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BY A. NOYES, DEP

**SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA**

Richard Riess,)
Petitioner,)
v.)
Desiree Tomlin Riess,)
Respondent.)
_____)

Case No.: FC 2011-093719

MOTION TO DISMISS

Petitioner, pro se, respectfully moves the Court to dismiss the instant matter for lack of subject matter jurisdiction. This motion is supported by the attached Memorandum of Points and Authorities.

Memorandum of Points and Authorities

Background

The Child was born in September 2000, while Petitioner and Respondent were still married and living together. In October 2001, while residing in Los Angeles, California, Respondent and Petitioner separated. Respondent relocated, with Child, to Phoenix, Arizona. In December 2001 Respondent relocated to Florida to revive a relationship with an ex-boyfriend (Capuano), leaving the Child with her mother in Phoenix. Respondent did not provide her

mother nor Petitioner with forwarding information.

Upon learning this fact Petitioner brought Child back to Los Angeles and commenced divorce and custody proceedings in the Superior Court of California (case no. YD042145). An initial custody hearing was set for February 6, 2002. Respondent and Petitioner appeared for the hearing. At that time the Court issued an initial custody order granting each party equal custody rights, in intervals of two weeks. The Court expressed concern about Respondent's intention of driving from Florida to California every four weeks with Child, who was only 17 months old, and informed Respondent that if she was to be traveling cross-country she would have to fly - driving that distance with the Child would not be acceptable. Respondent testified that she would relocate back to Phoenix and reside with her mother. The Court considered that an acceptable resolution and ordered Petitioner to relinquish Child to Respondent that day for two weeks. Petitioner complied with the Court's order.

Respondent immediately took custody of Child and proceeded to drive to Florida with the Child. Two weeks later Petitioner flew to Florida to take custody of the Child as directed by the Court. Respondent did not subsequently exercise her custody rights or make any further attempts to visit or maintain contact with the Child.

In February 2002 Child began attending a preschool in Torrance, California where Petitioner and Child met Liz M [REDACTED], a teacher at the school. Petitioner and M [REDACTED] became friends and M [REDACTED] began assisting Petitioner with caring for Child.

In May or June 2002 Respondent married Capuano in Florida, while still married to Petitioner.

In September 2002, upon becoming pregnant, by Capuano, with her second child (Sage) Respondent relocated again and changed her telephone number. Respondent did not notify Petitioner of her new whereabouts or contact information. Respondent discontinued all contact with Petitioner and Child. Due to the disappearance of Respondent the proceedings in California were put on hold

Petitioner and Child continued to reside at the same address from March 2001 until January 2003. After which time Petitioner and Child resided at a single address in Carson, California until January 2006 with M [REDACTED]. During that period Respondent knew of Petitioner's and Child's whereabouts and contact information which was available on Petitioner's and Child's web sites (www.richardriess.com and www.gabrielriess.com, respectively).

In January 2006 Petitioner accepted a project in Phoenix and relocated there temporarily with Child. Immediately upon relocating to Phoenix Petitioner contacted Respondent's mother who still resided in Phoenix, to inform her that they were in town and to attempt to re-establish contact with Respondent. Child visited with Respondent's mother on three occasions in January and February 2006. However, when Petitioner expressed concern regarding what he perceived as Respondent's mother's indiscretion, and stated he felt he should be present during future visits Respondent's mother discontinued further contact with Petitioner and Child:

In May 2007 Respondent made one telephone call to Petitioner and Child, wherein she spoke

to Child for approximately one hour. That was the first contact Child had with Respondent since her departure in 2001. Respondent refused to provide Petitioner or Child with contact information at that time. No further contact followed.

In July 2007 Petitioner was arrested in Phoenix on charges which were eventually dismissed (case nos. CR2007-147910 and CR2007-121755). That arrest led to a period of administrative detention by the Department of Homeland Security which lasted until August 2011. During the entire period of detention Child resided with Munoz in Carson, CA.

In February 2009, while Petitioner was in custody, Respondent visited Petitioner at the detention facility in Florence, Arizona. Respondent was accompanied by Capuano and one unidentified female whom Respondent claimed was her attorney. The visit seemed to serve no purpose other than to provoke Petitioner and no attempt was made by Respondent to establish contact with Child. Respondent did not provide Petitioner any contact information and no further correspondence followed.

In November 2010 Petitioner retained an investigator to attempt to locate Respondent. In January 2011 the investigator provided Petitioner Respondent's current contact information in Scottsdale, Arizona. Petitioner immediately contacted Respondent by mail to inquire whether she would be interested in receiving information about Child. A month later Respondent replied to Petitioner's letter stating she would be interested. Petitioner then informed Child he had contacted Respondent and forwarded Respondent's contact information to Child. Petitioner told Child that the decision whether or not to contact Respondent would be his

(Respondent's) alone and that Petitioner would not force or influence Child's decision in the matter.

Subsequently, Petitioner informed both Child and Respondent that he believed his period of detention was coming to an end soon. Petitioner stated that he believed he would be released from detention in the summer of 2011.

From January through March 2011 Petitioner and Respondent corresponded via mail on a number of occasions. Respondent stated in her letters that should would never uproot Child or remove him from the only family he has ever known. Respondent agreed that it would be very harmful to Child's emotional and psychological development and well-being to abruptly take him from Munoz's care and transplant him to Phoenix. Respondent stated that things would move only at a pace that Child was comfortable with and that she was prepared to wait whatever length of time it would take to build a relationship with Child. Based on Respondent's letters Petitioner believed she should be given a fair chance to attempt to develop a relationship with Child. In March 2011 Petitioner forwarded Child's contact information to Respondent because Child had not yet expressed an interest in establishing contact with her. Respondent then contacted Child by telephone.

Respondent made plans with Child to visit him in Los Angeles in April but then cancelled those plans and rescheduled the visit for May. Respondent steadfastly assured Child that it was not her intention to uproot him or to take him away from his home. When Respondent visited Child in May, for essentially the first time in Child's life, she again assured Child and M [REDACTED] that it

was not her intention to take Child. On the very next day, however, upon returning to Phoenix, Respondent telephoned Child and M [REDACTED] and told them that she had changed her mind and that she was going to bring Child to live with her in Phoenix at the end of the school year (June). Respondent stated that she had to move quickly because she knew that Petitioner was going to be released from detention very soon. Respondent further stated that Child was too young to make a decision about who he wanted to live with and that she, as the parent, would make that decision for him. Respondent did not inform Petitioner of her new plans and, in fact, had no further contact with Petitioner once she established contact with Child (although Petitioner continued to attempt maintain contact via mail, Respondent refused to reply).

Petitioner then learned from M [REDACTED] and Child that Respondent was intending to take Child to San Diego for one week in June. The trip corresponded to the end of the school year.

Petitioner waited two weeks to receive some notice from Respondent regarding the San Diego trip but Respondent continued to refuse to communicate with Petitioner. Fearing Respondent was not being completely forthcoming about her intentions and that she may be intending to take custody of Child by deceit Petitioner notified M [REDACTED] and Child that he could not permit Child to attend the San Diego trip. M [REDACTED] then contacted Respondent to inform her.

Respondent insisted that Petitioner and M [REDACTED] were trying to keep Child from her.

Respondent was yelling at M [REDACTED] and Child over the telephone and accused Child of lying and of ruining Sage's birthday present. Child had never encountered such behavior and was very upset by it. As a result of Respondent's behavior Child decided that he did not want to continue contact with Respondent until Petitioner returned home.

The following day Respondent finally accepted Petitioner's telephone call from the detention facility. Respondent was belligerent and insisted that she was Child's mother, that she had rights, and that because Petitioner was in "prison" he had no parental rights. Petitioner explained that due to Respondent's stated intention of taking Child at the end of the school year and her refusal to remain in contact with Petitioner he could not, in good faith, allow Child to go out of town for a week. Also, at that point Respondent had only had two one-day visits with Child, in Los Angeles. Following the cancellation of the San Diego trip communication between Respondent and Child diminished. Although Respondent made occasional telephone calls to Child he was uncomfortable talking to her after her accusations and her aggressive behavior.

On August 5, 2011 after not speaking with Child for approximately one month Respondent showed up at Child/M [REDACTED]'s residence without notice, demanding that M [REDACTED] hand over Child immediately. Child became very upset and insisted he did not want to go with Respondent. Respondent then called the police. Respondent showed the police a copy of the custody order from 2002 granting each parent custody in two week intervals. Respondent denied to the police that she had been absent from Child's life for the last nine years and that M [REDACTED] had been caring for Child for that duration. Although Child begged the police not to make him go with Respondent the police stated that due to the custody order he would have to go with her.

On August 8, 2011 Petitioner received a letter from M [REDACTED] explaining what had happened. No communication was received from Respondent. Petitioner then repeatedly attempted to call Respondent to speak to Child but Respondent would not accept Petitioner's calls from the

detention facility. Petitioner mailed numerous letters to Child at Respondent's address but each such letter was returned to Petitioner as "Unknown - Unable to Forward". After a week and a half Respondent finally accepted Petitioner's call and Petitioner was able to speak to Child. Petitioner informed Child that if what he wanted was to remain with Respondent then Petitioner would support that decision. Child stated, unequivocally, that he wanted to return to M■■■■'s care until Petitioner was released from detention. Based on Child's statements Petitioner began attempting to prepare his case, however, the detention facility's law library had no resources for family law.

On August 31, 2011 Petitioner was released from detention. During the four years that Petitioner was detained he maintained regular contact with Child via telephone and mail. Petitioner typically spoke to Child on the telephone at least once per week and often wrote more than one letter per week. Petitioner always called on Child's birthdays, holidays and during special occasions.

On September 11, 2011 Petitioner was informed by Respondent that she had retained counsel in this matter and that a hearing was scheduled for September 26, 2011 in Phoenix. On September 12, 2011 Petitioner spoke to Respondent's counsel for the first time. At this time Petitioner has not been served any documents or notices in this matter.

From January 2002 through January 2006 Petitioner and Child had no contact with Respondent or any member of Respondent's family. Prior to Petitioner locating and initiating contact with Respondent in January 2011 there have been only two contacts between

Petitioner/Child and Respondent. Throughout that entire duration of time Petitioner and Child's whereabouts have been available to Respondent (on the Internet or through Respondent's mother). However, Respondent made no attempt to establish contact.

Petitioner has been in contact with Child since being taken to Arizona by Respondent and Child has repeatedly insisted to Petitioner that what he wants is to return to Los Angeles and to be with Petitioner. Petitioner has consistently assured Child that whatever decision Child made regarding custody, Petitioner would respect and support and that Petitioner only wants Child to be happy. Child still asserts that he wishes to return to Petitioner.

Arguments

1. Arizona is not the Child's home state

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (implemented in Arizona as ARS section 25-1001, et. seq.) section 25-1031 provides that a court of the State of Arizona only has jurisdiction to make and initial custody determination if the state is the home state of the child on the date of commencement of the proceeding. Child has been residing in Los Angeles, CA exclusively since July 2007. Therefore, Child's home state is California and for that reason this Court lacks subject matter jurisdiction. Moreover, none of the exceptions provided for in section 25-1031 apply to the current matter.

2. Jurisdiction to modify the existing determination

The UCCJEA further provides, in section 25-1033, that a court of the State of Arizona does not

have jurisdiction to modify a child custody determination made by a court of another state unless a court of the State of Arizona has jurisdiction under section 25-1031 to make an initial custody determination. Because Child's and Petitioner's home state is California this Court lacks subject matter jurisdiction to modify the existing custody determination.

3. A proceeding concerning the custody of the Child has been commenced in California

The UCCJEA provides, in section 25-1036, that a court of the State of Arizona may not exercise its jurisdiction if, at the time of commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state. A proceeding concerning the custody of Child has already been commenced in the Superior Court of California (case no. YD042145) and is currently pending before that Court. For this reason, as well, this Court lacks subject matter jurisdiction to make a custody determination in the instant matter.

4. Respondent has engaged in unjustifiable conduct

The UCCJEA provides, in section 25-1038, that a court of the State of Arizona shall decline to exercise its jurisdiction to make a custody determination if the person seeking to invoke its jurisdiction has engaged in unjustifiable conduct. In the current matter Respondent, knowing that Petitioner was soon to be released from detention, promptly and without concern for the well-being of Child re-entered Child's life after being completely absent for nine years and took Child, against his will, from the only home he has ever known and the only people he has ever known as family out of his home state, to Arizona for the express purpose of commencing

custody proceedings in Arizona without notifying Petitioner or providing Petitioner an opportunity to respond. Immediately upon relocating Child to Arizona Respondent filed an ex parte petition for sole custody of Child. At no time prior to Respondent seizing custody of Child was Child in danger of being harmed or otherwise mistreated. In fact, Child was in a safe, stable, loving and caring environment surrounded by the people that have been his caregivers and the only family figures he has ever known. Petitioner contends that Respondent's actions in this respect demonstrate her blatant disregard for the well-being of Child and prove that Respondent was acting solely on her self-serving motive of "having both her boys at home with her". For this reason, as well, Petitioner contends that this Court should decline to exercise its jurisdiction over this matter.

For the reasons stated herein Petitioner respectfully requests the Court dismiss the current proceedings so that they may continue as originally commenced in Child's and Petitioner's home state of California.

Respectfully submitted this 14th day of September, 2011.



Richard Riess

Certificate of Service

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Dated: September 14, 2011



Richard Riess