cargo de **JUAN PABLO MATAS VIDAL**; el **REGIMEN DE VISITAS Y CONVIVENCIAS PROVISIONAL** a favor de **JUAN PABLO MATAS VIDAL** con sus menores hijos **SANTIAGO y RODRIGO** de apellidos **MATAS LIBBEY**; y el **USO DE LA VIVIENDA FAMILIAR** a favor de la señora **SUSAN CONSUELO LIBBEY AGUILERA** y de sus citados infantes, las cuales fueron decretadas en sentencia interlocutoria del catorce de diciembre de dos mil siete, modificada en sentencia del siete de mayo de dos mil ocho, por la H. Tercera Sala Familiar de este H. Tribunal, así como la diversa variación de fecha veintidós de octubre de dos mil ocho, realizada por la misma autoridad en cumplimiento a la ejecutoria pronunciada por el Juez Noveno de Distrito en Materia Civil en el Distrito Federal. Ahora bien, en el entendido de que dichas prerrogativas las podrán hacer valer en la vía y forma que en derecho proceda ante la autoridad competente para ello, y ante el C. Juez que por turno le corresponda, en el entendido de que en todo momento se deberá salvaguardar el interés superior de sus menores hijos, toda vez que conforme a lo dispuesto por el artículo 4º Constitucional, la Convención de los derechos del Niño, la Ley para la Protección de los Niños, Niñas y Adolescentes, y la Ley de los Derechos de los Niños y de las Niñas, los niños tienen derecho a una vida familiar en armonía, a ser queridos y respetado por sus padres y a una sana convivencia con ambos, máxime que es en ellos en donde debe recaer la aplicación preferente del derecho, entendida por preferencia la circunstancia en que se exalte el interés de los menores sobre cualquier otro, y toda la trascendencia de los intereses que salvaguarda este tipo de derecho subjetivo, que es precisamente la relación entre padres e hijos, generadora de recíprocos derechos y deberes, concebidos siempre en función del amparo de los hijos; derecho subjetivo que tiene como características la de ser un deber una obligación de la cual no pueden exonerarse, el mismo debe realizarse personalmente, porque representa un deber positivo de tracto continuo, que exige y requiere un despliegue eficaz y constante de una conducta que llene el cometido de la patria potestad, en donde los padres tienen obligación de velar por sus hijos, tenerlos en su compañía, alimentarlos, educarlos y procurarles una formación integral, ya que "la patria potestad, implica no sólo derechos, sino también deberes, sobre todo, el interés y protección de los menores, es por ello que se hace necesario aludir al Decreto Promulgatorio sobre los Derechos del Niño, Publicado en el Diario Oficial de la Federación el veinticinco de enero de mil novecientos noventa y uno, que de alguna manera Suscrito espera lleguen a comprender ambas partes como personas pensantes y racionales que son y lo analicen tomando conciencia del daño que está causando a sus menores hijos, destacando principalmente que: "... la familia, como grupo fundamental de la sociedad y medio natural para el crecimiento y el bienestar de todos sus miembros y en particular de sus niños, debe recibir la protección y asistencia necesarias para poder asumir plenamente sus responsabilidades dentro de la comunidad; reconociendo también que el niño para el pleno y armonioso desarrollo de su personalidad,

Familiar

de SUSAN CONSUELO
IMENTICIA PROVISIONAL
BEY AGUILERA y de los
MATAS LIBBEY a cargo de
/ISITAS Y CONVIVENCIAS
S VIDAL con sus menores
S LIBBEY; y el USO DE LA
SAN CONSUELO LIBBEY
ales fueron decretadas en
de dos mil siete, modificada
to, por la H. Tercera Sala
variación de fecha veintidós
a autoridad en cumplimiento
Distribo en Materia Civil en
que dichas prerrogativas las
to proceda ante la autoridad
tumo le corresponda, en el
aguardar el interés superior
dispuesto por el artículo 4°
del Niño, la Ley para la
Ley de los Derechos de los
na vida familiar en armonía,
una sana convivencia con
caer la aplicación preferente
stancia en que se exalte el
ida la trascendencia de los
recho subjetivo, que es
generadora de recíprocos
ón del amparo de los hijos;
s la de ser un deber una
el mismo debe realizarse
tivo de tracto continuo, que
de una conducta que llene
padres tienen obligación de
alimentarlos, educarlos y
ia potestad, implica no sólo
interés y protección de los
lir al Decreto Promulgado
o Oficial de la Federación
uno, que de alguna manera
s partes como personas
nando conciencia del daño
icando principalmente, que
ciudad y medio natural para
bros y en particular de sus
sesarías para poder asumir
comunidad; reconociendo
sarrollo de su personalidad,



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debe crecer en el seno de la familia en un ambiente de felicidad, amor y comprensión; y considerando que el niño debe estar plenamente preparado para una vida independiente en sociedad y ser educado en el espíritu de los ideales,..."; asimismo teniendo presente que, como se indica en la Declaración de los Derechos del Niño, "el niño por su falta de madurez física y mental necesita atención y cuidado especiales, incluso la debida protección legal, tanto antes como después del nacimiento"; se acuerda en la citada Convención situaciones que vienen precisamente a proteger el interés superior de los menores en los que debe recaer la aplicación preferente del derecho, Convención en la que se entiende por niño todo ser humano menor de dieciocho años de edad según versa el artículo 1, asimismo se desprende del numeral siguiente que los derechos enunciados en la Convención referida aseguran su aplicación a cada niño sujeta a su jurisdicción sin distinción, independientemente de la raza, el color, el sexo, el idioma, la religión, la opinión política o de otra índole, el origen nacional, étnico o social, la posición económica, los impedimentos físicos, el nacimiento o cualquier otra condición del niño, de sus padres o representantes legales, tomando los estados partes todas las medidas apropiadas para garantizar la protección del menor, contra toda forma de discriminación o castigo por la condición, las actividades, las opiniones expresadas o consideradas de sus padres, tutores o familiares, y así una serie de artículos cuyo propósito fundamentalmente buscan a todas luces y sin discusión alguna salvaguardar el desarrollo de los citados menores en sus aspectos físicos, mental y emocional en forma armónica e integral, pero lo más importante es precisamente tener de todo el cúmulo de derechos que al menor le corresponde, es lo establecido en el artículo 12 y 13 de la Convención ya antes citada.

En virtud de lo anterior, devuélvase los documentos exhibidos previa razón que por su recibo obre en autos y en su oportunidad archívese el presente asunto como total y definitivamente concluido. Y en cumplimiento a la circular 23/2010 de veintitrés de marzo del año en curso y acuerdos generales 10-07/2005, 31-35/2009 y 5-32/2009 emitidos por el Pleno del Consejo de la Judicatura del Distrito Federal y en términos del artículo 28 del Reglamento del Sistema Institucional de Archivos del Tribunal Superior de Justicia y Consejo de la Judicatura del Distrito Federal; se hace del conocimiento de las partes, que el presente expediente y documentos que obran en el mismo y que hayan sido exhibidos como base la acción y como pruebas, son susceptibles de destrucción; lo anterior, una vez que, concluya el presente procedimiento, por lo que las partes deberán acudir a este Juzgado a solicitar la devolución de sus documentos dentro del término de **SEIS MESES**, contados a partir de que surta efectos el presente proveído, dejando razón de su recibo.- Comuníquese lo anterior a las partes e interesados mediante Boletín judicial en términos del artículo 114 parte última del Código de Procedimientos Civiles.-**NOTIFÍQUESE**. Así lo proveyó y firma el C. Juez Trigésimo Sexto de lo Familiar, **LICENCIADO JORGE RODRIGUEZ MURILLO** asistido de la Secretaría de Acuerdos "B" Licenciada Martha Melida Rodríguez Mendoza, que autoriza y da fe de lo actuado.

— Firma electrónica SICOR/TSJDF Fin — 6 c08Q8RFANWymF6dheZMRCIAAQJCYAUXDWTZq5
11Q-WYDZegEaRUS3w7RZLqY449dQ4DFJAWPSNvmHdenp1

— Firma electrónica SICOR/TSJDF Fin — 1Fc08Q8RFANWymF6dheZMRCIAAQJCYAUXDWTZq5
uF4de4PSWEA[F2b51W0v9H4D110g3Kdsq1Tmb75

En el Boletín Judicial No. 24 correspondiente al día 8 de
Febrero de 53 se hizo la publicación de Ley.— Conste.
El 11 de Febrero del 57, surtió efectos la notificación
anterior.— Conste.



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DE LO FAMILIAR**



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Trigésimo Sexto de lo Familiar

- Firma electrónica SICORTS/DF Inicio - Instancia: Trigésimo Sexto de lo Familiar Expediente: 1472/2007 Secretaría: B Documento: acuerdo publico 2013-03-05
Firmante: JF363610AS: 6109-3158-5415-1953-464

- Firma electrónica SICORTS/DF Inicio - Instancia: Trigésimo Sexto de lo Familiar Expediente: 1472/2007 Secretaría: B Documento: acuerdo publico 2013-03-05
Firmante: JF363610AS: 6109-3158-5415-1953-464

INC. MOD. MED.PROV.CAM.GUARD.CUST.

EXP. 1472/07

LA SECRETARIA HACE CONSTAR Y CERTIFICA: Que el término de **OCHO DÍAS**, concedidos para apelar el acuerdo del día ocho de febrero del año en curso, corr (e) (lo) del **DOCE AL VEINTIUNO DE FEBRERO DEL AÑO DOS MIL TRECE.- CONSTE.-** México, Distrito Federal a cuatro de marzo del año dos mil trece.

[Firma manuscrita]

México, Distrito Federal a cuatro de marzo del año dos mil trece.- Vista la certificación que antecede, se decreta que el auto de fecha ocho de febrero del año en curso ha quedado firme, para todos los efectos legales a que haya lugar, expídanse las copias certificadas de las constancias que indica previo pago de derechos y razón que asiente al recogidas.- Notifíquese.- Lo proveyó y firma el C. Juez Trigésimo Sexto de lo Familiar, asistido de la C. Secretaria de Acuerdos "B", que autoriza y da fé.

[Firma manuscrita]

- Firma electrónica SICORTS/DF Fin - PDSQBRNXPWY...
VW5YQDUWAEAKGTP...
WV5YQDUWAEAKGTP...
WV5YQDUWAEAKGTP...

En el Boletín Judicial No. 4 correspondiente al día 5 de Marzo de 13 se hizo la publicación de Ley.- Conste.
El 6 de Marzo del 13, surtió efectos la notificación anterior.- Conste.



**U26-DO TRIGESIMO SEXTO
DE LO FAMILIAR**



**TRIGESIMO SEXTO
DE LO FAMILIAR**

**TRIGESIMO SEXTO
DE LO FAMILIAR**

LA CIUDADANA LICENCIADA **MARTHA MELIDA RODRIGUEZ MENDOZA** SECRETARIA DE ACUERDOS "B" DEL JUZGADO TRIGÉSIMO SEXTO DE LO FAMILIAR DEL DISTRITO FEDERAL.- - - - -

- - - - - C E R T I F I C A - - - - -

LAS PRESENTES COPIAS FOTOSTÁTICAS CONCUERDAN FIELMENTE EN TODAS Y CADA UNA DE SUS PARTES CON LAS QUE OBRAN EN EL JUICIO **ORDINARIO CIVIL DIVORCIO NECESARIO** PROMOVIDO POR **MATAS VIDAL JUAN PABLO** EN CONTRA DE **LIBBEY AGUILERA SUSAN CONCSUELO**, CON NUMERO DE EXPEDIENTE **1472/2007** SE EXPIDEN EN CUMPLIMIENTO A LO ORDENADO EN AUTO DE FECHA CUATRO DE MARZO DE DOS MIL TRECE, CONSTANTE DE CINCO FOJAS UTILES DEBIDAMENTE SELLADAS, COTEJADAS Y FIRMADAS. DADA EN LA CIUDAD DE MÉXICO, DISTRITO FEDERAL A LOS VEINTITRES DÍAS DEL MES DE ABRIL DEL DOS MIL TRECE.

RECIBIDO
LO FAMILIAR

LA C. SECRETARIA DE ACUERDOS "B"



JUZGADO TRIGÉSIMO SEXTO
DE LO FAMILIAR


LIC. MARTHA MELIDA RODRIGUEZ MENDOZA.

Addendum F


No-Fault Decree of Divorce Dated
11/25/2010

**"2010, Mexican Independence Bicentennial
And Centennial of the Mexican Revolution"**

Mexico City, Federal District, at 11:30 A.M. on November 25, 2010, time set for the hearing referred to in Article 272 B of the Code of Civil Procedure, before RODRIGO ALBERTO HACES-RODRIGUEZ, 24th acting family judge, assisted by the conciliation clerk by operation of law, XOCHITL AVIÑA-RUIZ, who attests to the records of the **DIVORCE PROCEEDINGS** filed by **MATAS-VIDAL JUAN PABLO** against **LIBBEY-AGUILERA SUSAN CONSUELO** under case number 1529/2010, appeared both **MATAS-VIDAL JUAN PABLO** and **LIBBEY AGUILERA SUSAN CONSUELO**, who identify themselves, respectively with their voter's identification cards, folio numbers 7849357 and 9643160, issued by the Federal Election Institute; the acting family judge hereby certifies to have seen such documents and returned them to the interested parties. **THE HEARING WAS FORMALLY OPENED BY THE COURT:** Thereupon, the standing of the spouses is analyzed whereby the petitioner has legal standing as shown in his initial petition for divorce and the record of the Bureau of Vital Statistics submitted and the divorcing spouse through the summons served by the process server of the jurisdiction on September 20, 2010, as well as the answer to such petition filed with this Court on October 12, 2010. Then, the conciliation stage was opened to analyze the natural consequences arising from the dissolution of the bonds of marriage and, in the exercise of the right to speak, both parties stated that no settlement may be reached, since the legal status of their minor children whose names are **SANTIAGO** and **RODRIGO**, both of **MATAS-LIBBEY** last name, are subject to litigation with the 36th Mexico City Family Court. Consequently, a request is hereby made to continue processing the petition for divorce. **THE COURT ADJOURNS** the hearing and after having analyzed the case records, based on the provisions of Articles 287 of the Civil Code, hereby issues the following decree:

MEXICO CITY, FEDERAL DISTRICT, NOVEMBER 25, 2010, THIS CASE having come to be decided and taking into account that this Court has jurisdiction to hear and decide the petition for divorce filed by **MATAS-VIDAL JUAN PABLO** against **LIBBEY-AGUILERA SUSAN CONSUELO** under case number 1529/2010, pursuant to the provisions of Articles 156 (XII) and 159 of the Code of Civil Procedure for the Federal District, in accordance with Points I and II, and Articles 48 (III) and 52 (II) of the Organic Law of the Supreme Court of Justice, in addition to the fact that the existence of the marriage and that the standing of the parties are duly supported with a certified copy of their marriage certificate, an official document which probative value is fully acknowledged, according to Articles 39 and 50 of the Civil Code, in connection with Articles 327 (IV) and 403 of said Code and, since the provisions of Article 266 of the Civil Code for the Federal District, which reads as follows:

"Divorce dissolves the marital bonds and each spouse is free to remarry. Divorce may be requested by any one or both spouses, upon a petition filed with a court of law, stating such spouse's desire not to continue in the marriage, and




Maria del Socorro Muniva Melchor
Perito Traductor ante el
Tribunal Superior de Justicia del
D. F.


without the need to state a ground for divorce, provided, at least one year has elapsed since the marriage;"

apply to this case, the bonds of marriage between **MATAS-VIDAL JUAN PABLO** and **LIBBEY-AGUILERA SUSANA CONSUELO** are hereby dissolved, which marriage was entered into in Mexico City, Federal District, under the **SEPARATION PROPERTY SYSTEM** on June 26, 1999, with the following registration data: **ENTITY 09, DISTRICT 01, BUREAU 17, CERTIFICATE NO. 436, YEAR 1999, TYPE MA**. Both parties are now free to remarry, with no limitations. Also, both parties hereby state their conformity with the decree issued in this case and, therefore, the decree is hereby declared as final and conclusive for all legal purposes. Accordingly, an official communication to the Director of the Bureau of Vital Statistics of this City is ordered to be remitted so that the Director may make the respective annotations referred to in Article 291 of the Civil Code. With respect to the proposal and counterproposal of a settlement agreement submitted by the parties, their rights are left intact so that, if any, they may exercise their rights by filing an ancillary proceeding. A set of a certified copy of this hearing is issued to each of the parties, prior receipt of the payment and explanation of the reason for obtaining such copy. Thereupon, the hearing is adjourned at 12:15 P.M. on the date, month and year set forth above, and the parties involved have hereunto set their hand, along with the judge and the conciliation clerk, who attest this instrument.

I, the undersigned, Ma. del Socorro Munive Melchor, SPANISH/ENGLISH expert translator, hereby certify that, to the best of my knowledge and belief, the foregoing is true and complete translation in one (2) pages of the document in the Spanish language which is attached hereto.

Mexico City, December 6, 2010.


MA. DEL SOCORRO MUNIVE MELCHOR
 Calle 8 No. 716, Depto. 2
 Col. Patrimonio La Raza
 02880 México, D.F.
 Tel. 5583-0101


 Ma. del Socorro Munive Melchor
 Perito Traductor ante el
 Tribunal Superior de Justicia del
 D.F.

Addendum G

Utah Code § 78B-13-102 (definitions)

Utah Code § 78B-13-110 (communication between courts)

Utah Code § 78B-13-112 (cooperation between courts)

Utah Code § 78B-13-201 (initial jurisdiction)

Utah Code § 78B-13-206 (simultaneous proceedings)

Utah Code § 78B-13-208 (jurisdiction declined by reason of
conduct)

Utah Code § 78B-13-209 (Information to be submitted to court)

78B-13-102 Definitions.

As used in this chapter:

- (1) "Abandoned" means left without provision for reasonable and necessary care or supervision.
- (2) "Child" means an individual under 18 years of age and not married.
- (3) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or parent-time with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.
- (4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or parent-time with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3, Enforcement.
- (5) "Commencement" means the filing of the first pleading in a proceeding.
- (6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.
- (7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.
- (8) "Initial determination" means the first child custody determination concerning a particular child.
- (9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this chapter.
- (10) "Issuing state" means the state in which a child custody determination is made.
- (11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.
- (12) "Person" includes government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.
- (13) "Person acting as a parent" means a person, other than a parent, who:
 - (a) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
 - (b) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.
- (14) "Physical custody" means the physical care and supervision of a child.
- (15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
- (16) "Tribe" means an Indian tribe, or band, or Alaskan Native village which is recognized by federal law or formally acknowledged by a state.
- (17) "Writ of assistance" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

Renumbered and Amended by Chapter 3, 2008 General Session

78B-13-110 Communication between courts.

- (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.
- (2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, the parties shall be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
- (3) A communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of that communication.
- (4) Except as provided in Subsection (3), a record shall be made of the communication. The parties shall be informed promptly of the communication and granted access to the record.
- (5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that which is stored in an electronic or other medium and is retrievable in perceivable form. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

Renumbered and Amended by Chapter 3, 2008 General Session

78B-13-112 Cooperation between courts -- Preservation of records.

- (1) A court of this state may request the appropriate court of another state to:
 - (a) hold an evidentiary hearing;
 - (b) order a person to produce or give evidence under procedures of that state;
 - (c) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
 - (d) forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and
 - (e) order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.
- (2) Upon request of a court of another state, a court of this state may:
 - (a) hold a hearing or enter an order described in Subsection (1); or
 - (b) order a person in this state to appear alone or with the child in a custody proceeding in another state.
- (3) A court of this state may condition compliance with a request under Subsection (2)(b) upon assurance by the other state that travel and other necessary expenses will be advanced or reimbursed. If the person who has physical custody of the child cannot be served or fails to obey the order, or it appears the order will be ineffective, the court may issue a warrant of arrest against the person to secure his appearance with the child in the other state.
- (4) Travel and other necessary and reasonable expenses incurred under Subsections (1) and (2) may be assessed against the parties according to the law of this state.
- (5) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of these records.

Renumbered and Amended by Chapter 3, 2008 General Session

78B-13-201 Initial child custody jurisdiction.

- (1) Except as otherwise provided in Section 78B-13-204, a court of this state has jurisdiction to make an initial child custody determination only if:
 - (a) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;
 - (b) a court of another state does not have jurisdiction under Subsection (1)(a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 78B-13-207 or 78B-13-208; and
 - (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent have a significant connection with this state other than mere physical presence; and
 - (ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
 - (c) all courts having jurisdiction under Subsection (1)(a) or (b) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 78B-13-207 or 78B-13-208; or
 - (d) no state would have jurisdiction under Subsection (1)(a), (b), or (c).
- (2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.
- (3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child custody determination.

Renumbered and Amended by Chapter 3, 2008 General Session

78B-13-206 Simultaneous proceedings.

- (1) Except as otherwise provided in Section 78B-13-204, a court of this state may not exercise its jurisdiction under this chapter if at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Section 78B-13-207.
- (2) Except as otherwise provided in Section 78B-13-204, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 78B-13-209. If the court determines that a child custody proceeding was previously commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.
- (3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:
 - (a) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;
 - (b) enjoin the parties from continuing with the proceeding for enforcement; or
 - (c) proceed with the modification under conditions it considers appropriate.

Renumbered and Amended by Chapter 3, 2008 General Session

78B-13-208 Jurisdiction declined by reason of conduct.

- (1) Except as otherwise provided in Section 78B-13-204 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person invoking the jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:
 - (a) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
 - (b) a court of the state otherwise having jurisdiction under Sections 78B-13-201 through 78B-13-203 determines that this state is a more appropriate forum under Section 78B-13-207; or
 - (c) no other state would have jurisdiction under Sections 78B-13-201 through 78B-13-203.
- (2) If a court of this state declines to exercise its jurisdiction pursuant to Subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the wrongful conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Sections 78B-13-201 through 78B-13-203.
- (3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to Subsection (1), it shall charge the party invoking the jurisdiction of the court with necessary and reasonable expenses including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the award would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state except as otherwise provided by law other than this chapter.

Renumbered and Amended by Chapter 3, 2008 General Session

78B-13-209 Information to be submitted to court.

- (1) In a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit shall state whether the party:
 - (a) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or parent-time with the child and, if so, identify the court, the case number of the proceeding, and the date of the child custody determination, if any;
 - (b) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court and the case number and the nature of the proceeding; and
 - (c) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or parent-time with, the child and, if so, the names and addresses of those persons.
- (2) If the information required by Subsection (1) is not furnished, the court, upon its own motion or that of a party, may stay the proceeding until the information is furnished.
- (3) If the declaration as to any of the items described in Subsection (1) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.
- (4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.
- (5) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be put at risk by the disclosure of identifying information, that information shall be sealed and not disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

Renumbered and Amended by Chapter 3, 2008 General Session