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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Luz Adriana Zaragoza Gutierrez,

Petitioner,

v.

Octavio Ramirez Juarez,

Respondent.

No. CV-17-02158-PHX-GMS

ORDER

Pending before the Court is Petitioner Luz Adriana Zaragoza Gutierrez's Verified Petition for Return of Child A Under the Hague Convention, (Doc. 1). A hearing was held on the matter on July 28, 2017. For the following reasons, the Court grants Zaragoza's Petition.

BACKGROUND

Zaragoza and Respondent Octavio Ramirez Juarez are the parents of Child A. Zaragoza and Ramirez are Mexican citizens. Child A was born in Phoenix, Arizona on July 23, 2006. Zaragoza and Ramirez never married, and in November 2009, Zaragoza and Child A returned to Mexico. Ramirez remained in the United States. It was agreed that Child A would remain in Mexico with Zaragoza.

Beginning in 2013, Zaragoza and Ramirez agreed that Child A would visit Ramirez in the United States for one month each summer. Child A spent a month visiting Ramirez in the summers of 2013, 2014 and 2015, each time returning to Zaragoza in Mexico at the conclusion of the visit.

Child A again came to the United States in the summer of 2016, under circumstances which Zaragoza and Ramirez dispute.

According to Zaragoza, Ramirez had been pushing throughout 2015 and 2016 for Child A to come live with him in Phoenix for the 2016–17 school year, but Zaragoza refused, as she believed that Ramirez did not have the time to take good care of Child A. Ultimately, Ramirez's parents came down to Zaragoza in Mexico on July 20, and Zaragoza agreed to another summer visit, on the understanding that Child A would return in a month. Zaragoza testified that she packed one bag for Child A, containing about eight changes of clothes and no other personal belongings. Child A left for the United States on July 21. In August, a week before Child A was to return to school in Mexico, Zaragoza testified, Ramirez told Zaragoza that he would keep Child A in the United States so that she could learn English.

Ramirez, on the other hand, testified that Zaragoza and Ramirez agreed that Child A would spend two years in the United States and that they would determine what the next steps were depending on how Child A was doing in school after those two years.

Zaragoza alleges that Ramirez has restricted Child A's communications with Zaragoza, which Ramirez disputes.

In September 2016, Zaragoza filed a Hague Convention application with the Central Authority of Mexico, seeking the return of Child A. That application was then sent to the United States Department of State.

Zaragoza now seeks an order from this Court returning Child A to Zaragoza or her agent.

DISCUSSION

The International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 et seq., implements the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501 ("Hague Convention"). A federal district court hearing a case under the Hague Convention does not reach the merits of a custody dispute. *See Shalit v. Coppe*, 182 F.3d 1124, 1128 (9th Cir. 1999).

Rather, the court "is to determine only whether the removal or retention of a child was 'wrongful' under the law of the child's 'habitual residence,' and if so, to order the return of the child to the place of 'habitual residence' for the court there to decide the merits of the custody dispute, unless the alleged abductor can establish one of a few defenses." *Id.*

The petitioner bears the initial burden of showing that the removal or retention was wrongful. 22 U.S.C. § 9003(e)(1)(A). The burden then shifts to the respondent to demonstrate the applicability of any affirmative defenses. 22 U.S.C. § 9003(e)(2).

I. Zaragoza has demonstrated that Child A was wrongfully retained in the United States when her habitual residence was Mexico.

In determining whether a child has been wrongfully removed or detained from her habitual residence, a court must ask the following questions:

> (1) When did the removal or retention at issue take place? (2) Immediately prior to the removal or retention, in which state was the child habitually resident? (3) Did the removal or retention breach the rights of custody attributed to the petitioner under the law of the habitual residence? (4) Was the petitioner exercising those rights at the time of the removal or retention?

Mozes v. Mozes, 239 F.3d 1067, 1070 (9th Cir. 2001).

A. The Retention Took Place on August 13, 2016.

The retention occurred on August 13, 2016, when Ramirez informed Zaragoza that he intended to keep Child A in the United States. *See Mozes*, 239 F.3d at 1070 & n.5 (citing case where "mother wrongfully retained children by announcing her intent not to return them" to their home country).

B. At the Time of the Retention, Child A's Habitual Residence was Mexico.

The Hague Convention does not define "habitual residence," but the Ninth Circuit has provided guidance on this "flexible, fact-specific" inquiry. *See Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004).

> First, in order to acquire a new habitual residence, there must be a "settled intention to abandon the one left behind." This is a question of fact . . . . Second, there must be (A) an "actual 'change in geography,'" combined with (B) the

> "passage of 'an appreciable period of time.'" This period of time must be "sufficient for acclimatization."

Id. (citing *Mozes*, 239 F.3d at 1071–78) (internal citations omitted). The "settled intention" that must be considered is that of "the person or persons entitled to fix the place of the child's residence"—that is, the parents. *Mozes*, 239 F.3d at 1076. In "cases where the child's initial translocation from an established habitual residence was clearly intended to be part of a specific, delimited period[] . . . courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence." *Id.* at 1077.

That both parents initially agreed to the child's presence in a new country is not enough to infer a settled intent to abandon the prior habitual residence:

> Where, as here, children already have a well-established habitual residence, simple consent to their presence in another forum is not usually enough to shift it there. Rather the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration.

Id. at 1081.

Here, while the parents dispute exactly how long Child A was intended to remain in the United States, neither asserts that it was supposed to be an indefinite stay. Zaragoza says that they agreed to a definite stay of one month; Ramirez says that they agreed to a definite stay of two years. Prior to that, Child A had spent the previous seven years of her life in Mexico (with the exception of summer visits to the United States). There was thus no "settled intent" on the part of the parents for Child A to abandon her prior habitual residence of Mexico. Further, while there has been a geographic shift with respect to where Child A is living, there was only a short period of time between her arrival in the United States and the retention. Nothing after that matters, because "a parent cannot create a new habitual residence by wrongfully removing and sequestering a child." *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001).

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C. The Retention Breached Zaragoza's Custody Rights Under the Law of Mexico.

The Court must consider the law of the child's habitual residence in determining if the petitioner possesses custody rights that have been breached by the removal or retention. *See, e.g.*, *Asveta v. Petroutsas*, 580 F.3d 1000, 1017 (9th Cir. 2009). Zaragoza has provided the Civil Code for the State of Guanajuato, the Mexican state in which she resides. (Doc. 4 at 17–21.) Article 469, contained within the chapter on child custody, provides that:

> When the two parents have recognized the child born outside of marriage and they live together, they shall both exercise patria potestas.[1] If they are separated what is stipulated in article 436 shall be used.

(Doc. 4 at 19.) Article 436 is unfortunately only partially legible in the copy of the Code provided by Zaragoza. However, the United States District Court for the Middle District of Florida recently construed, for the purpose of a Hague Convention action, the custody rights afforded by the Civil Code for the State of Guanajuato to the unmarried Mexican parents of a child born in the United States and subsequently moved to Mexico as a habitual resident there with one of the parents:

> The operative language is found in Section One, Title Eight, Articles 469 and 471 of the Guanajuato Civil Code, which state, respectively, that "[w]hen both parents have recognized a child born out of wedlock and they live together, they will jointly exert parental authority/responsibility (*patria potestas*)," and "[w]hen the parents of a child born out of wedlock separate and in the case the parents cannot agree on the matter, the judge will designate which parent will exert parental authority/responsibility (*patria potestas*), always considering the best interest of the child." This Court, considering identical provisions in the Civil Code for the State of Hidalgo, Mexico, held that where "the evidence amply establishe[d] that Petitioner and Respondent ha[d] not agreed to the terms of exertion of parental authority/responsibility over [the minor child] and . . . the matter ha[d] not been decided by a judge[,] . . . [petitioner's] rights and obligations provided by the doctrine of *patria potestas* . . . ha[d] not been severed."

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[1] Patria potestas is an ancient civil law concept that has evolved in Mexico to "encompass[] the rights of both parents." *See Whallon v. Lynn*, 230 F.3d 450, 456–57 & n.7 (1st Cir. 2000) (citing the law of Baja California Sur).

De La Riva v. Soto, 183 F. Supp. 3d 1182, 1196 (M.D. Fla. 2016) (internal citations and footnote omitted). Accordingly, that court found that the petitioner in that case had custody rights under Guanajuato law. Applying the same law to a materially-identical factual situation, this Court so finds here.

D. Zaragoza Was Exercising Her Custody Rights at the Time of Retention.

It will not be lightly presumed that a parent with custody rights is not exercising them. On the contrary:

> [I]f a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. Once it determines that the parent exercised custody rights *in any manner*, the court should stop—completely avoiding the question whether the parent exercised the custody rights well or badly.

Asvesta, 580 F.3d at 1018 (quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996)). There is no evidence that Zaragoza entirely abandoned her custody rights at any point.

II. Ramirez Has Not Shown the Applicability of Any Affirmative Defenses.

Having determined that Zaragoza has demonstrated by a preponderance of the evidence that Ramirez wrongfully retained Child A, in violation of the custody rights which Zaragoza was exercising pursuant to the laws of Zaragoza's habitual residence, the Court next looks to see if Ramirez can demonstrate that any of the "narrow exceptions set forth in the Convention applies." *See* 22 U.S.C. § 9001(a)(4). Articles 12, 13 and 20 of the Hague Convention set out these exceptions.

According to Article 12, if (1) judicial proceedings are commenced one year or more from the date of wrongful removal or retention *and* (2) "the child is now settled in its new environment," return should not be ordered.

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Article 13 sets out three exceptions:

> [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
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> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority 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, Article 13.

Finally, Article 20 states that "[t]he return of the child . . . 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."

Ramirez must prove the "grave risk of harm" or "fundamental principles of human rights" exceptions by clear and convincing evidence; he need only show the others by a preponderance of evidence. 22 U.S.C. § 9003.

A. Article 12's "Well-Settled" Exception is Inapplicable.

The date of wrongful retention in this case was August 13, 2016. Proceedings were commenced on July 6, 2017. (Doc. 1.) The "well-settled" exception applies only when proceedings are commenced more than a year after the wrongful removal or retention, and thus the Court need not consider whether Child A is "settled" in the United States. The exception is inapplicable here.

B. Zaragoza Was Exercising Her Custody Rights at the Time of Retention, and She Did Not Consent to or Acquiesce in the Wrongful Retention.

As discussed above, Zaragoza possessed custody rights as of August 13, 2016 and did not fail to exercise them. The primary dispute on which evidence was presented and

on which this case turns is whether Zaragoza consented to or acquiesced in the retention of Child A in the United States.

> In examining a consent defense, it is important to consider what the petitioner actually contemplated and agreed to in allowing the child to travel outside its home country. The nature and scope of the petitioner's consent, and any conditions or limitations, should be taken into account. The fact that a petitioner initially allows children to travel, and knows their location and how to contact them, does not necessarily constitute consent to removal or retention under the Convention.

Baxter v. Baxter, 423 F.3d 363, 371 (3d Cir. 2005). The parties dispute the extent to which Zaragoza consented to Child A's stay in the United States. Zaragoza asserts that she agreed to a summer visit; Ramirez asserts that Zaragoza agreed to a stay of two years.

As an affirmative defense, the burden of demonstrating this exception is on Ramirez. He has not carried that burden by a preponderance of the evidence. The evidence on the matter at the hearing consisted entirely of Zaragoza's testimony and Ramirez's testimony. In such a "he said, she said" situation, the Court as trier of fact must make a credibility determination. *See Saldivar v. Rodela*, 879 F. Supp. 2d 610, 628 (W.D. Tex. 2012).

Two points relating to Child A's July 21, 2016 departure from Mexico weigh in Zaragoza's favor. First, Zaragoza and Ramirez agree that Child A only packed a small suitcase with some clothing and minimal other personal belongings, if any. Zaragoza, who assisted Child A in packing, asserts that that was because the visit was only to last for a month. Ramirez asserts that Child A took only a small bag because she was flying on an airplane. The Court finds Zaragoza's explanation more credible.

Second, both parties agree that Ramirez's parents came down to see Zaragoza and Child A on July 20, 2016. Zaragoza says that they came to convince her that Child A would only be visiting for a month. Ramirez testified on cross examination that his parents went to see Zaragoza because Zaragoza had previously refused to agree to let Child A go to the United States on a more permanent basis. When pressed, he explained that this worry was based on an incident in 2014 where Zaragoza did not want to send

Child A to the United States, and/or concern over the manner in which she was planning on sending Child A to the airport for her flight. This unclarity weighs against Ramirez; moreover, if, as he testified, he was worried that Zaragoza would not send Child A to the United States, it casts doubt on the possibility that she had consented to any two-year stay in the United States. At any rate, Ramirez has not established consent by a preponderance of the evidence.

The acquiescence inquiry focuses on a petitioner's actions after the removal or retention. "Unlike consent, acquiescence must be formal, and might include 'testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.'" *Walker v. Walker*, 701 F.3d 1110, 1122–23 (7th Cir. 2012) (quoting *Friedrich*, 78 F.3d at 1070). There is no evidence of such acquiescence. On the contrary, Zaragoza filed a petition with the Central Authority of Mexico the month after the retention and now has commenced this action. *See Mozes*, 239 F.3d at 1086 n.57 ("Given that [petitioner] has litigated continually for the children's return since then, he obviously has not 'subsequently acquiesced' in their retention.").

C. There Is No Evidence of a Grave Risk of Harm Should Child A Be Returned to Mexico.

"[T]he exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest." *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005) (quoting *Friedrich*, 78 F.3d at 1068). "Rather, the question is whether the child would suffer serious abuse, that is a great deal more than minimal." *Id.* (internal quotation marks and citations omitted). Further, in keeping with the limited reach of the Court's decision, the question is not whether the child would face a risk of grave harm should she *permanently* reside in Mexico, but rather whether she would face such a risk while courts in Mexico make a custody determination. *See Mozes*, 239 F.3d at 1086 n.58; *see also Friedrich*, 78 F.3d at 1069 ("[T]here is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute—*e.g.*, returning the child to a zone

of war, famine, or disease.").

There is no evidence of any such abuse or other grave risk of harm should Child A be returned to Mexico. This exception is inapplicable.

D. The Court Declines to Apply the "Mature Child" Exception.

Another court in this district has recently and aptly summarized the discretion and caution with which a district court must approach Article 13's exception for the wishes of a mature child:

> This exception, like the others, is to be applied narrowly. 42 U.S.C. § 11601(a)(4).
>
> The Hague Convention provides no specific age at which a child is deemed sufficiently mature for his or her opinion to be considered. *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 279 (3d Cir. 2007). Indeed, "[g]iven the fact-intensive and idiosyncratic nature of the inquiry, decisions applying the age and maturity exception are understandably disparate." *de Silva v. Pitts*, 481 F.3d 1279, 1287 (10th Cir. 2007).
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> The State Department Regulations explain that "a child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child." 51 Fed. Reg. at 10,510. Such influence need not be intentional or sinister; it may simply result from the child's retention by one parent. *Hirst v. Tieberghien*, 947 F. Supp. 2d 578, 598 (D.S.C. 2013); *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 204 (E.D.N.Y. 2010).

Aguilera v. De Lara, No. CV14-1209 PHX DGC, 2014 WL 3427548, at *7 (D. Ariz. July 15, 2014).

Child A did not testify in this matter. The Court notes that under the limited scope of inquiry appropriate in a Hague Convention case, Child A's age, and the fact that Child A has been with her father for close to a year with only telephonic contact with her mother, any evidence as to her wishes would be given little weight.

E. Article 20's "Human Rights and Fundamental Freedoms" Exception Does Not Apply.

The exception to return based on the "protection of human rights and fundamental freedoms" is narrowly construed. It 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. Lee*, 720 F.3d 96, 108 (2d Cir. 2013) (quoting U.S. State Dep't, *Hague International Child Abduction Convention: Text and Legal Analysis*, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1985)). As of mid-2013, no federal court had ever relied on this exception to deny a Hague Convention petition. *Id.*

The exception is likewise inapplicable here. It is "construed even more narrowly than the grave-risk exception," *Rodriguez v. Sieler*, No. CV 12-167-M-DLC, 2012 WL 5430369, at *9 (D. Mont. Nov. 7, 2012), and, as with the grave risk exception, there is no evidence here that the "human rights and fundamental freedoms" exception applies.

CONCLUSION

The question before this Court is a narrow one. It is not whether Ramirez or Zaragoza is a better parent, or whether Mexico or the United States is a better place for Child A to live, or any such questions related to the ultimate custody dispute. The Court determines simply that Zaragoza has demonstrated by a preponderance of the evidence that Child A was wrongfully retained in the United States as defined by the Hague Convention; and that Ramirez has not demonstrated that any of the Convention's "narrow exceptions" apply. Pursuant to the limited inquiry prescribed by the Hague Convention, the Court determines that the questions of Child A's custody must be determined by the Mexican legal system.

IT IS THEREFORE ORDERED that the Verified Petition for Return of Child A Under the Hague Convention, (Doc. 1), is granted. The Clerk of Court is directed to terminate this matter.

IT IS FURTHER ORDERED that Respondent shall return Child A to Mexico within 20 days of this Order, and Child A shall remain in Mexico until the custody proceedings in the Mexican courts have been concluded.

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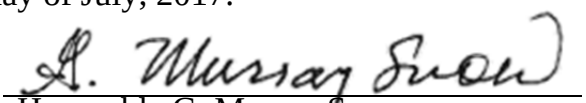
IT IS FURTHER ORDERED that if Petitioner wishes to make application for an award of necessary expenses pursuant to the statute, 22 U.S.C. § 9007, she will do so in compliance with LRCiv 54.2.

Dated this 28th day of July, 2017.



Honorable G. Murray Snow
United States District Judge