

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

AARON TELLER,

Petitioner,

-against-

SARA FEIGA HELBRANS,

Respondent.

19 Civ. 3172 (SJB)

**MEMORANDUM OF LAW
IN SUPPORT OF MOTION
TO INTERVENE**

PRELIMINARY STATEMENT

This is an action brought by petitioner Aaron Teller pursuant to the Convention on the Civil Aspects of International Child Abduction (the “Hague Convention”) and the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. §§ 11601-11611, against respondent Sara Feiga Helbrans. Petitioner seeks, among other things, orders (1) declaring that the courts of Guatemala have sole jurisdiction to determine custody of the Teller children, Y.C.T., C.T., Y.S.T., F.T., D.T., and R.T., and (2) directing the prompt return of the children to Guatemala. (Docket Entry (“DE”) 1 at 24).

Respondent Sara Feiga Helbrans, the mother of the Teller children, asserts in her verified answer that Guatemala is not the “habitual residence” of the Teller children under the Hague Convention, and that “even if a wrongful removal were shown to have occurred, the petition should be denied pursuant to Article 13(b) of the Hague Convention... [because] the return of the children to Guatemala would expose the children to grave risk of harm and/or place the children in an intolerable situation.” (DE 26 at 19).

Y.C.T. seeks to intervene in this action as of right pursuant to Rule 24 of the Federal Rules of Civil Procedure. She has an unquestionable interest in the subject matter of this action – that is, the determination whether she, along with her siblings, should be returned to Guatemala

under the Hague Convention. Moreover, because Y.C.T. is situated differently from her siblings, her defenses to being returned to Guatemala would be different from theirs, and neither respondent nor the other Teller children can adequately represent Y.C.T.'s interests. Y.C.T. also seeks an order from this court pursuant to Federal Rules of Civil Procedure Rule 17(c) permitting her to enter into an attorney-client relationship with The Legal Aid Society for purposes of representation in this matter.

STATEMENT OF FACTS

Petitioner and respondent were married in Canada in March 2005, and their children Y.C.T., C.T., Y.S.T., F.T., D.T., and R.T. were born in Canada. The family were members of a small, ultra-orthodox Jewish sect called Lev Tahor. In April 2014, the family moved to Guatemala along with many other members of Lev Tahor. They resided in an insular community outside of Guatemala City where they had limited contact with individuals who were not members of Lev Tahor. Critics of Lev Tahor describe it as a cult.

In or around February 2018, Y.C.T. was married to another member of Lev Tahor at the age of 13. At that time, Y.C.T. began living with her husband, who was then 19 years old.

In October 2018, respondent left Lev Tahor with 3 of the children and began to reside in Brooklyn, New York. Respondent attempted to bring all of the children out of the Lev Tahor community, but Y.C.T., C.T. and D.T. instead were taken by the petitioner to Mexico. Respondent apparently secured the assistance of United States authorities, and Y.C.T., C.T. and D.T. were located when petitioner attempted to obtain passports for the children at a United States Embassy in Mexico. In November 2018, Y.C.T., C.T. and D.T. were transported to New York by U.S. officials and Safe Horizon, a New York-based victim assistance organization.

On November 14, 2018, respondent filed custody and family offense petitions against petitioner in the Kings County Family Court, on behalf of herself and the children (Docket Nos. V-29177-82/18; 0-29185-18). In her custody petition, the mother alleged that Lev Tahor was a cult, of which the father remained a member. According to the mother, Lev Tahor was under investigation by a number of governments, and the Guatemalan government had assisted her in leaving the community and traveling to the United States. According to the mother, the father then fled from Guatemala to Mexico, with Y.C.T., C.T., and D.T., and was apprehended in November 2018, when he appeared at the United States Embassy there, together with a woman impersonating the mother, in an attempt to obtain new passports for Y.C.T., C.T., and D. T.. The father was arrested and Y.C.T., C.Y., and D. T. were flown to the United States and reunited with the mother.¹ The mother stated that it was her understanding that, at that time, the father remained in prison in Mexico.

The mother further alleged that members of the Lev Tahor community previously had committed acts of emotional abuse against her and had taken the children from her in an effort to retain them in the Lev Tahor community. Further, she alleged that the community had forced Y.C.T. to marry at age thirteen. The mother asserted that she feared that the father and other community members would attempt to kidnap the children and return them to Lev Tahor in Guatemala, where they would be "in danger of malnourishment, corporal punishment and forced to marry persons much older than them."

On that date, the Hon. Lisa Friederwitzer entered an ex parte full stay-away temporary order of protection against the father, on behalf of the mother and the children, and an order

¹ When she first arrived in the United States, Y.C.T. resided with a host family. On or about December 8, 2018, she and her brother C.T. were allegedly kidnapped by members of Lev Tahor and taken to Mexico. Criminal charges are pending against several Lev Tahor members in relation to that incident. Index No. 19 Cr. 497 (S.D.N.Y.); *see also* DE 1-10. Y.C.T. and C.T. were returned to New York from Mexico by U.S. authorities on December 27, 2018.

granting the mother temporary custody of the children. Petitioner was personally served with the respondent's Family Court petitions, the temporary order of custody, and the ex parte temporary order of protection, in Brooklyn, New York, on November 14, 2018.

Thereafter, over the course of nearly six months, petitioner did not appear in the Family Court in response to the respondent's petitions, the temporary order of protection and the order granting temporary custody to respondent. Moreover, petitioner made no attempt to vacate or otherwise challenge the temporary orders granted in his absence, including by challenging the jurisdiction of the Family Court.

Between November 14, 2018 and February 4, 2019, The Children's Law Center was assigned to represent the children in Family Court. Upon The Children's Law Center's determination that it could not represent all of the children due to potential conflicts of interest, C.T. and Y.C.T. were each assigned separate counsel.

On March 25, 2019, respondent, her attorney, and all counsel for the children appeared in Family Court. As petitioner again failed to appear, the court scheduled an inquest regarding both of the respondent's Family Court petitions, to take place on June 6 and June 13, 2019. The court continued the temporary orders of custody and order of protection and stated that it would send notice to the father at the address that he had provided when he was served in November 2018. In addition, at the request of her attorney, the court scheduled an in camera interview with Y.C.T. for April 8, 2019.

On March 28, 2019, Chayeh Weingarten, a member of Lev Tahor, and friend of the father, filed a petition against respondent, seeking custody of the children. In that petition, Ms. Weingarten explicitly she sought custody of the children in order to remove them from their mother's care and turn them over to petitioner.

On April 11, 2019, petitioner signed an affidavit in support of Ms. Weingarten's Family Court petition. In that affirmation, petitioner stated that he was "currently in the process of requesting the return of [his] children with support and legality of international law regarding parental abduction of children, and meanwhile [he] agree[d] and suggest[ed] that [Ms.] Weingarten take temporary custody of [the] children."

On May 6, 2019, the mother filed a motion seeking to dismiss Ms. Weingarten's petition for lack of standing.

On May 15, 2019, an associate of petitioner's attorney in this case, Ram Gopalkrishan Sharma, Esq., filed a notice of appearance in the Family Court clerk's office in connection with the petition filed by Ms. Weingarten.

Petitioner's attorney, Michael Musa-Obregon, Esq., first appeared in the Family Court on June 6, 2019, in connection with Ms. Weingarten's custody petition, as well as the mother's custody and family offense petitions, which were scheduled to be heard at the same time. However, the father did not appear either personally or by telephone. On that date, Mr. Musa-Obregon asked the Family Court to grant visitation to the father. The matter was adjourned without decision regarding visitation to June 13, 2019 for counsel to report to the court whether it had authority to order visitation during the pendency of the Hague Convention proceeding.

On June 13, 2019, The Children's Law Center provided the Family Court with authority indicating that the Family Court could, in its discretion, enter temporary visitation orders while the Hague proceeding was pending. However, although all six children consented to visits with petitioner, the Family court declined to enter a visitation order over respondent's objection and in light of the parties' initial appearance in the Hague Convention proceeding being scheduled for the following day. The Family court adjourned the matter to August 9, 2019, but made it clear

that it would entertain a renewed application for visitation at that time, if counsel demonstrated that it was within the Family Court's authority to enter such a temporary order. On August 9, 2019, after colloquy regarding contact between petitioner and the children and what safeguards must be in place for such contact to occur, the Family Court ordered the parties to draft a stipulated order for contact detailing all such terms and submit it to the court.

Since the filing of this matter on May 29, 2019, The Children's Law Center, counsel for Y.S.T., F.T., D.T., and R.T., has been granted permission to intervene on behalf of those children to represent their interests in this matter. (DE 27 and Order dated 7/15/2019). On August 7, 2019, Brian Zimmerman, C.T.'s counsel in the Family Court, filed a motion to intervene on behalf of C.T.. Y.C.T.'s Family Court counsel is unavailable to proceed on her behalf in this action (DE 45).

This matter first came to the attention of The Legal Aid Society on July 24, 2019. However, we were not able to meet with Y.C.T. until August 7, 2019. The Legal Aid Society has now agreed to represent Y.C.T. in this action.

ARGUMENT

I. Y.C.T. Should Be Permitted to Intervene in this Action

Rule 24 of the Federal Rules of Civil Procedure allows interested parties in an action to intervene. Rules 24(a) and (b), respectively, allow interested parties to intervene (1) as of right or (2) by permission of the court. Courts broadly interpret Rule 24 in favor of intervention. *Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 407 (S.D.N.Y. 2006); *Miller v. Silbermann*, 832 F. Supp. 663, 673 (S.D.N.Y. 1993).

Although the children are not generally parties to Hague Convention proceedings, nothing in the Hague Convention prohibits their intervention. In *Walsh v. Walsh*, the First Circuit refused to

adopt a rule that intervention by the children in Hague Convention cases is impermissible, and acknowledged that there may be cases where intervention by the children is necessary. 221 F.3d 204, 213 (1st Cir. 2000). At least one court has recognized the necessity of intervention by the child even where a guardian *ad litem* had already been appointed. *See Jakubik v. Schmirer*, 13 Civ. 4087(PAE), 2013 WL 3465857 (S.D.N.Y. 2013).

a. Y.C.T. is Entitled to Intervene as of Right

Rule 24(a)(2) states, in pertinent part, that a party may intervene as of right if that party “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Courts have interpreted Rule 24(a) to include four requirements for intervention as of right: [A]n applicant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action. *Brennan v. N.Y.C. Bd. of Ed.*, 260 F.3d 123, 128 (2d Cir. 2001). Y.C.T. satisfies all four requirements.

In considering the timeliness of a motion to intervene, courts consider “(1) how long the [movant] had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the [movant] if the motion is denied; and (4) any unusual circumstances mitigating for or against a finding of timeliness.” *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

Although the Verified Petition in this matter was filed on May 29, 2019, Y.C.T. did not have counsel available to her until August 7, 2019. Y.C.T.’s motion to intervene is being filed promptly after her securing counsel. Y.C.T. is committed to adhering to the schedule approved by this Court

on June 24, 2019. Any prejudice to the other parties caused by allowing Y.C.T. to intervene is by far outweighed by the prejudice to Y.C.T. that would occur if she is deprived of the opportunity to advocate for her own interests in the determination whether she should be returned to Guatemala. This prejudice would be particularly acute given that Y.C.T. will turn 15 years old before the trial in this matter is scheduled to commence, and her younger siblings, ages five through eleven, have already been allowed to intervene. Y.C.T.'s younger siblings are not similarly situated to her so as to be able to represent her interests. Finally, Y.C.T.'s age and her lack of available assigned counsel to help her protect her interests mitigate in favor of a finding of timeliness.

In order to establish an interest sufficient to intervene as of right, a movant must establish that the interest asserted is "direct, substantial and legally protectable." *Brennan*, 260 F.3d at 128; *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). In determining whether a movant seeking to intervene as of right has demonstrated the requisite interest in the subject matter of the action, courts should define "interest" broadly. *See Rolle v. New York City Housing Auth.*, 294 F. Supp. 574 (S.D.N.Y. 1969); *Norwalk CORE v. Norwalk Bd. of Ed.*, 298 F. Supp. 208 (D. Conn. 1968) (same).

In this case, Y.C.T. has a direct, substantial and legally protected interest in the outcome of this action. Like the intervenor in *Jakubik, supra*, Y.C.T. "has an obvious interest in this litigation" because it will determine whether she will be returned to Guatemala, where she would reside in a highly restrictive environment. 2013 WL 3465857, at *1. Y.C.T. has an interest in remaining in the United States, "and a ruling (in either direction) will profoundly affect her." *Id.*

Y.C.T.'s interests will not be adequately protected by the other parties to this litigation because they are not similarly situated. Respondent has asserted in her verified answer that Guatemala was not the "habitual residence" of the Y.C.T. and her siblings under the meaning of the

Hague Convention, and that if they were to be returned to Guatemala they would be exposed to grave risk of harm and/or placed in an intolerable situation. Y.C.T. would additionally assert under Article 13(a) of the Hague Convention that she was not wrongfully removed from Guatemala because petitioner was not actually exercising a right to her custody when she left Guatemala, and that she “objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [her] views” under Article 13 of the Hague Convention. *See Blondin v. Dubois (Blondin IV)*, 238 F.3d 153, 166 (2d Cir.2001) (“[T]he unnumbered provision of Article 13 provides a *separate* ground for repatriation and ... a court may refuse repatriation *solely* on the basis of a considered objection to returning by a sufficiently mature child.” (emphases in original)) Y.C.T. is capable of viewing her circumstances with clear eyes and making a rational decision about where she should live that should be given great weight; *Jakubik, supra*, at *1-*2 (noting that the Respondent's assertion of, and articulation of facts and arguments bearing on, the Hague Convention defenses would not necessarily suffice to protect the child's interest, and that the age and maturity exception in the unnumbered provision of Article 13 provides a sufficient basis to deny a petition) (citations omitted).

b. Y.C.T. Also Satisfies The Requirements For Permissive Intervention

Assuming *arguendo* that Y.C.T. is not allowed to intervene as of right, she should be allowed to intervene pursuant to Rule 24(b)(1)(B), which states, in pertinent part, that a party should be allowed to intervene by permission when that party “has a claim or defense that shares with the main action a common question of law or fact.” To qualify for permissive intervention a movant must show that: (1) intervention is timely; (2) there is no undue delay or prejudice to the parties; and (3) there is a question of law or fact in common with the original claim. *U.S. v. Columbia Pictures Indus., Inc.*, 88 F.R.D. 186, 189 (S.D.N.Y. 1980). Y.C.T. meets all three requirements.

As described above, Y.C.T.’s intervention motion should be deemed timely and causes no undue delay or prejudice to the parties, thereby satisfying the first and second requirements. Y.C.T.’s defenses to being returned to Guatemala under the Hague Convention raise factual and legal questions common to those raised in the verified petition, satisfying the third requirement. The arguments Y.C.T. would assert if permitted to intervene would raise factual and legal questions relating to whether she was wrongfully removed from her habitual residence, whether returning her to Guatemala would expose her to grave risk of harm, and whether she is of sufficient age and maturity that her objection to being returned to Guatemala should be taken into account. Thus, Y.C.T.’s intervention would satisfy Rule 24(b)(1)(B)’s requirement of “a common question of law or fact” that are central to this matter.

II. This Court Should Issue an Appropriate Order Permitting Y.C.T. to Form an Attorney-Client Relationship with The Legal Aid Society

Y.C.T. also asks the Court to “issue [an] appropriate order” permitting her to proceed in this action without requiring a parent or other adult to co-sign her retainer agreement (attached hereto as Exhibit 1). Y.C.T.’s parents are both parties to the action and are therefore not appropriate co-signers, as they each have a potential conflict of interest. There is nothing in the record to support appointing a guardian *ad litem* for Y.C.T. – who turns 15 in four weeks – as such an appointment would transfer Y.C.T.’s decision-making capacity away from her and to a third party. Where a child is involved in litigation that she did not initiate (as is the case here), FRCP 17(c)(2) authorizes the Court to issue an “appropriate order” to “protect a minor [...] who is unrepresented in an action.” Y.C.T. is unrepresented, but an Order permitting her to enter into an attorney client relationship with The Legal Aid Society without a parent’s signature would protect her interests. (Alternatively, the Court could appoint a limited-purpose guardian *ad litem* whose sole function would be to decide whether Y.C.T. should enter into this attorney client relationship.)

To be sure, Y.C.T. has already obtained independent legal representation without her parents' consent in the related family court action. The Court in that case assigned counsel to each minor, including Y.C.T., pursuant to New York Family Court Act § 241 (declaring that minors are entitled to counsel of their own choosing and assigning counsel where a child is unrepresented, without retainers or parental involvement), and New York Family Court Act § 249 (directing that family court ensure minors are represented in certain actions "if independent legal representation is not available to such minor"). There is no federal court or Hague Convention corollary to State court appointed counsel for subject children.² Yet it is undisputed that, like the other children's family court lawyers (The Children's Law Center and Brian Zimmerman, Esq.), Y.C.T.'s family court attorney does have the authority to represent Y.C.T. in this action -- however, for reasons unrelated to the child's circumstances, her family court attorney has not appeared. The unintended and inequitable result is that unless the Court permits Y.C.T. to sign a retainer on her own behalf, Y.C.T. will not be able to direct her own representation in the same litigation that her siblings are vigorously litigating through counsel. This was not the intention behind Fed. R. Civ. P. 17(c)(2), which specifically directs this Court to *protect* Y.C.T.'s interests through "appropriate" court orders. It is respectfully submitted that the most appropriate Order in this circumstance is for Y.C.T. to be permitted to intervene by counsel of her own choosing, and therefore to be able to sign the retainer on her own behalf. In the alternative, if this Court is not inclined to issue such an order, Y.C.T. respectfully requests that this Court use its inherent powers to assign The Legal Aid Society to represent her so that she may have the assistance of counsel to pursue her interests in this litigation without the appointment of a guardian *ad litem*, as she has done in the related family court matter.

² Appointment of counsel for parties including the intervening child, is not unprecedented in Hague Convention cases. *See, e.g., In re D.T.J.*, 956 F. Supp. 2d 523, 527 (S.D.N.Y. 2013) (appointing counsel to the child); *Reyes Olguin v. Cruz Santana*, 2005 WL 67094 at n.1 (E.D.N.Y. 2005) (noting that attorneys for parties appeared *pro bono*).

CONCLUSION

For all the foregoing reasons, this Court should grant Y.C.T.'s motion to intervene and enter an order permitting Y.C.T. to enter into an attorney client relationship with The Legal Aid Society without a parent's signature or, in the alternative, appoint The Legal Aid Society to represent Y.C.T. in this matter.

Dated: August 9, 2019
New York, New York

Respectfully submitted,

/s/ _____
Theresa B. Moser

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[PROPOSED] ORDER

Upon the motion of Y.C.T. and the Declaration of Theresa B. Moser and pursuant to Rule 17(c)(2) of the Federal Rules of Civil Procedure, it is hereby Ordered that Y.C.T. be permitted to retain The Legal Aid Society to represent her in this action.

Dated: _____

Sanket J. Bulsara, M.J.