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United States District Court,  
 D. Massachusetts.  
 Richard Charles WHALLON, Jr.  
 v.  
 Diana LYNN.  
**No. Civ.A. 00-11009-RWZ.**

April 18, 2003.

*MEMORANDUM OF DECISION*

[ZOBEL](#), J.

\*1 Petitioner Richard Whallon and respondent Diana Lynn, both U.S. citizens, lived in Mexico when their daughter, Micheli, was born on July 4, 1995. Later that year, they separated and Micheli lived with respondent. On October 1, 1999, respondent, against the expressed wishes of petitioner, left Mexico with Micheli and settled in Massachusetts. After locating Micheli, petitioner sought her return and brought an action in this Court under Article 3 of the Hague Convention on Civil Aspects of International Child Abduction, T.I.A.S. No. 11670, [19 I.L.M. 1501 \(1980\)](#) (“Convention”). This Court ordered her return to Mexico and the Court of Appeals affirmed. See [Whallon v. Lynn, 230 F.3d 450 \(1st Cir.2000\)](#). However, these decisions did not end the matter.

The history of the parties' many skirmishes since this Court's order under the Convention is somewhat muddled as their several subsequent submissions recount only those events that favor their respective positions. Based on the evidence adduced at the hearing on petitioner's later submitted motion for sanctions and fees, I find the following facts: Respondent reluctantly went back to Mexico in November 2000 with Micheli and promptly initiated proceedings for custody and to terminate petitioner's rights, without notice to petitioner. Some time later, her counsel told her that she had received a “provisional custody order,” which allowed her to go back to Massachusetts during the Christmas holiday when the courts in Mexico were closed. Although respondent's expert on Mexican law, Victor Viveros, testified that a provi-

sional order does not require personal service to be valid, his testimony concerning service of process was ambiguous at best. In any event, he also agreed that the provisional order did not allow respondent to leave the country so long as petitioner retained the right of *patria potestas*.<sup>[FN1](#)</sup> After Christmas, respondent returned to Mexico to resume her pursuit of permanent orders granting her full custody. She then went to Massachusetts. At this point, petitioner filed a motion for sanctions and fees. After a hearing on the motion, this Court deferred ruling until the conclusion of the Mexican proceeding. In May 2001, the Mexican court issued an order granting respondent custody and terminating petitioner's *patria potestas* rights. Petitioner appealed the order and in September 2002, the Mexican appellate court reversed the termination of petitioner's *patria potestas* rights. Predictably, respondent appealed that ruling. No decision has apparently been rendered.

[FN1](#). Historically, *patria potestas* protected the father's right to a child. Baja California Sur's code suggests the continuance of *patria potestas* rights in a weaker form under Mexican law despite the presumption that in the case of divorce, the mother takes custody of children under the age of seven. *Patria potestas* rights have been interpreted to signify “a meaningful, decisionmaking role in the life and care of the child, and not the mere access to the child associated with visitation rights.” [Whallon v. Lynn, 230 F.3d 450, 458 \(1st Cir.2000\)](#).

Subsequent “informational” submissions by both parties disclose the following additional facts. During her brief stay in Mexico in late 2000, respondent apparently also commenced criminal proceedings against petitioner for threatening her. He was convicted and later deported from Mexico. Petitioner now resides in San Diego, California. At some point after he moved there, respondent further obtained a restraining order against him in the California courts.

\*2 In his “informational” submission, petitioner presses for a decision on the motion for sanctions and costs. I find that the provisional order of the Mexican court provided no authority for respondent to leave

Mexico with the child. Furthermore, the order was invalid because petitioner had no notice thereof. I am not persuaded, however, that respondent was aware of the limitations of the order or its invalidity. I credit her testimony that she understood from her counsel that, given the provisional order of custody, she could leave Mexico temporarily. While respondent unquestionably intended to deprive petitioner of all rights of custody, she did so in accordance with this Court's order-she litigated the matter in Mexico. After her temporary sojourn in Massachusetts for Christmas, she returned to Mexico for that purpose. On this record and based on these findings, the motion for sanctions and fees is denied.

There remains petitioner's earlier motion for an award of legal fees incurred in connection with the initial Petition for Return of Child to Petitioner.<sup>FN2</sup> The Hague Convention provides that "[a]ny court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of petitioner ... unless the respondent establishes that such order would be clearly inappropriate."<sup>42 U.S.C. § 11607(b)(3)</sup>. Here, the prerequisite to an award of fees and costs is clearly established. Petitioner prevailed in this Court and in the Court of Appeals, which ordered the child returned to Mexico. Two issues remain: first, whether the claimed expenses were "necessary," and second, whether an order against respondent would be "clearly inappropriate." Notably, the Court may reduce the hours claimed by the attorneys on grounds of duplication, padding, or frivolity. *Feier v. Freier*, 985 F.Supp. 710, 712 (E.D.Mich.1997). The Court also has the discretion to reduce any award.*Id.*; *Distler v. Distler*, 26 F.Supp.2d 723, 729 (D.N.J.1998).

<sup>FN2</sup>. Petitioner also claims costs under [Rule 54, Fed.R.Civ.P.](#) 54, and [28 U.S.C. § 1920](#). He has not, however, filed a bill of costs, so I will decide the motion under the Convention which is, in any event, sufficiently broad to include costs as well as fees.

Petitioner claims the startlingly high sum of \$64,866.17 for fees and expenses. The fees of lead counsel, Miles & Stockbridge, amount to \$20,584 and those of local counsel, Tucker & Cinquegrana, are \$20,819. The remaining \$23,463.17 is comprised of the travel expenses of counsel, expert witnesses,

their assistants, and petitioner, as well as fees for service of process, translators, experts, and miscellaneous items. Respondent broadly disputes many of the expenses and argues that others are not recoverable. She also objects to petitioner's choice of Maryland counsel which necessitated not only expenditures for travel, but the engagement of local counsel. Respondent argues that the fees of both counsel are excessive.

Petitioner's bald submission of copies of bills and records, unaccompanied by an explanatory summary, is difficult to understand. Adding to the confusion, the figures in petitioner's memorandum do not match the itemized figures listed on the Index to Exhibits, which, in turn, are not supported by the jumble of copied checks, bills and records attached as exhibits. For example, in his memo, petitioner seeks \$11,932.92 for expenses incurred by Miles & Stockbridge. However, the Index of Exhibits lists \$1,347.39 as Miles & Stockbridge expenses and no combination of the remaining categories yields the requested \$11,932.92. Furthermore, directing the Court to Exhibit 4, petitioner requests \$611.43 for Federal Express and messenger services, \$600.51 for computer research, \$1.75 for telephone calls, \$53.20 for facsimile transmissions, and \$80.50 for photocopies. However, Exhibit 4 contains copies of two checks to Federal Express in the amounts of \$564.26 and \$392.28, and another check to Rapid Response Delivery for \$2,521.10. There are also copies of voided checks and pages and partial pages of daily shipping reports, though none of the entries are identified as pertaining to this case. The photocopy charges total \$156.40 in contrast to petitioner's requested \$80.50. Finally, the attached time sheets provide no description of the work done, and the charts which purport to reflect "telecopier charges" do not specify which charges concern this case, what was faxed, to whom, and at what rate. Because the photocopy costs are documented, the requested \$80.50 is allowed. The Court will also allow the requested \$611.43 for Federal Express and messenger services. The remainder of the requested costs identified as "Miles & Stockbridge expenses" are inadequately documented.

<sup>\*3</sup> Petitioner also seeks \$5,222.15 for travel and lodging for his counsel and Dr. Carlton Munson, his expert. Because petitioner has not justified the necessity of first class airline tickets, one half of the price

of the first class ticket will be applied to all requests for airfare. Furthermore, counsel made two trips to Boston-staying at a \$223.77/night hotel the first time and spending three nights at a much more expensive hotel (\$387/night) the second time. The Court will adjust the hotel bills to reflect the more reasonable of the two rates submitted. Therefore, counsel's travel expenses total \$2,127.33. The airfare and hotel bills of Dr. Munson, petitioner's expert, are similarly reduced, and the expenses of his assistant are deleted altogether. His expenses totaled \$2,435.65, which includes his \$600 professional fee.

Petitioner further contends that he retained a translator to translate Mexican law into English. The amount billed for these translation services, \$4,580.47, is difficult to justify in the context of the matters presented to the Court. Furthermore, petitioner states that he then paid a Mexican attorney to interpret the Mexican law. His retention of the Mexican attorney seems to negate the need to hire a separate translator. Therefore, the translator fees are not allowed. In addition, there is no itemization of the Mexican counsel fees. The submitted document merely states that legal advice was given concerning the Hague Convention and Mexican custody law. Given that petitioner also had two other sets of counsel to advise him on the Hague Convention, I find that the legal advice regarding the Hague Convention was duplicative and therefore, I am awarding one half of the amount requested-\$1,000.

Finally, respondent is not responsible for expenses incurred by petitioner, such as the many cups of coffee or latte, cigarettes, and newspapers included in the accounting. Because it is impossible from the records to determine whether the petitioner's multiple telephone calls pertained to the case, those costs will not be allowed. In addition, since petitioner is not entitled to surveillance costs, and the attached bill charges \$820 for surveillance and service of process without separating the two, petitioner is denied the entire sum. Finally, respondent asserts that she is not accountable for the cost of Micheli's airplane tickets because they were not used. In any case, the tickets inexplicably were for round trips from Boston to San Diego and San Diego to San Jose Cabo. They are not included in the award. The total award for expenses to Miles & Stockbridge amounts to \$6,254.91. I also award \$674.87 in expenses to Tucker & Cinquegrana.

As for counsel fees, respondent is correct that the choice of lead counsel probably increased the cost of these proceedings. However, petitioner is entitled to make that choice. In this case, the particular expertise and quality of lead counsel, Mr. Stephen Cullen, likely bore heavily on petitioner's selection. But respondent is also correct in pointing out that the counsel fees are excessive. Although the hourly rates, ranging from \$180 to \$250, are eminently reasonable, the 234.1 hours spent by lawyers at both law firms, totaling \$41,403 in fees, is extreme even granting that this is an extraordinarily contentious case. This is particularly true given that it all culminated in a two-day hearing. In the limited number of cases involving similar applications under [42 U.S.C. § 11607\(b\)\(3\)](#), petitioners have requested and received significantly smaller amounts.<sup>FN3</sup> Furthermore, much of the work done by the two firms appears to be duplicative. Therefore, I am awarding each side one half of their requested fees: \$10,292 to Miles & Stockbridge, and \$10,409.50 to Tucker & Cinquegrana.

[FN3](#). For example, in [Berendsen v. Nichols, 938 F.Supp. 737 \(D.Kan.1996\)](#), the court awarded \$5,840.15 of the \$11,651.84 requested by petitioner. In [Grimer v. Grimer, 1993 WL 545261 \(D.Kan.\)](#), the court awarded \$8,203.40 for fees and expenses from the \$8,917.17 requested by petitioner. In [Distler v. Distler, 26 F.Supp.2d 723 \(D.N.J.1998\)](#), the court awarded \$10,717.20 of the \$13,945 requested by the petitioner. In the case involving the largest request, \$30,656.59, the court awarded \$15,737.07. [Freier v. Freier, 985 F.Supp. 710 \(E.D.Mich.1997\)](#).

\*4 Respondent asserts that an award of the magnitude requested is inappropriate because she is unable to pay it. She states that she lives on loans from family and friends so that she could devote herself entirely to her children.<sup>FN4</sup> Respondent also harkens back to petitioner's conduct toward her before this case began. Since I have already rejected her version of those events, I do not consider them in this connection. I do find, however, that respondent has shown that an award of the current sum would be "clearly inappropriate" for the reasons she articulated and because both parties bear responsibility for the degree of enmity between them, which was in large part responsible for the legal costs. Therefore, I am further

reducing the award for legal fees by 25%: Miles & Stockbridge to receive \$7,719 and Tucker & Cinquegrana to receive \$7,807.13. See [Berendsen v. Nichols](#), 938 F.Supp. 737, 739 (D.Kan.1996)(court reduced fee award by 15% noting that it has “discretion to reduce any potential award to allow for the financial condition of the respondent” and an award that would limit respondent's ability to support his children would be “clearly inappropriate.”); [Rydder v. Rydder](#), 49 F.3d 369, 373-4 (8th Cir.1995)(court reduced award to \$10,000 because respondent's “straitened financial circumstances” made the initial \$18,487.42 award so excessive as to constitute abuse of discretion.).

[FN4](#). Defendant has another older daughter who also lives with her.

Accordingly, the motion is allowed. Miles & Stockbridge is awarded \$13,973.91 (\$7,719 for fees and \$6,254.91 for expenses), and Tucker & Cinquegrana, awarded \$8,482 (\$7,807.13 for fees and \$674.87 for expenses).

D.Mass.,2003.  
Whallon v. Lynn  
Not Reported in F.Supp.2d, 2003 WL 1906174  
(D.Mass.)

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