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United States District Court,  
E.D. New York.  
In re the Application of Noel Stalin Reyes OLGUIN, Petitioner,  
v.  
Maria del Carmen Cruz SANTANA, Respondent.  
No. 03 CV 6299(JG).

Aug. 5, 2004.

Gregg Roth, Law Firm of Jerome A. Wisselman, P.C., Great Neck, New York, for  
Petitioner.

Lea Haber Kuck, Alison E. Cahill, New York, New York, for Respondent.

#### ORDER

GLEESON, J.

\*1 Petitioner Noel Stalin Reyes Olguin petitions for the return of his children, Sergio Noel Cruz Reyes ("Sergio") and Raul Stalin Cruz Reyes ("Raul"), pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or "Convention") and its implementing legislation, the International Child Abduction Remedies Act, 42 U.S.C. <section><section> 11601-11611. Respondent Maria del Carmen Cruz Santana moves to dismiss the petition on the ground that this Court does not have jurisdiction to consider the petition, as Olguin did not have custody of the children at the time they were taken by Santana.

Specifically, Santana argues both that Olguin did not have rights of custody over the children under Mexican law and that, even if he did, he was not exercising those rights, as required by the Convention. I held a hearing on July 1, 2004 and heard testimony from Olguin, Santana, and members of Olguin's family on the issue of whether Olguin was actually exercising custody rights at the time Cruz brought the children to New York in mid-2003. After the hearing, the parties submitted the opinions of two Mexican-law experts on the custody issue. For the following reasons, I conclude both that Olguin had custody rights under Mexican law and that he was actually exercising those rights for purposes of the Convention.

FINDINGS OF FACT The following constitute my findings of fact and conclusions of law. Olguin

and Santana, who never married, began living together in December 1996, shortly after Sergio was born. From the outset, the relationship was rocky. Olguin abused alcohol, physically abused Santana, and spent most of the time when he was not working carousing with friends and girlfriends. When Santana became pregnant after Sergio was born, Olguin insisted she have an abortion, which she did. He beat Santana, sometimes in front of Sergio and once in front of his father, Reyes Olvera Sergio Raul ("Reyes"). When Santana became pregnant with Raul, Olguin told her to get another abortion. He even brought her pills that could achieve that result, which Olguin was able to obtain through his job in the pharmaceuticals division of the Mexico Institute of Social Services. When Santana refused to abort the child, Olguin beat her. In response, Santana said she would have the child and leave. The physical abuse of Santana continued while she was pregnant with Raul.

The difficulties between Olguin and Santana reached a crescendo on July 19, 2001. On that date, in the presence of Raul, Olguin beat Santana and tried to throw her down the stairs in their home. Santana reported the beating to Mexican police and went to live with her parents for the next two months. After that two-month period, Santana took the children for the first time to New York. After approximately eight months, Olguin and Reyes showed up at the home in the Bronx where Santana was living with the two children. Reyes promised that everything would change if Santana returned to Mexico. He assured her that Olguin would be more responsible and would stop drinking. Reyes promised the boys new toys and bicycles if they returned. In the end, Reyes and Olguin convinced Santana to return to Mexico.

\*2 She and the boys did so in April 2002. For the first couple of months, Olguin acted differently than he had before July 19, 2001. However, he soon reverted to his old habits of beating Santana, abusing alcohol, and carousing at night. Fearful of additional physical abuse, Santana took the boys once again and left Olguin in or about May 2003.

During the time between approximately April 2002 and May 2003, Olguin and Santana lived together with their sons in a home owned by Olguin's parents, who contributed significantly to the upbringing of the two boys. Specifically, they purchased clothing and other items for them and food for the household. However, Olguin's financial contributions were not nonexistent. Though he earned substantially less than the combined income of his parents, he also provided financial support to his own family.

Olguin worked from 1:00 p.m. to 8:00 p.m. Before going to work, he would sometimes drop Sergio off at school, accompanied on occasion by Raul. After work, he would on occasion take the children to the park or take them for a

ride in the car where they liked to fall asleep. He also accompanied them to soccer games and to church.

DISCUSSION Under the Hague Convention, Santana's removal of the children from Mexico is wrongful only if

a it is in breach of rights of custody attributed to a person ... either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal ...; and

b at the time of removal ... those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal....

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 3, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 ("Hague Convention"); [FN1] see also Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494, 10,507 (Mar. 26, 1986) ("To invoke the Convention, the holder of custody rights must allege that he or she actually exercised those rights at the time of the breach.").

FN1. The Hague Convention is reprinted in Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494, 10,498-502 (Mar. 26, 1986).

#### A. Custody Rights

Santana first argues that, by operation of Mexican court order, Olguin did not have custody rights over Sergio and Raul. I briefly set forth the facts and procedural history underlying this contention.

After Santana left Mexico with the children for the first time, sometime in September 2001, Olguin moved in Mexican court for visitation rights. Though Santana did not appear in that action, the court denied Olguin's motion. An appellate family court, however, reversed that decision and granted Olguin visitation rights on November 22, 2001. On February 6 and 27, 2002, Olguin sought to enforce those rights through letters to Mexican courts. On March 12, 2002, however, the case was closed due to inactivity. That discontinuance was affirmed by an appellate court on April 18, 2002. As set forth above, Olguin persuaded Santana to return to Mexico in April 2002, where they lived together with the children until May 2003.

\*3 Citing the court orders discussed above, Santana argues that Olguin had only visitation rights, not custody rights, and that therefore this Court does not have jurisdiction under the Convention to entertain Olguin's petition. Olguin responds that not only was the Mexican case closed, thereby nullifying the visitation order, but that under Mexican law, as he and Santana were living together with the children, they had joint custody over the children.

Both parties have submitted the written opinions of experts on Mexican law in support of their arguments. Santana's expert, Eduardo Magallon Gomez, states that the discontinuance of Olguin's Mexican custody case makes the visitation order final and binding. That is, though Olguin and Santana reconciled in April 2002, Olguin continued to have only visitation rights, not custody rights. Olguin's expert, Javier Vilchis Chavez, predictably disagrees. He states that the closure of the case nullified the visitation order. Therefore, according to Chavez, the parties were in the same position they were in prior to the visitation order, i.e., having joint custody rights.

Under the Hague Convention, a removal is wrongful only if it is in breach of rights of custody, which the Convention distinguishes from "rights of access." *Croll v. Croll*, 229 F.3d 133, 137 (2d Cir.2000). Article 5 of the Convention defines "rights of custody" to include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Hague Convention art. 5(a). Therefore, if Olguin had only visitation rights, Santana's removal was not wrongful and I cannot entertain Olguin's petition. However, based on my understanding of Mexican law, as informed by the expert submissions, I conclude that Olguin did in fact have custody rights over Sergio and Raul.

Chavez cites various authority for his opinion that the closure of the court proceeding granting Olguin visitation rights nullified that order, and I accept his opinion on this point. Indeed, Santana's argument--that the order remains in effect until Olguin returns to the courts to have it vacated--proves too much. According to Gomez, even if Olguin had gone on to live with Santana and his children for twenty years, caring for them and providing for their basic needs on a daily basis, he would still have only visitation rights. That is neither wise policy nor, according to Chavez, the state of the law. Rather, under Mexican law, the visitation order expired when the case was closed due to inactivity. Therefore, until a Mexican court made a determination as to custody rights, Olguin and Santana had equal rights over the children, and Olguin is protected by the Convention. [FN2] See *Furnes v. Reeves*, 362 F.3d 702, 714-15 (11th Cir.2004) ("[T]he violation of a single custody right suffices to make removal of a child wrongful. That is, a parent need not have 'custody' of the child to be entitled to return of his child under the Convention; rather, he need only have one right of custody. Further, he need not have a sole or even primary right of custody." (citing Hague Convention art. 3(a))).

FN2. I note that in *Whallon v. Lynn*, 230 F.3d 450 (1st Cir.2000), the First Circuit had occasion to analyze the custody rights of separated, unwed parents under the law of Baja California Sur, a Mexican state (though not the state of habitual residence here). The patria potestas rights in Baja California Sur provide that both parents of a child born outside of wedlock continue to exercise "paternal authority." *Id.* at

457. The court equated these patria potestas rights with rights of custody for purposes of the Convention. Id. at 458.

## B. Actual Exercise of Custody Rights

\*4 Santana next claims that even if Olguin had custody rights under Mexican law, he was not actually exercising those rights as required by the Convention. Though it is Olguin's burden to establish by a preponderance of the evidence the ultimate issue raised by the petition--that Santana has "wrongfully removed" the children under Article 3 of the Convention, 42 U.S.C. <section> 11603(e)(1)(A); *Blondin v. Dubois*, 189 F.3d 240, 245 (2d Cir.1999) --Santana bears the burden of proving by a preponderance of the evidence her claim that Olguin was not actually exercising custody rights at the time of the removal, 42 U.S.C. <section> 11603(e)(2)(B); *Blondin*, 189 F.3d at 246. In her explanatory report on the Convention, Elisa Perez-Vera, the official Hague Conference reporter for the Convention, wrote:

[A]rticle 13 of the Convention ... shows us the real extent of the burden of proof placed upon the "abductor"; it is for him to show, if he wishes to prevent the return of the child, that the guardian had not actually exercised his rights of custody. Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (i.e. discharged by the "abductor" if he wishes to prevent the return of the child). [FN3]

FN3. Perhaps a better way to characterize what Perez-Vera describes as a burden shift is to say that Olguin has the burden of production (i.e., he must produce evidence that he actually took physical care of the children), while Santana bears the ultimate burden of persuasion on the actual-exercise issue.

Elisa Perez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts & Documents of the Fourteenth Session 426, 449 (1980) ("Explanatory Report" ); [FN4] see also 51 Fed.Reg. at 10,507 ("In the scheme of the Convention it is presumed that the person who has custody actually exercised it. Article 13 places on the alleged abductor the burden of proving the nonexercise of custody rights by the applicant as an exception to the return obligation."). But see *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir.1996) ("The plaintiff in an action for return of the child has the burden of proving the exercise of custody rights by a preponderance of the evidence.").

FN4. The Second Circuit has repeatedly recognized that the Perez-Vera Report is "an authoritative source for interpreting the Convention's provisions." ' *Croll v. Croll*, 229 F.3d 133, 137 n. 3 (2d Cir.2000)

(quoting Blondin, 189 F.3d at 246 n. 5).

In order to shift the burden of disproving actual exercise to Santana, Olguin need "provide only some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate." Explanatory Report at 448. Indeed, Perez-Vera concluded that while the inclusion of Article 3(b)'s "actually exercised" requirement "might prove to be useful," it "must not be expected to come into play very often." Id. at 449.

In its legal analysis of the Convention, the Department of State ("DOS") noted that "[v]ery little is required of the applicant in support of the allegation that custody rights have actually been or would have been exercised. The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child." 51 Fed.Reg. at 10,507. Furthermore, other language in Perez-Vera's report supports the proposition that the "actually exercised" element should be construed broadly. Perez-Vera "stressed" "that the intention is to protect all the ways in which custody of children can be exercised." Explanatory Report at 447. More generally, the Convention favors "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." Id. at 446.

\*5 Though the Second Circuit has not had an opportunity to analyze Article 3(b) or 13(a) in depth, the Sixth Circuit thoughtfully addressed the "actually exercised" issue in *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir.1996). There, the Sixth Circuit declined to create a common law definition of "exercise." Id. at 1065. Rather, the court held that the only "acceptable solution" (in the absence of a ruling from a court in the country of habitual residence) was "to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child." Id. First, the court reasoned that "American courts are not well suited to determine the consequences of parental behavior under the law of a foreign country." Id. The court believed it was too difficult to decide whether a "parent's custody rights should be ignored because he or she was not acting sufficiently like a custodial parent." Id. Second, "an American decision about the adequacy of one parent's exercise of custody rights is dangerously close to forbidden territory: the merits of the custody dispute." Id.; see also *Blondin v. Dubois*, 189 F.3d 240, 246 (2d Cir.1999) (noting that Article 13(a) does "not authorize a court to exceed its Hague Convention function by making determinations, such as who is the better parent, that remain within the purview of the court with plenary jurisdiction over the question of custody." (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir.1993))). Finally, "the confusing dynamics of quarrels and informal separations make it difficult to assess adequately the acts and motivations of a parent." *Friedrich*, 78 F.3d at 1065.

In light of these considerations, the Friedrich court held that if 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. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of the federal courts.

Id. at 1066 (footnote omitted); see also id. ("Although there may be situations when a long period of unexplainable neglect of the child could constitute non-exercise of otherwise valid custody rights under the Convention, as a general rule, any attempt to maintain a somewhat regular relationship with the child should constitute 'exercise.' "). "This rule leaves the full resolution of custody issues, as the Convention and common sense indicate, to the courts of the country of habitual residence." Id.

I find the reasoning of Friedrich persuasive, and therefore follow it. Here, based on my findings set forth above, Olguin has established that he exercised custody rights. He and Santana lived together with the boys for about one year before Santana brought them to New York the second time (the act that gave rise to this action). Though Olguin's parents provided much of the financial support for the children, Olguin himself also provided financial support for his family. Before going to work, Olguin would sometimes drop Sergio off at school, accompanied on occasion by Raul. From time to time he would take his sons to the park or for a ride in the car to help them fall asleep. He also brought them to soccer games and to church.

\*6 This is the preliminary evidence of actual exercise that the Convention requires. See 51 Fed.Reg. at 10,507; Explanatory Report at 448- 49. Under Friedrich, my analysis ends there. I do not, and need not, decide whether Olguin exercised custody rights well or badly, as that question is dangerously akin to those underlying a custody dispute. In any event, my conclusion finds support in the facts of other cases to address the issue. See *Mozes v. Mozes*, 239 F.3d 1067, 1085 (9th Cir.2001) (holding that the petitioner had been actually exercising his custody rights where he had "remained in regular contact with his family, visited them several times, and provided all finances needed to support his wife and children"); *Whallon v. Lynn*, 230 F.3d 450, 453, 459 (1st Cir.2000) (finding rights of custody exercised where respondent spent two weekends a month with child, lived near her, provided some financial support, drove her to school, bought her clothes, took her to the doctor, and helped her with her homework); *Armiliato v. Zaric-Armiliato*, 169 F.Supp.2d 230, 240 (S.D.N.Y.2001) (finding actual exercise where petitioner provided the sole means of financial support for his daughter, was in constant contact with her, visited her regularly, assisted in determining where she should attend

school, ministered to her medical needs, and took her on vacation).

For purposes of the Hague Convention, Olguin has carried his burden of production on the actually-exercised issue. For her part, Santana has failed to rebut that presumption by a preponderance of the evidence. For these reasons, I conclude that Olguin was actually exercising his custody rights at the time Santana brought the children to New York in 2003.

CONCLUSION I conclude that Olguin had custody rights under Mexican law and was actually exercising those rights at the time Santana absconded with the children. Therefore, as Olguin has proved by a preponderance of the evidence that the removal was wrongful under the Convention, 42 U.S.C. <section> 11603(e)(1)(A), Santana's motion to dismiss is denied. However, before Santana and the children may be sent back to Mexico, Santana must be given an opportunity to prove one or more of the Convention's affirmative defenses. To that end, I will appoint a guardian ad litem to represent the best interests of the children throughout the upcoming stages of these proceedings.

Those stages should include an inquiry into (1) whether sending the children back to Mexico would subject them to a grave risk of physical or psychological harm, Hague Convention art. 13(b), and (2) if so, whether any ameliorative measures can be taken by Olguin, Santana, or the Mexican authorities to reduce such risk, see *Blondin v. Dubois*, 189 F.3d 240, 248-49 (2d Cir.1999). The parties may wish to introduce testimony of experts on Mexican family law regarding the social and legal support services that would be available to Santana and the children should they return to Mexico. See *Blondin v. Dubois*, 238 F.3d 153, 159 (2d Cir.2001). Experts on child psychiatry and pediatrics may also be relevant. *Id.*

\*7 I will instruct the guardian ad litem to assess, among other things, the extent to which Sergio and Raul are settled here in the United States. *Id.* at 164 (describing this inquiry as one factor in the Article 13(b) analysis). The guardian should also elicit the children's own views on returning to Mexico. *Id.* at 166. I will hear the parties as to whether I should interview the children in camera, without their parents present, or whether I should rely solely on the report of the guardian.

A status conference will occur on August 24, 2004 at 10:00 a.m. to address these issues, and any others raised by the parties.

So Ordered.