

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MAGNUS ANDERUNG,

Petitioner,

vs.

RAINA MARIE ANDERUNG,

Respondent.

No. 4:13-cv-00080 – JEG-CFB

MEMORANDUM AND ORDER

Petitioner Magnus Anderung (Magnus), a citizen of Sweden, filed this action under the Hague Convention on the Civil Aspects of International Child Abduction in 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11 (the Convention) against his ex-wife, Respondent Raina Marie Anderung (Raina), a citizen of the United States, in an effort to have the couple’s minor child, L.A, returned to Sweden. A bench trial was held on March 25-26, 2013. Attorneys Kodi Brotherson and Stacey Warren represented Magnus, and attorney Mark Hinshaw represented Raina. The Court heard testimony from Magnus; Raina; and Raina’s mother, Deborah Pedicini. Testifying as Magnus’ expert witness via video conference from the District Court of Gavle, Sweden, was Jessica Sandberg (Ms. Sandberg), a Swedish attorney with expertise in the filed of international child custody matters. Ms. Sandberg is one of five attorneys in Sweden that specialize in international child abduction. A Swedish judge was present during Ms. Sandberg’s testimony and administered the Swedish expert witness oath to Ms. Sandberg.

Ms. Sandberg explained that under Swedish National Code relating to, among others, custody and divorce matters, the court will appoint legal aid counsel, chosen by the client or selected by the court, and counsel’s fees will be paid for by the court. This protection is afforded to Swedish citizens and non-citizens alike. Magnus contacted the Swedish Ministry of Foreign Affairs, the designated Swedish central authority under the Convention, seeking assistance under the Convention for L.A.’s return to Sweden. Ms. Sandberg, was contacted to assist Magnus in

filing the application under the Convention. The application was transmitted to the U.S. Department of State, the designated U.S. central authority under the Convention. Ms. Brotherson and Ms. Warren filed in this Court, on Magnus' behalf, the Petition under the Convention; Ms. Sandberg's name does not appear on the Petition nor does she appear as counsel of record in this proceeding. Ms. Sandberg specifically denied being Magnus' co-counsel on the Convention case, explaining that while she has served as co-counsel with local U.S. counsel on other Convention cases, she has not been retained as such in this case. Ms. Sandberg is, however, Magnus' legal aid counsel in a new custody proceeding filed in the District Court of Gavle in December 2012, which is effectively stayed pending the outcome of the Convention case before this Court.

Mr. Hinshaw challenged Ms. Sandberg's testimony as an expert witness, reiterating the objection under Federal Rule of Civil Procedure 26(a)(2)(B) previously raised and denied in a motion in limine, arguing that although Ms. Sandberg was timely disclosed as Magnus' expert witness, no report was attached to that disclosure, preventing Mr. Hinshaw from retaining his own expert. The Court again rejected this argument and recognized Ms. Sandberg as a qualified expert in her field. Mr. Hinshaw also challenged Ms. Sandberg regarding the scope of her testimony before this Court and whether she was acting as Magnus' advocate. Ms. Sandberg firmly denied that she was testifying as Magnus' counsel, pointing out that based upon the oath she took before testifying as an expert witness before this Court, she cannot, and was not, acting as co-counsel and that her testimony was restricted to providing neutral information regarding Swedish children and family law. The Court is satisfied with this disclaimer and has only considered Ms. Sandberg's testimony as it informs on Swedish children and family law services in general and in providing clarification thereof on documents admitted into evidence. This general description of Swedish law and procedure is uncontradicted in the record.

Under Federal Rule of Civil Procedure 52(a), following a bench trial “tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.”

I. INTRODUCTION

The Hague Conference on Private International Law adopted the Hague Convention on the Civil Aspects of International Child Abduction in 1980. T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11. In 1988, the United States ratified the treaty and passed implementing legislation, known as the International Child Abduction Remedies Act (ICARA), 102 Stat. 437, 42 U.S.C. § 11601 et seq. See generally *Abbott v. Abbott*, 560 U.S. —, — — —, 130 S. Ct. 1983, 1989–1990, 176 L. Ed. 2d 78 (2010).

The Convention seeks “to secure the prompt return of children wrongfully removed to or retained in any Contracting State” and “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.” Art. 1, S. Treaty Doc. No. 99–11, at 7. Article 3 of the Convention provides that the “removal or the retention of a child is to be considered wrongful” when “it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention” and “at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.” Ibid.

Article 12 then states:

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.” Id., at 9.

There are several exceptions to that command. Return is not required if the parent seeking it was not exercising custody rights at the time of removal or had consented to removal, if there is a “grave risk” that return will result in harm, if the child is mature and objects to return, or if return would conflict with fundamental principles of freedom and human rights in the state from which return is requested. Arts. 13, 20, id., at 10, 11. Finally, the Convention directs Contracting States to “designate a Central Authority to discharge the duties which are imposed by the Convention.” Art. 6, id., at 8; see also Art. 7, ibid.

Congress established procedures for implementing the Convention in ICARA. See 42 U.S.C. § 11601(b)(1). The Act grants federal and state courts concurrent jurisdiction over actions arising under the Convention, § 11603 (a), and directs them to “decide the case in accordance with the Convention,” § 11603(d). If those courts find children to have been wrongfully removed or retained, the children “are to be promptly returned.” § 11601(a)(4). ICARA also provides that courts ordering children returned generally must require defendants to pay various expenses incurred by plaintiffs, including court costs, legal fees, and transportation costs associated with the return of the children. § 11607(b)(3). ICARA instructs the President to designate the U.S. Central Authority, § 1606(a), and the President has designated the Office of Children’s Issues in the State Department’s Bureau of Consular Affairs, 22 CFR § 94.2 (2012).

Chafin v. Chafin, 133 S. Ct. 1017, 1021-22 (2013).

The United States and Sweden are both contracting states to the Convention, which came into force in the United States in 1988 and in Sweden in 1989. “A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.” Hague Convention art. 19; see § 11601 (“The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.”). “The district court is to ascertain 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.” Barzilay v. Barzilay (Barzilay II), 600 F.3d 912, 917 (8th Cir. 2010). “The Hague Convention has two main purposes: ‘to secure the prompt return of children wrongfully removed to or retained in any Contracting State[,]’ and ‘to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.’” Baxter v. Baxter, 423 F.3d 363, 367 (3d Cir. 2005) (quoting Hague Convention, art. 1). “More broadly, the Convention’s procedures are designed to restore the status quo prior to any wrongful removal or retention, and to deter parents from engaging in international forum shopping in custody cases.” Id.; see also Silverman v. Silverman, 338 F.3d 886, 899 (8th Cir. 2003) (“[T]he primary purpose of the Hague Convention: ‘to restore the *status*

quo ante and to deter parents from crossing international boundaries in search of a more sympathetic court.” (quoting Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995)). Fundamentally, through this disciplined process it is not this Court’s task to resolve the underlying custody dispute, but rather to determine if the status must be restored in order for the authorities in Sweden to resolve those important additional questions.

II. FINDINGS OF FACT

The Court has compiled its findings of fact from the testimony heard at trial, the evidence admitted into the record, and the pleadings submitted in this case. Because the parties contest the issues of consent, acquiescence, and grave risk of harm to L.A. due to a history of domestic violence, the Court’s findings of fact necessarily include a detailed account of the testimony and evidence relating to those issues.

A. BACKGROUND

Magnus is a citizen of Sweden. Raina is a citizen of the United States. Magnus and Raina met in New York City in November 2006 and were married in Dallas Center, Iowa, in June 2007. After the wedding, the couple returned to New York City for approximately one week and then traveled to Magnus’ hometown of Gavle, Sweden, where they lived with Magnus’ mother while Magnus took a summer job. The couple returned to New York City at the end of August 2007.

Upon arriving in New York City, Magnus and Raina went to a friend’s bar where the couple drank and eventually began to argue. Magnus left Raina at the bar and took a cab to their apartment. Magnus and Raina gave differing accounts of what occurred once Raina arrived at the apartment. According to Magnus, Raina arrived home at 6:30 a.m. very drunk. Magnus tried to go back to bed, but Raina jumped on the bed and put her thumbs in his eyes. When Magnus responded by grabbing her wrists, Raina grabbed Magnus’ throat. Magnus reached up around Raina’s neck, pushed her off him, and they fell to the floor. Raina testified that they began to

argue, and things got physical. Magnus pushed her down and grabbed her around the neck. Magnus then left the apartment and went to a nearby park, where the police found him and arrested him. The arrest record, which was admitted into evidence as Petitioner's Exhibit 13, shows that Magnus was charged with two counts: (1) Harassment Second: Physical Contact, and (2) Assault Third with Intent to Cause Physical Harm. Magnus pleaded guilty to disorderly conduct and was sentenced to one year of probation. Magnus testified that prior to that arrest, he had never been arrested nor had any contact with the police.

Late in September 2007, Magnus and Raina returned to Gavle and moved into an apartment. The couple stayed in Gavle until March 2008. Magnus testified that during that time, there was a lot of alcohol consumption, that he and Raina fought often, that during the fights Raina would yell loudly for help, and that the police were called to the apartment on three occasions. Although Raina vaguely describes Magnus being arrested or taken away by the police, Magnus denies having been arrested during that time period. There were no arrest or incident reports admitted into evidence to corroborate Raina's assertion.

In March 2008, the couple moved to Surrey, England, and lived in an apartment above the pub where they both worked. While in Surrey, the couple had another fight, which, according to Magnus, started when Raina arrived home to their apartment drunk and without the couple's new computer. Magnus admitted that he was irritated and that after tracking down the computer at the pub where Raina left it, Magnus went to their bedroom. Raina began yelling and hitting Magnus, so Magnus barricaded himself in the bedroom, at which point Raina began yelling and threatening to call the police and reminded Magnus that she was good at doing that. The police were called and Magnus was taken to a police station. According to Raina, Magnus was arrested, however, Raina offered no record of an arrest, and Magnus testified that he went voluntarily with the officers but was not arrested. Magnus and Raina reunited the next day but were informed by the manager of the pub where they both worked that they needed to leave

immediately because of the previous night's events. The couple moved briefly to southern England and then to London.

In October 2008, the couple was still residing in London and got into an argument over Raina wanting to use funds in the couple's bank account. Magnus and Raina's versions of the altercation differ, but they agree that there was physical contact as Raina struggled to retrieve the debit card from Magnus and that two men unknown to the couple came over and grabbed Magnus. The men released Magnus, and the couple went to their apartment. According to Raina, once inside the apartment, she and Magnus continued arguing, and Magnus slapped Raina in the face. Magnus denied doing so but said that Raina did call the police, who arrested Magnus and charged him with second degree assault. Magnus initially pled not guilty, but once trial began, Magnus decided to plead guilty. During his testimony at the bench trial in the present case, Magnus again denied striking Raina but said he pled guilty out of fear.

After Magnus was released from the London jail, the couple reconciled, and in January 2009, Raina became pregnant with L.A. In May 2009, the couple moved back to Sweden. Magnus testified he gave Raina the choice to return to Sweden or the United States and that Raina chose Sweden because she felt their child would be better off in Sweden due to Sweden's free social services, medical care, dental care, and schools. L.A. was born in Sweden on September 27, 2009.

Both Raina and Magnus testified that from the time Raina became pregnant in January 2009 until September 2011, there were no episodes of domestic violence that involved the police.¹ Magnus testified, however, that by May 2011, at least twice a month Raina was

¹ Raina testified that when L.A. was about six months old, Magnus pushed Raina onto the bed and, on a separate occasion, kicked Raina in the side while she was standing in the hallway. Raina said that these incidents were "nothing major."

assaulting him and threatening to call and tell the police that he had hit her. Consequently, Magnus began recording their arguments and had recorded over forty by May 2011.

During Magnus' testimony, Petitioner's Exhibit 23, an audio CD of recorded arguments between Magnus and Raina that occurred at the couple's apartment in May 2011, was admitted into evidence without objection. The CD contains four tracks with over two hours of recording; approximately twelve minutes of the recording was played during the bench trial. Placing the portion of the recording played in court, Magnus described that the couple had been arguing all day. That evening, Magnus refused Raina's demands, so Raina announced she was going out to find entertainment elsewhere and left the apartment around 11:00 p.m. The portion of the CD played during the bench trial was recorded the next morning at approximately 3:30 a.m. when Raina returned to the apartment from being out at a pub. Raina can be heard yelling that Magnus ruined her evening and he needed to make it up to her. The recording is difficult to describe in text but reveals loud, profane, and high-intensity behavior on the part of Raina as she demands that Magnus engage in sex. Magnus tells Raina to be quiet because she is going to wake L.A. and the neighbors. Raina responds by yelling over and over, "you f*** with me, I am gonna f*** with you."² Magnus asks Raina to be quiet and to go to bed because she is drunk and reeks of alcohol. Raina repeatedly tells Magnus that if he does not do what she wants him to do, she will call the police, tell the police that he beat her, and threatens to give herself some bruises. Magnus objects telling Raina she is lying and that he has not touched her. Raina dismisses Magnus' objections, threatening that the police will believe her because Magnus has a record and that he will be sent to jail once again. At some point, L.A. is awakened by the noise and while Magnus is holding L.A., Raina starts hitting and pinching Magnus. Raina continues to

² To fully appreciate the aggravated and volatile nature of the argument, it is necessary to point out extensive profanity and sexually graphic language can be heard throughout the recording but has not been repeated in this Order.

threaten Magnus, telling him she will report his drug problem to the police and that she will take L.A. away from Magnus.

Magnus testified that Raina knew he was recording their arguments; Raina, on the other hand, first testified that she had no clue she was being recorded but later said that she suspected Magnus was recording their arguments. Raina conceded that on the recording, she can be heard saying she knew she was being recorded; however, Raina explained that she was intoxicated when Magnus made that recording.

Magnus testified that during their marriage, with the exception of when Raina was pregnant and nursing L.A., arguments similar to the one recorded on the CD occurred at least twice a month. Raina similarly testified that she and Magnus had frequent arguments but denied that Magnus remained calm as portrayed on the recording. Raina denied ever lying to the police about Magnus hitting her and that the reason she can be heard on the recording saying she would lie to the police is because she was desperate, that Magnus had always escaped trouble in the past, and she wanted him to know he should get in trouble for what he had done.

At the end of September 2011, Raina's mother, Deborah Pedicini (Deborah), came from the U.S. to visit and stayed with Magnus, Raina, and L.A. in the family's apartment; Deborah slept in Raina and Magnus' bedroom with Raina, while Magnus slept on a cot in L.A.'s bedroom. On a Saturday afternoon, Raina, L.A., and Deborah returned to the apartment after a day of shopping. According to Magnus, L.A. was sitting on his lap and was not interested in trying on the clothes they had purchased, when Deborah commented that she would not be surprised if Magnus had sexually abused L.A. The comment triggered an argument between Raina and Magnus that continued for hours. After Raina went to bed, Magnus told Deborah he was going to show her how Raina acted and started to play the recorded argument contained on Exhibit 23. Raina heard the noise, came out of her room, took the computer away from Magnus, and tried to leave the apartment with the computer. Raina and Magnus began struggling over the computer;

Deborah called the police. Magnus locked himself in L.A.'s room. When the police arrived, they spoke with Raina and Deborah but left without speaking to Magnus. No one was arrested.

The next morning, Magnus told Deborah he wanted her to leave. According to Magnus, Deborah, who was eating a bowl of cereal at the time, threw the bowl, which crashed on the floor right in front of L.A., leaving a hole in the floor. Magnus then told Deborah he knew why Raina acted the way she did. Deborah testified that Magnus had gotten right up in her face and was screaming at her that she had screwed up her children, so she dropped her cereal bowl hard to scare Magnus away from her. Magnus then got dressed and left the apartment. When he returned later that day, Raina, Deborah, and L.A. were gone; they had taken Deborah's suitcase and some of Raina and L.A.'s belongings. Raina, Deborah, and L.A. stayed with Raina's friend that night and the next day they went to the police. Raina filed a report accusing Magnus of assaulting her and sexually abusing L.A. and informed the police about Magnus' convictions in New York and in London. Based on this report, Swedish Social Services placed Raina and L.A. in an apartment. Agents from the Swedish Social Services went to the Magnus' apartment, informed him of Raina's allegations, and served him with a three-month restraining order. When interviewed by the police, Magnus denied the allegations against him and recounted Raina's own conduct; the police dismissed the restraining order and informed Magnus there would be an investigation.

After receiving Magnus' interview report, the Swedish Social Services agents went to Raina's apartment. The agents, who according to Raina never believed her report of abuse, were very upset and gave Raina the choice to either join L.A. for evaluation in Familjeboendet (FAMBO), Swedish Social Services family housing, or L.A. would be removed from Raina's care and taken into the custody of the Swedish Social Services by the end of the day. Raina went to FAMBO with L.A. for approximately eight weeks; during that time, Magnus was allowed

supervised visits with L.A. After Raina's period of evaluation at FAMBO, Magnus then began his period of evaluation with L.A., which concluded at the end of January 2012.³

On October 18, 2011, while Raina was in FAMBO with L.A., Magnus filed for divorce in the District Court of Gavle and sought sole custody of L.A. Ms. Sandberg explained that when a couple with a child under the age of sixteen files for divorce, there is a six-to-twelve month thinking period before the divorce can be finalized. Ms. Sandberg also explained that custody of minor children is shared unless one party contests custody; if custody is contested, Swedish Social Services conducts a home study.

Magnus testified that in December, while he and L.A. were in FAMBO, Raina and he started having communication regarding where L.A. would spend Christmas. After the holidays, they continued to communicate about how they would share custody of L.A.

Magnus identified Petitioner's Exhibit 2, as the certified English translation of a home study report submitted to the District Court of Gavle. As Ms. Sandberg testified, such reports are submitted as a matter of course in disputed custody cases. In connection with the home study, Raina and Magnus were interviewed on October 25, 2011, and November 15, 2011, respectively. An intermediate custody hearing was set for January 30, 2012; however, according to Magnus, he and Raina had reached an agreement to share custody of L.A., so the intermediate

³ In regard to the accusation of sexual abuse, the report submitted to the District Court of Gavle in connection with the custody case states:

It emerges that the mother's suspicions of sexual abuse are based on the fact that Magnus wanted [L.A.] to sleep in the same room as him and not in the same room as Raina and the maternal grandmother. Raina thinks that this is strange. Otherwise, she has neither seen nor heard anything that makes her suspect or that indicates sexual abuse. When the investigator asked whether she thought it was more strange for [L.A.] to sleep with her father than with her mother, Raina said that you can never be sure. The investigation team's assessment was not to report the matter to the police on the basis of this information.

Pet'r's Ex. 2, at p. 1.

custody hearing was unnecessary. Raina denied that there was an agreement to share custody and maintained that the custody hearing was canceled because Magnus refused to attend; nonetheless, Raina admitted that she and Magnus had been agreeing on the custody of L.A. on their own since being discharged from FAMBO. When asked why in a contested custody case an intermediate custody hearing would have been cancelled absent a custody agreement between the parents, Raina, who was represented by counsel in the divorce and custody proceedings,⁴ explained that she found the whole process extremely confusing. Raina also acknowledged that a letter later signed by Magnus' and Raina's attorneys on June 19, 2012, and August 10, 2012, respectively, informed the District Court of Gavle that the parties, having previously reached a custody agreement, requested that the court dismiss the custody case. Further evidence that Magnus and Raina had a custody agreement is found in the initial report submitted to the District Court of Gavle in connection with the new custody case, which indicates that when discharged from FAMBO in January 2012, Raina and Magnus had "agreed that [L.A.] should live with each parent every other week" and that "both parents wish to continue to hold joint custody of [L.A.]" Pet'r's Ex. 2, at p. 3. Magnus testified that although the initial custody arrangement called for each parent to have L.A. every other week, while Magnus finished his chef's internship in Stockholm, he and Raina modified the arrangement such that Raina had L.A. during the week while Magnus had L.A. on the weekends.

When Raina was released from FAMBO, she moved into her own apartment; when Magnus was released, he returned to the apartment the family previously shared. Raina signed a

⁴ As previously noted, Sweden provides legal aid to parties involved in a family dispute without regard to citizenship; the party can choose an attorney or the court can appoint one.

three-month lease from December to March. After March, Raina continued leasing the apartment on a month-to-month basis.⁵

Magnus testified that in December, while he and L.A. were still in FAMBO, he began communicating with Raina about how L.A. would spend the holidays. Although their testimonies differ regarding the details, both Magnus and Raina indicated that by March 2012, to a certain degree, they were spending time together with L.A. Magnus testified that although Raina did not give up her apartment, Raina and L.A. began living with him in his apartment in March because a drug addict neighbor in Raina's apartment building was harassing Raina.

Magnus testified that around that time, Raina started expressing concern that Swedish Social Services would come and take L.A. away,⁶ and Raina believed that securing a U.S. passport for L.A. would prevent Swedish Social Services from being able to do so. To that end, they made an appointment with the U.S. Embassy in Stockholm for August 28, 2012. Magnus said that they had some discussions about moving to Stockholm because of the family's recent involvement with the Swedish Social Services in Gavle. According to Magnus, Raina became increasingly anxious about Swedish Social Services and persuaded Magnus to let her visit her

⁵ Magnus testified that Raina applied for child support, which is paid through the Swedish Social Insurance Agency when parents do not live together. He explained that the amount received was based upon the custody agreement that Raina would have L.A. five days a week. Raina received those payments until September 2012.

⁶ Ms. Sandberg explained that the Care of Young Persons (Special Provision) Act or LVU, is Sweden's child protective services law. Ms. Sandberg testified that in custody cases, if the Swedish Social Services become concerned for the welfare of the child due to cooperation problems between the parents, they can step in and put the child in foster care, but that it is unusual. She further testified that parents appearing before the LVU have a right to a public attorney of their choice. Ms. Sandberg opined that the LVU, which is governed and overseen by the Swedish Ombudsman, is an effective system for providing protection for children.

When asked whether the Swedish Social Services provided assistance to Raina or Magnus during their divorce proceedings, Ms. Sandberg answered that the Swedish Social Services became involved when Raina went to the police and accused Magnus of domestic abuse and that under those circumstances, Swedish Social Services is obligated to investigate.

family in the U.S. until the appointment with the U.S. Embassy on August 28. Magnus said he told Raina that he had already been away from L.A. too much, and did not want them to go, but that Raina was very persistent and told Magnus she could not relax for fear that Swedish Social Services would snatch L.A. away from them, and that Raina reassured him that it would be only three months. Raina's father purchased round-trip tickets for Raina and for L.A., scheduled to depart Stockholm on May 27, 2012, and to return to Stockholm on August 25, 2012.

Magnus denied that the family had plans to move to the U.S. before Raina and L.A. left Sweden on May 27. Magnus acknowledged signing and notarizing a consent to travel form giving his permission for L.A. to travel to the U.S. on May 27, 2012, and to return to Sweden on August 25, 2012. Magnus identified Petitioner's Exhibit 3 as a partially completed U.S. Citizenship and Immigration Services Form G-325A (form G-325A), which is a biographic information form required to start the immigration process in the U.S. Magnus denied completing or signing the form and identified the handwriting on the form as Raina's. Magnus noted that the partially completed form conspicuously omitted information readily known to Magnus, such as the city and county of his birth, his mother's maiden name, and his father's date of birth. Magnus also identified Petitioner's Exhibit 1-E as L.A.'s preschool records, which documented that "L.A.'s mother" had informed the school that L.A. would be gone for summer vacation and would return the end of August 2012. Pet'r's Ex. 1-E. Magnus acknowledged that Raina took their two cats when she left, stating that the cats were to stay with Raina's mother because of the expense and the limited space in their apartment, and further, because he had a cat allergy, it really did not matter if the cats left. Magnus was asked that if there was no plan to immigrate to the U.S., how did he explain text messages between he and Raina on WhatsApp chat on August 18, 2012, discussing Magnus' immigration process, suggesting that Raina get an apartment big enough for three, and that she buy a \$2000 car. Magnus explained that by then he knew Raina was not going to return, and that those messages were part of his desperate attempt to be reunited with

L.A. Magnus also qualified that he was not encouraging Raina to buy a car; rather, Raina told Magnus she was going to buy a car that cost \$4000, so he suggested that she buy the less expensive car for \$2000.⁷

Raina, on the other hand, testified that the family started making plans to relocate to the U.S. in April 2012. Raina provided no specifics but stated that she and Magnus had discussions about moving to the U.S. and that she did all the research. According to Raina, the plan was that she and L.A. would go to the U.S. and that Magnus would stay in Sweden and save money. Raina denied that the couple had any written agreement regarding a mutual plan for Magnus to immigrate to the U.S. or for L.A. to remain in the U.S. after August 25, 2012. In support of her contention that there was a plan to immigrate to the U.S., Raina testified that in rushing to the airport on May 27, she partially completed form G-325A and that Magnus signed the partially completed form telling Raina he would need to get the rest of the information to complete the form. Raina conceded that she never submitted the form G-325A, explaining that Magnus never sent her the necessary funds. Raina confirmed sending Magnus a text message on May 28, 2012, that said, "Sweet dreams angel. 89 days," Pet'r's Ex. 1-F, and acknowledged that August 25 was exactly eight-nine days from May 28 and that August 25 was the date that she and L.A. were to return to Sweden with their prepaid airline tickets. Raina acknowledged that when she left Sweden: she packed only four suitcases, which contained L.A.'s summer clothes, a few toys, and keepsakes, but left many of L.A.'s toys and clothes behind; she did not have her mail forwarded to the U.S.; she continued receiving mail and paying rent at her apartment in Sweden; she did not notify her landlord she was leaving; and she did not notify Swedish Social Insurance Agency she

⁷ Magnus was questioned about several exhibits that were not offered or admitted into evidence. One of those exhibit was an April 2012 email exchange purportedly between Magnus and an immigration attorney asking about Magnus' chance of immigrating to the U.S.

was leaving. Raina denied that Magnus was allergic to cats or that the plan was for the cats to live with her mother.

According to Raina, when she arrived in the U.S., she learned that she could get L.A. a U.S. Passport while in the U.S. and did not need to wait for the August 28 appointment with the U.S. Embassy in Sweden. Raina informed Magnus about this and sent him the instructions and necessary paperwork, which he completed and returned to Raina. Raina submitted the paperwork, and L.A.'s passport was processed. L.A.'s passport is currently in the custody of the Clerk of Court for the Southern District of Iowa pursuant to this Court's Order of February 19, 2013, ECF No. 5.

Raina admitted that she did not inform the Swedish authorities that she did not plan to return, and that for approximately three months after arriving in the U.S., Raina continued to receive benefits from the Swedish Social Insurance Agency for herself and for L.A. On August 21, Raina remarked in a text message exchange with Magnus that she had not received her monthly check from the Swedish Social Insurance Agency despite being entitled to six months of benefits while traveling. Raina admitted not informing the Swedish Social Insurance Agency that she applied for public assistance from the State of Iowa.

Magnus testified that it became clear Raina would not return to Sweden on August 25, so he began communicating with Raina desperately trying to find a way to be reunited with L.A. By October 2012, communication between Magnus and Raina had broken down. At the end of October, the Swedish Social Insurance Agency contacted Raina by telephone to inform Raina that the Swedish government had become aware that she and L.A. had moved out of the country. Raina explained that while she planned to return to Sweden on August 25, she had problems with her passport and then decided not to return to Sweden. The Swedish Social Insurance agent informed Raina that by moving to the U.S., Raina did not have the right to receive alimony, child support, or health care benefits from Sweden, and, therefore, her support payments were being cancelled.

On October 25, 2012, Raina authorized the District Court of Gavle to finalize the divorce proceeding Magnus had begun one year earlier. Raina did not object to the shared custody of L.A.⁸ On November 14, 2012, the District Court of Gavle entered Magnus and Raina's divorce decree. Magnus testified that at that time, Raina stopped giving him any information about L.A. and would not talk about returning L.A. to Sweden. It was around this time that Magnus submitted the application for L.A.'s return to the Swedish Ministry of Foreign Affairs, which transmitted it to the U.S. Department of State. On February 14, 2013, the Verified Petition for Return of Child to Petitioner and Petition for Immediate Issuance of Show Cause Order to Respondent was filed in this Court. On February 19, 2013, Raina responded to the Petition, denying wrongfully removing or retaining L.A., and submitted 179 pages of WhatsApp text messages purportedly refuting Magnus' claims.

On February 19, 2013, consistent with the objectives of the Convention, the Court entered an Order prohibiting Raina from removing L.A. from the jurisdiction and setting a Rule 16 scheduling and status conference. The Court further ordered Raina to appear at the hearing with L.A. and to surrender L.A.'s passport and other travel documents to the Clerk of Court for the Southern District of Iowa. The hearing was held on February 25, 2013, which Raina and L.A. attended. The Court entered an expedited scheduling order setting discovery deadlines and trial. Less than one week before trial, Raina filed a petition for a restraining order (relief for domestic abuse protection) against Magnus in the Polk County District Court; the petition was summarily denied for lack of evidence.

⁸ In December 2012, Magnus filed a new custody case in the District Court of Gavle, again requesting sole custody of Raina. On December 4, 2012, Swedish Social Services interviewed Magnus for purposes of the new custody case but have not received a response from Raina. As previously noted, the Court verified that the custody proceeding is effectively stayed pending the outcome of the Convention case before this Court.

III. CONCLUSIONS OF LAW

A. Petitioner's Prima Facie Case

Magnus, as Petitioner, has the initial burden of establishing “by a preponderance of the evidence” that L.A. was “wrongfully removed or retained within the meaning of the Convention.” § 11603(e)(1)(A); see Barzilay II, 600 F.3d at 917.

The removal or the retention of a child is to be considered wrongful where:

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Barzilay II, 600 F.3d at 917 (quoting Hague Convention art. 3). “The first step in determining a child’s habitual residence is to discern when the alleged wrongful removal or retention took place, for ‘the text of the Convention directs courts to only one point in time in determining habitual residence: the point in time “immediately before the removal or retention.””’” Id. at 918 (quoting Silverman, 338 F.3d at 897 (quoting Hague Convention art. 3)).

1. Date Retention Became Wrongful

Since Magnus gave his express consent for L.A. to travel from Sweden on May 27, 2012, for a visit to the U.S., this is a wrongful retention rather than a wrongful removal case. Raina argues it was by mutual agreement that Raina and L.A. would come to the U.S. and stay indefinitely and that Magnus would join them at a later date. Magnus disputes Raina’s contention and argues Raina wrongfully retained L.A. in the U.S. after August 25, 2012. Magnus and Raina dispute the reasons the stay extended beyond August 25.

Raina explained that upon arriving in the U.S. she discovered that she could apply for L.A.’s U.S. Passport while in the U.S. and would not need to return to Sweden to meet with the

U.S. Embassy in Stockholm on August 28, 2012, to get L.A. a U.S. Passport. Raina sent Magnus the application for L.A.'s U.S. Passport and a note listing the necessary documents Magnus needed to supply with the application; Magnus signed the application and sent the documentation. Raina submitted the application, but by August 25, Raina had not received the passport; Raina told Magnus and the Swedish Social Insurance Agency that without travel documents, L.A. would not be able to travel back to Sweden on August 25, 2012, as previously planned. WhatsApp text messages, contained in Petitioner's Exhibit 15, show that on July 9, 2012, Magnus told Raina, "[y]ou fooled me how can I be happy? The only thing keeping me standing up was that I was going to see her and you in 90 days!" Pet'r's Ex. 15, at p. 1. Raina responded, "so meet us in [N]orway [E]ngland wherever you want." *Id.* Magnus reminds Raina that she told him that once L.A. had her passport, she would be safe and would come back but that is not going to happen even though Raina had promised. *Id.* Raina responds, "u r crazy if u make either one of us go back." *Id.* Although from that point on, text messages between Magnus and Raina consist of some discussions of Magnus coming to the U.S. to get L.A. and needing to verify whether he was admissible due to his arrest in New York, those subsequent messages do not alter the fact that when Raina and L.A. left Sweden on May 27, all indication was that L.A. would return on August 25. Magnus' attempts to be reunited with his daughter once it became apparent Raina was not going to return to Sweden cannot be construed as prior consent to retain L.A. in the U.S. beyond August 25. Accordingly, based upon this record, the Court finds August 25, 2012, is the date that retention became wrongful.

2. Habitual Residence

The pivotal determination, then, is whether Sweden or the U.S. is L.A.'s habitual residence. See Barzilay II, 600 F.3d at 917 ("[T]his case turns on the determination of the children's habitual residence, for the retention of a child in the state of its habitual residence is not wrongful under the Convention."). "[T]he factors relevant to the determination of habitual

residence: ‘settled purpose of the move to the new country from the child’s perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country.’” *Id.* at 918 (quoting *Barzilay v. Barzilay (Barzilay I)*, 536 F.3d 844, 851-52 (8th Cir. 2008)); *see also Walker v. Walker*, 701 F.3d 1110, 1119 (7th Cir. 2012) (“In a case alleging wrongful retention, we determine a child’s habitual residence by asking whether a prior place of residence . . . was effectively abandoned and a new residence established . . . by the shared actions and intent of the parents coupled with the passage of time. Because the parents often dispute their intentions, the court should look at actions as well as declarations in determining whether the parents shared an intent to abandon a prior habitual residence.” (alterations in original) (internal citations and quotation marks omitted)).

Raina argues the facts of this case clearly show “that the parties manifested a shared understanding that [L.A.]’s stay abroad in the United States would last indefinitely, thereby demonstrating a mutual intent to allow [Raina] and [L.A.] to abandon Sweden as [L.A.]’s habitual residence.” Resp’t’s Trial Br. 13, ECF No. 24. The Court must disagree.

a. Settled Purpose

The settled purpose of a family’s move to a new country is a central element of the habitual residence inquiry. This settled purpose need not be to stay in a new location forever, but the family must have a sufficient degree of continuity to be properly described as settled. Additionally, the settled purpose must be from the child’s perspective, although parental intent is also taken into account.

Barzilay II, 600 F.3d at 918 (alterations, internal citations, and quotation marks omitted).

On May 27, 2012, when L.A. and Raina left Sweden, L.A. was two years and eight months old. L.A. was born in Sweden, lived her entire life in Gavle, Magnus’ mother and three of his siblings live in Gavle, and L.A. attended preschool classes with other children in Gavle. Despite these connections, there is no evidence in the record that L.A.’s Swedish family or friends were informed that L.A. was leaving Sweden forever. Raina testified that she took mostly summer

clothing and a few of L.A.'s toys and only brought to the U.S. what she could fit into four suitcases. Although Raina brought the family's two cats with her, Magnus testified that the cats were going to stay with Raina's mother and would not be returning in August because the cats were an added expense and because Magnus was allergic to them.⁹ From a child's perspective, to be taken away from the only place known to her as home without saying goodbye to immediate family or friends and to have most of her belongings left behind is inconsistent with a settled purpose to abandon that country as the child's habitual residence. See id. (concluding the settled purpose from the children's perspective was to remain in Missouri permanently where two of the three children had lived in Missouri their entire lives and the third child lived there for five of his ten years).

The parents' conduct leading up to Raina and L.A.'s departure belies the assertion that when Raina left on May 27, 2012, the couple had a "settled purpose" to abandon Sweden: Raina did not move out of her apartment in Gavle and continued to pay rent even though she had a month-to-month lease and could have discontinued the lease at any time; Raina informed L.A.'s preschool that L.A. was taking summer vacation and would return in August; Raina took only summer clothing and a few of L.A.'s toys and keepsakes, leaving most of their belongings in Sweden; Raina obtained round-trip rather than one-way tickets from Sweden to the U.S.; Raina

⁹ Magnus was cross examined about an email not admitted into evidence that Magnus sent to Raina on November 5, 2012, wherein Magnus demanded that Raina return one of the two cats. Magnus acknowledged the email, indicating when taken in context of his communication with Raina at the time, you see that he sent the email not because he wanted the cat back, but for Raina's ironic response telling Magnus he was a horrible person for wanting to separate cat brothers when Raina was separating a father from his daughter.

Among the voluminous text messages contained in Respondent's Exhibit A is a string of messages sent on November 4 and 5, 2012, Magnus is complaining to Raina that for several days, she has not allowed him to talk to or to know anything about L.A. Magnus asks to talk to L.A. and then texts, "I want my cat back." Resp't's Ex. A at 161. In the next message, Magnus says, "God how mean this is keeping me and [L.A.] apart! You have no clue how much this hurts me! Hearing her voice makes me cry! But what do you care about that?" Id.

did not notify the Swedish Social Insurance Agency that she was permanently leaving Sweden and instead continued to receive benefits for at least three months after she left; and neither Magnus nor Raina withdrew their divorce and custody proceedings that were pending in the District Court of Gavle.

Documentary evidence also contradicts an intent to abandon Sweden. Magnus signed a consent to travel form, which limited authorization for L.A.'s travel to a 90-day period. Even if the Court were to accept Raina's account that Magnus hurriedly signed the incomplete or blank form G-325A and that Raina filled in the information, it would mean that Magnus and Raina not only waited until the very day Raina and L.A. were to depart for the U.S. before filling out the essential document for commencing Magnus' immigration process, the form was left conspicuously incomplete and was never submitted to U.S. immigration authorities.

Raina's testimony that she was uncertain Magnus had saved enough money to afford immigrating, and that the immigration process was never pursued because of a lack of funds, further negates the concept that the couple had a shared intent to immigrate as such an important matter would presumably be addressed prior to making plans to relocate. Further, once Raina and L.A. were in the U.S., the communication between Magnus and Raina further demonstrates the indeterminacy of a plan to permanently abandon Sweden. See Walker, 701 F.3d at 1120 (concluding that while parts of the abducting parent's testimony showed that "the couple *might have been considering* relocating to the United States, this is a perilously thin basis for inferring that their trip . . . was truly intended to be the start of that permanent move" (emphasis added)). Magnus' instruction to Raina in *August 2012* to get an apartment big enough for all three and to buy a car for \$2000, demonstrates that the parties had not decided on any living arrangements in the U.S. *prior* to May 27, 2012, and thus lacked a "settled purpose" to abandon Sweden at that time. Raina admitted holding herself and L.A. out to be citizens of Sweden to continue obtaining benefits from the Swedish government and that Magnus was complicit with the extension of

benefits. However, when asked when the benefits from the Swedish government stopped, Raina said it was in October after she *told* Magnus that she and L.A. were going to stay in the U.S. For Raina's account to be believed requires coming to the inescapable conclusion that Raina provided false or misleading information to the Swedish government in order to receive Swedish benefits for months after abandoning the country. In addition, if Magnus and Raina *together* had a settled purpose to move to the U.S. permanently, Raina would have had no reason to tell Magnus in October 2012 that *she* planned to stay in the U.S. with L.A.

The record evidence simply does not support Raina's contention that the couple had a settled purpose to abandon the country of mutual residence, Sweden, to take up residence in the U.S. See Walker, 701 F.3d at 1116-17 (concluding the country of mutual residence, Australia, not the U.S., was the children's habitual residence, because the record was too contradictory and underdeveloped to support the conclusion that the couple previously held a mutual intent to abandon Australia and to take up residence in the U.S.); Baxter, 423 F.3d at 368-69 (concluding that under the facts of that case, moving the mother and son from the family's home in Australia to the U.S. was merely the first opportunity to escape from the disagreeable and crime-ridden conditions of the island in Australia's Northern Territory where the family had been living but fell "short of the 'settled purpose' required under the Convention for a finding that the country of habitual residence has been abandoned").

b. Change of Geography, Passage of Time, Acclimatization

In this case, L.A. clearly changed locations, leaving the only country in which she had ever lived, Sweden, and coming to the U.S., a country completely foreign to her. Regarding the passage of time, approximately eight weeks passed between August 25, 2012, the onset of L.A.'s wrongful retention in the U.S., and October 31, 2013, when Magnus filed the application for assistance under the Convention with the Swedish Foreign Ministry. Magnus filed the Verified Complaint in this case on February 14, 2013, and by the time of trial, L.A. had been in the U.S.

for ten months. Raina testified that L.A. now prefers to speak English and has lost the ability to speak Swedish. Raina described that she has a support network in the U.S. and that L.A.'s aunt, Raina's sister, provides childcare for L.A. Raina indicated that there were a couple preschools that L.A. could attend, but L.A. was not yet in preschool. Magnus testified that in Gavle, he, too, has a support network. At the time of trial, Magnus indicated he had been living in his mother's home but would be moving into an apartment in June. Magnus also testified that the Swedish school system guaranteed that L.A. would have placement in preschool.

To find Raina's assertions that L.A. has become acclimatized in the U.S. support a finding that the U.S. has become L.A.'s habitual residence would run contrary to the purposes of the Convention. An abducting parent who retains a child in a foreign country and argues against the child's return because a change in residence would be traumatic for the child runs contrary to the purposes of the Convention. See Mota v. Castillo, 692 F.3d 108, 115-16 (2d Cir. 2012) ("It would frustrate the objectives of the Convention if a parent or guardian could secure an advantage in an anticipated custody dispute merely by whisking the child away to a foreign land, and retaining her there long enough to amass evidence of the child's acclimatization to the new location.").

3. Custodial Rights

There is no dispute that at the time of wrongful retention, Magnus had joint custody of L.A. As documented in the initial report submitted to the District Court of Gavle in connection with the custody case, when Raina and Magnus were discharged from FAMBO in January 2012, they had "agreed that [L.A.] should live with each parent every other week" and that "both parents wish to continue to hold joint custody of [L.A.]." Pet'r's Ex. 2, at p. 3. The documentation later filed by the District Court of Gavle also states that the couple had agreed on joint custody of LA. In addition, the parties both testified that immediately prior to Raina and L.A. departing for the U.S. on May 27, 2012, Raina and L.A. were living in the same apartment with Magnus.

Upon consideration of all the relevant factors, the Court concludes Sweden is L.A.'s habitual residence.

B. Article 13(a) Exceptions

Magnus having met his burden of presenting a prima facie case that Sweden is L.A.'s habitual residence and Raina has wrongfully retained L.A. in the U.S., to prevent L.A.'s return to Sweden, the burden shifts to Raina to prove an affirmative defense under article 13 of the Convention. § 11603(e)(2)(B); see Silverman, 338 F.3d at 900. Raina asserts that the affirmative defenses of consent, acquiescence, and grave risk of harm prevent L.A. from being returned to Sweden.

The respondent must prove the defense of consent or acquiescence to the removal or retention by a preponderance of the evidence, or the defense of a grave risk of harm by clear and convincing evidence. 42 U.S.C. § 11603(e)(2). The affirmative defenses are narrowly construed to effectuate the purposes of the Convention, and even finding an exception under article 13 does not automatically preclude an order of return.

Baxter, 423 F.3d at 368. In fact, "American courts have emphasized that 'a federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention.'" Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009) (quoting Friedrich v. Friedrich (Friedrich II), 78 F.3d 1060, 1070 (6th Cir. 1996)).

1. Consent

Raina argues that because Magnus consented to permit Raina and L.A. to relocate to the U.S., he could not subsequently revoke that consent and hope to resurrect a Convention action. Raina asserts without legal authority that consent once granted by one party and relied upon by the other is binding.

The consent exception applies when a petitioning parent, either expressly or through his conduct, agrees to a removal or retention before it takes place. A parent's consent need not be formal, but "it is important to consider what the petitioner actually contemplated and agreed to in allowing the child to travel outside its home country."

Walker, 701 F.3d at 1122 (internal citations omitted) (quoting Baxter, 423 F.3d at 371).

“Consent need not be expressed with same degree of formality as acquiescence in order to prove the affirmative defense under article 13(a).” Baxter, 423 F.3d at 371. Consent, like acquiescence, however, focuses on the petitioner’s subjective intent. Id.

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.

Id.

As previously discussed, the evidence in this record demonstrates that Magnus gave his consent for L.A. to come to the U.S. for a visit from May 27, 2012, until August 25, 2012: the consent to travel form allowing L.A. to travel to the U.S. for 90 days, L.A.’s preschool reservation showing she would return at the end of August, the round-trip airline ticket with scheduled return date of August 25, 2012, and Magnus’ various text messages indicating he would see L.A. at the end of the ninety days. In arguing Magnus consented to L.A. staying indefinitely in the U.S., Raina admits making misrepresentations to both Swedish and U.S. authorities and argues that Magnus was complicit with those misrepresentations. It is unclear why such conduct, even if both parents were complicit, amounts to consent to retain L.A. in the U.S. beyond August 25. Further, for the Court to find that deceiving the country of the child’s habitual residence, Sweden in this case, amounts to an exception under the Convention to returning L.A. to the country of her habitual residence runs contrary to the Convention’s purpose. The evidence shows Magnus and Raina had a mutual intent to secure a U.S. Passport for L.A., which both thought had to be accomplished in Sweden. Once Raina discovered she could secure the passport without returning to Sweden, Raina secured the necessary information and signatures, and once the process was underway, Raina unilaterally changed the plan and decided she would not to return

to Sweden. This conduct does not demonstrate that Magnus consented to L.A. staying indefinitely in the U.S. See Baxter, 423 F.3d at 371 (concluding the petitioning parent's initial consent allowing the child to go for a visit for a limited period of time while the family figured out its next move did not demonstrate consent to the child's permanent retention in the U.S.).

2. Acquiescence

Raina next argues that "it is clear that the petitioner subsequently acquiesced to [L.A.]'s relocation to the United States," Resp't's Trial Br. 19, pointing to the time line in this case noting that Magnus contacted an immigration attorney on April 18, 2012, indicating that he and his wife wanted to move back to the U.S.; dropped Raina, L.A., and the family's cats off at the airport; executed a critical immigration document; and over the next five months, repeatedly conveyed to Raina that he was permanently moving to the U.S.

Acquiescence is implicated if a petitioning parent agrees to or accepts a removal or retention after the fact. 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. One way or another, the exceptions [must] be drawn very narrowly lest their application undermine the express purposes of the Convention. It is also worth remembering that the Article 13 exceptions are permissive: a court may order return even if it finds that the parent opposing the petition has established that one of the exceptions applies.

Walker, 701 F.3d at 1122-23 (alteration in original) (internal citations and quotation marks omitted).

In addition to apparent mis-characterizations and misstatements of the evidence, Raina's assertions fail to demonstrate acquiescence. The email with the immigration attorney to which Raina refers was never offered nor admitted into evidence, is profoundly redacted, and Magnus denied sending it. Further, an inquiry regarding his immigration status hardly amounts to formal acquiescence to Raina retaining L.A. in the U.S. Similarly, taking his wife and daughter to the airport for what by all appearances was to be a visit to the U.S. does not amount to acquiescence.

Assuming the immigration document to which Raina refers is the form G-325A, that document was not executed, and, at best, it was partially completed. Again, not an indication of acquiescence.

Finally, in considering the text messages between Magnus and Raina, the Court first notes that Raina submitted WhatsApp text messages beginning on August 5, 2012. Magnus, on the other hand, submitted the couple's text message chats starting one month earlier on July 9, 2012. Magnus' messages to Raina on July 9 accuse Raina of fooling him, saying he thought he was going to see L.A. in 90 days and now that is not going to happen, and that Raina had told him once L.A. had her passport they would come back. Raina responds that Magnus is crazy if he makes either Raina or L.A. go back to Sweden. Magnus replies that he is so depressed that he will not be seeing L.A. that he cannot do his job or concentrate and that when he sees young children he thinks of L.A. and begins to cry.

As time passes, the text messages meander from discussions of Magnus coming to the U.S. and bringing L.A. back to Sweden to Magnus coming and staying in the U.S. for good. The discussions are laced with doubt that Magnus is admissible because of his conviction in New York as well as a lack of money to get there. Raina points to *one* text message out of thousands in which Magnus says get an apartment big enough for three and another suggesting that Raina buy a \$2000 car. Read in context, neither message demonstrates that Magnus has acquiesced to L.A.'s detention. The only constant thread throughout the text messages is Magnus telling Raina how much he misses L.A. and how hard it is to be apart from her. On October 22, 2012, Magnus sent Raina a lengthy text message stating, "the deal was [to] come back 25th August pick up clothes and leave [L.A.]. Suddenly you changed your mind." Pet'r's Ex. 15, at 260. Other text messages describe a plan to immigrate Magnus to the U.S. Still others talk about moving to other countries. What Raina has not pointed to however, is any formal statement that Magnus agrees that Raina can keep L.A. in the U.S. To the contrary, the text messages show that within

sixty days of date of wrongful detention, Magnus sought information on how to file a petition under the Convention. On this record, Raina has not demonstrated by a preponderance of the evidence that Magnus acquiesced to L.A. remaining in the U.S. See Friedrich II, 78 F.3d at 1070 (holding that instead of casual statements made to third parties, the acts that determined whether the left behind parent acquiesced to the retention of his son in America were that within twenty-one days after the abduction, the left behind parent secured a German court order awarding him custody and that since the abduction, he resolutely sought custody of his son).

C. Article 13(b) Exception - Grave Risk of Harm

Raina's final argument is that L.A. would be at grave risk of harm if she is returned to Sweden, which lacks a functioning judicial system to give protection, because Magnus has a history of violence and because removing L.A. from her primary physical care giver will result in psychological harm, L.A. should not be returned to Sweden under Article 13(b).

The Article 13(b) exception applies "if the party opposing the petition establishes by clear and convincing evidence that 'there is 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.'" Vasquez v. Colores, 648 F.3d 648, 650 (8th Cir. 2011) (quoting § 11603(e)(2)).

1. Domestic Violence and Lack of Functioning Judicial System

Raina argues that L.A. would be at grave risk of harm and should not be returned to Sweden due to Magnus' history of violence and because of the failure of the Swedish judicial system to provide protection.

Raina accuses Magnus of lying to Swedish Social Services and telling them he is the victim of domestic abuse and asserts that the overwhelming evidence in this case demonstrates Magnus "is not in any way credible." Resp't's Br. 22.

As detailed above, Magnus and Raina have a history of volatile arguments. Magnus has been arrested and charged with domestic violence on two occasions. His last arrest was in 2008.

Both Magnus and Raina testified that there were no major incidents from the time Raina became pregnant in 2009 until September 2011. There is no evidence that Magnus ever harmed L.A. In addition, Raina's challenges to Magnus' credibility ring hollow given record evidence diminishing her own credibility. Raina admitted lying to Swedish and U.S. officials on immigration documents and for purposes of obtaining social services in both countries. The audio recording on Petitioner's Exhibit 23 further damages Raina's credibility and demonstrates that Raina possesses the very same violent behavior she argues puts L.A. at grave risk of harm if she is returned to Sweden with Magnus. The recording also brings seriously into question, the details of Raina's allegations of Magnus' acts of domestic violence as Raina can be heard repeatedly threatening Magnus that if he does not do what she wants him to do, she will call and lie to the police that he beat her and threatening to give herself some bruises.

Raina's criticism of inaction by the Swedish authorities is also contrary to the record. As recounted in Petitioner's Exhibit 2, as well as Raina's own testimony, when Raina and her mother went to the police and reported that Magnus beat Raina and sexually molested L.A., the Swedish Social Services Agency immediately took Raina and L.A. into protective custody and issued a temporary restraining order on Magnus. After an investigation, however, it was determined that Raina's allegations were not credible. Nonetheless, Raina's initial report to the police in September 2011 triggered Swedish Social Services Agency to conduct a thorough investigation, which required that both Raina and Magnus stay with L.A. at FAMBO for a period of evaluation. A report was then filed finding there were no concerns for L.A.'s safety.

Ms. Sandberg provided information regarding Sweden's Care of Young Persons Act or LVU and explained that if there are allegations or concerns that a child is being neglected or abused, the Swedish Social Services Agency is obligated to step in and, if necessary, take the child into protective custody. Ms. Sandberg described the Swedish legal system as having a strong focus on child welfare. She further described that home studies are performed in child

custody cases as a matter of course to determine if there are any concerns about either or both parents. Ms. Sandberg provided the example that if a child reports to a teacher that one or both parents has done something abusive to the child, Swedish Social Services Agency is called, the child is taken into protective custody, and the parents will be brought for questioning, usually within the hour. In international cases, Swedish child services will act in conjunction with the foreign country's child services agency and will conduct and/or order home studies as necessary in each case. She further explained that if there is any risk to a child that is returned to Sweden under the Convention, the Swedish Social Services Agency will step in and, if necessary, be at the airport when the child arrives, or will arrange to conduct a home study, do home visits, and will report back to the country from which the child was returned. The Court is confident that, contrary to Raina's assertions, Sweden has a competent child welfare system in place. Indeed, Raina expressed concern that Swedish authorities were overly aggressive in such cases.

Accordingly, Raina has utterly failed to present any evidence, let alone clear and convincing evidence, that L.A. would be at grave risk of harm if she is returned Sweden. See Lozano v. Alvarez, 697 F.3d 41, 48 n.2 (2d Cir. 2012) (rejecting the grave risk of harm defense finding there was "simply insufficient evidence that merely returning to the United Kingdom – even if the country was the site of some of the child's trauma, whether caused by the child witnessing Petitioner's abuse of Respondent or by being in the shelter – in and of itself would present a grave risk to the child" (internal quotation marks omitted)); Vasquez, 648 F.3d at 651 (rejecting the mother's grave risk of harm defense which was based upon the mother's own testimony that the father had shaken the child's "head forcefully six to ten times a month, head-but[ted] her two to three times a month, or hit[] her on the back with his fist," where the opinion of the court-appointed pediatric neurologist that examined the child indicated that the child had "normal, age-appropriate neurological development, that there was no evidence of any neurologic injury").

2. Psychological Harm

Raina's final argument is that removing L.A. from Raina's care and returning L.A. to Sweden constitutes an intolerable situation for L.A. Raina provides no other specifics or explanation why L.A. would be worse off without Raina present than L.A. has been without Magnus present. Further, Raina has not presented any evidence that she cannot accompany L.A. to Sweden. The reason that Raina has been L.A.'s primary care giver is because Raina has wrongfully retained L.A. in the U.S. to the exclusion of Magnus. To find this defense justified, continuing to keep L.A. and Magnus apart runs contrary to the purpose of the Convention. Raina has failed to demonstrate by clear and convincing evidence that removing L.A. from Raina's care would constitute an intolerable situation. See Baxter, 423 F.3d at 373-74 (holding the district court erred in basing its determination that the child would be in grave risk of harm if returned based upon the disagreeable and crime-ridden conditions in which the family had been living even though the evidence showed that the petitioner had moved away from that area and the respondent had not cited any specific evidence of potential harm to the child upon return to the country of habitual residence).¹⁰

¹⁰ During her testimony, Raina made one passing reference that Magnus made suicide threats, and Mr. Hinshaw mentioned the same in closing argument. The Court asked Respondent to provide specific record references to those threats. Respondent filed a chart of forty references contained in text messages found in Respondent's Exhibit A. Examples provided include: "I'm going nuts" (p. 80); "I cry every damn day I hate my life here." (p. 81); "This is too much for me. I can't do it anymore." (p. 84); "Makes me wanna die." (p. 98); "Dying is what I want to do and so is going to happen! Goodbye!!!!!!!!!" (p. 108). Resp't's Summ. Ex. 1-2, ECF No. 36.

Petitioner submitted a responsive summary, putting the examples in context of the complete text message reference as found in Petitioner's Exhibit 15. For example, "Pls read what I have written before as well. *Im going nuts*. Being here makes me miserable." (emphasis added) (p. 189); "I love you but it sucks and makes me irritated to be here in my own and missing everything thats why we cant get along because *I hate the life here* and you not believing that I have had problems with my salaries makes me wanna scream. Get it??" (emphasis added) (p. 191). Pet'r's Summ. Ex. 1, ECF No. 37.

Given isolated references, the Court was required to work through the large number of text messages in an effort to glean some understanding of their importance in total, recognizing the inherent limitations in such a method of communication. The Court's own review of the text

The Court finds Raina has not met her burden of proving an affirmative defense preventing L.A.'s return to Sweden.

IV. ORDER

The Court finds that L.A.'s habitual residence is Sweden, L.A. has been wrongfully retained in the U.S. since August 25, 2012, and there are no affirmative defenses preventing L.A. from being returned to Sweden. Based on the foregoing, it is the Order of this Court that:

1. Petitioner Magnus Anderung's Petition for Return of Minor Child, ECF No. 1, is hereby **GRANTED**.
2. Petitioner and Respondent's minor child, L.A, shall be **RETURNED** to Sweden, at Respondent's expense, within fourteen (14) days of the filing date of this Order, with Respondent should she desire to accompany her.
3. Respondent is ordered to make all necessary arrangements associated with returning the child to Sweden. If Respondent is unable or unwilling to accompany the child in keeping with this order, Respondent shall make other appropriate arrangements for the child to be safely accompanied during her return to Sweden. However, L.A. may not be placed in the care or control of a third party for her return without the Court's express permission.

messages taken in context of the conversation string rather than as isolated words, finds that, at most, they depict a despairing father that misses his family. Further, in response to Raina's allegation regarding his mental status, Magnus requested a report from his healthcare unit which was completed on March 19, 2013, and was admitted as Petitioner's Exhibit 20. The report indicates that Magnus has been treated at the healthcare unit since 2004 for sleep problems, stress reaction, anxiety, and depressive disorder of moderate degree. The report also discloses "no record of misuse of medication, nor of any abuse of illegal drugs or alcohol in our records during this time." Pet'r's Ex. 20. Accordingly, the Court is satisfied that forty cryptic references to suicide or going crazy, taken in light of the thousands of text messages submitted with this record, taken together with the report provided by Magnus' healthcare unit do not suggest a particularized risk to L.A.

4. Respondent shall not – absent leave of the Court – remove the minor child from the Southern District of Iowa pending her return to Sweden.
5. Counsel for Respondent shall file a notice with the Clerk of Court immediately upon L.A.'s arrival in Sweden indicating that Respondent has fully complied with the terms of this Order.
6. No award of attorneys' fees or other costs, apart from the aforementioned transportation costs associated with the child's return, will be made at this time. The Court will consider any separate petition regarding this issue that Petitioner may file, upon motion properly made.

IT IS SO ORDERED.

Dated this 21st day of May, 2013.



JAMES E. GRITZNER, Chief Judge
U.S. DISTRICT COURT