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Case No: FD23P00471

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2023

Before :

MR DAVID LOCK KC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

B
- and -
G

Applicant

Respondent

Jason Green (instructed by **Dawson Cornwell LLP**) for the **Applicant**
Julia Gasparro (instructed by **ITN Solicitors**) for the **Respondent**

Hearing dates: 26 and 27 October 2023

Approved Judgment

This judgment was handed down remotely on 03 November by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR DAVID LOCK KC

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr David Lock KC :

1. In this case the Father seeks an order pursuant to the Child Abduction and Custody Act 1985 (“**the 1985 Act**”), which brought the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25th October 1980 (“**the Convention**”) into effect as part of UK domestic law, that his daughter, A should return to Spain. Unusually, and for reasons I will explain below, the Respondent to the application is not A’s mother but her grandmother, G, defends the case on the basis that (a) A is habitually resident in the UK and thus there is no power to make a return order under the Convention and/or (b) if A is habitually resident in Spain then A objects to the court making a return order and submits the court should give effect to those objections. G’s primary case is that A’s future place of residence should be determined in Family Court proceedings that she has commenced in the UK and that the Court should make an order in those proceedings that A should live with her in London.
2. Lying behind these legal issues is a very sad set of facts arising out of the death of A’s Mother from cancer in February 2023. Whatever I say in this judgment, I cannot begin to imagine the stresses and pressures that all family members must have endured. Although there is a child at the heart of this case, the evidence shows that every member of A’s extended family has been deeply affected by the death of A’s Mother and all are still grieving for a young woman who was taken from them far too early in her life. Different people process and respond to grief in different ways, and I hope that, in making findings in this case, I have been sufficiently sensitive to the raw feelings of everyone in this family arising from the Mother’s sad death. Nonetheless, amidst their grief, there is a dispute as to whether A should live with her Father or her grandmother and a decision on that matter has to be made by either by this court or by the Family Court.
3. I am confident that A is in the fortunate position where both G and the Father love A and are devoted to her, and both have the capacity to provide her with a loving and nurturing environment in which to develop into her teenage years. However, A can only be primarily based in one country and, family mediation having failed, a decision has to be made by this court, if it is permitted to do so, or by the Family Court. For the reasons set out below I have concluded that a decision can be made by this court and that A should live with her Father in Spain. I will therefore make a return order that A should return to live in Spain. I will invite the parties to agree the terms of such an order which provides a timetable for an orderly return for A to move back to Spain as soon as reasonably practicable and to agree undertakings which can then become enforceable in Spain so as to ensure that A will be able to spend extended periods of time in England with her grandmother and the wider members of her maternal family during the school holidays.

The facts.

4. A was born in City A, Spain on 10 March 2011. Her Mother was CS (“**the Mother**”) and her Father is B (“**the Father**”). CS’s Mother, who is the Respondent to these proceedings, is G. The Mother and Father both worked for the Spanish navy, and they

met in about 2008. They have never married and A is their only child. The Mother and Father ceased to be a couple in about 2012 but the Father says in his witness statement that they “*maintained a very positive friendship following our separation*”. I have had regard to a considerable amount of documentary material as part of this case and have heard the Father giving evidence. I am satisfied that this is an accurate statement of the position and that, although they ceased to be a couple, the Mother and the Father appear to have remained on excellent terms throughout and worked co-operatively together to co-parent A.

5. In the first 10 years of A’s life she predominantly lived with her Mother but also spent extended periods of time with both her Father and with G. G explains that the Mother came to live with G in City A for the last couple of months of her pregnancy and that A was born on 10 March 2011 in City A. She says that the Father stayed with them for a few weeks after A was born but shortly returned to City B for work. G looked after the Mother and A, as she explained that it is a tradition from their country of origin, for the grandmother to care for her daughter and the newborn baby for the first 45 days to allow the new Mother to recover after giving birth. G continued to care for A for the first year as the Mother juggled her work and family responsibilities but then A moved to live with the Mother on a full-time basis.
6. Thereafter it appears that A spent at least half of each school holiday period living with the Father. In 2012, G and her husband decided to move to the UK with her two younger daughters because the UK presented better opportunities for G’s husband to be able to work. G has lived in the UK since 2012 but, as was clear when she gave evidence, continues to speak exclusively in Spanish despite having lived in the UK for the past 11 years.
7. In about 2013 the Mother commenced a new relationship with Mr J and the Father has also developed a new relationship with his partner of the last 11 years, D. There is no evidence of any tension between the Father and the Mother arising out of these new relationships and, on the contrary, everyone appears to have worked hard to make these relationships work for everyone concerned and in particular for A. There is ample evidence which I accept that that D is an important person in A’s life. Whilst no one can take the place of her Mother, I accept that D has developed an important relationship with A and combined with G, is able to provide strong and loving support to A.
8. In September 2020, the Mother requested leave from work to spend time with her family in England and for A to have the benefit of being able to speak fluent English, which she did not have at that time. The Father gave his consent for A to start school in England in September 2020, and the Mother was able to move to join A in about October 2020. The agreement was that A should stay in England for one year. At this time, A was 9 years old. G claimed in her witness statement that the arrangement was for A to spend 2 years in England, but she accepted when giving evidence that this was not correct and that the original agreement was for A to spend a single year in England.

9. A started school at School X in September 2020 although, at that stage, her English was limited. Unfortunately, the Mother was diagnosed with an aggressive form of ovarian cancer on 28 February 2021. The Mother was told that she had developed a rare type of ovarian cancer and there were limited treatments. Initially, the doctors did not recommend surgery due to the risk posed given the advanced stage of the cancer and the Mother began treatment with Chemotherapy in April 2021. After some months of Chemotherapy, there seemed to be some progress and surgery was recommended which took place on 6 October 2021. The surgery involved removing the Mother's uterus and part of her intestines. The operation appeared initially to be a success but unfortunately about 6 months later the Mother found out the cancer had come back and was more aggressive. Thus, by the spring of 2022 the Mother knew that she was only getting palliative care.
10. The Mother's terminal illness must have been hugely challenging for everybody who cared for her. The Father visited London when he could during this period and, at times, his Mother, L, also came to London to provide care to the Mother and to support A. G explained that she left her job in August 2022 so that she could provide care for her daughter and A. The Mother had extended stays in hospital and sadly died on 6 February 2023.
11. Once the Mother was diagnosed with cancer any thought of her and A returning to Spain at the end of the 202/21 academic year was abandoned, with the Father's full agreement. The Mother was in receipt of care and support from the NHS, and it was agreed that she should stay in England to access treatment and that A should stay with her. Thus, even though A only came to England to attend school for a single year, she was still attending an English school when the Mother died in February 2023, albeit by this time she had finished primary school and started secondary school. Throughout that time A was living in G's house with G, her Mother, and her two aunts who, I understand, are nearer to her in age and thus must have been more akin to older sisters.
12. Unfortunately, the Father's naval duties meant that he was required to go to sea for about 3 months on 8 February what he described as a "mission". He was thus unable to travel to London to support A in the period immediately after the Mother's death or attend the funeral. D travelled to London to support A and attend the Mother's funeral and the paternal grandmother also came to London to support A and stayed until 5 March 2023.
13. Once D returned to Spain, she made an application for A to attend school in Spain and the plan for A to move to Spain at the end of the 2022/23 academic year was progressing. A started to have concerns about the plan and the Father travelled to London on 28 June and discussed the plans with her. He left on 3 July 2023 and, on 8 July 2023, A was taken to the airport by G and caught a flight to City S. There is a video of A arriving in City S which shows she was very happy at arriving in Spain and the Father described the days after A arrived in Spain in positive terms.

14. A was due to start school in Spain on 15 September 2023. However, it had been arranged that she would visit the United States of America with her two aunts for a holiday and A was very excited about this holiday. The two aunts were flying to the USA from London and so A travelled back to London on 13 July 2023 and, after she had had a farewell party with her London friends on 15 July, she left London to go to the USA. Although the Father pressed for her to be booked on a return back directly from the USA to Spain, G told him that the prices of flights were much higher to travel to Spain than to England, and so A was booked on a flight to London from the USA on 25 August and the Father booked her a flight to return to Spain on 26 August 2023.

A never returned to Spain. On 24 August 2023 G commenced proceedings in the West London Family Court seeking permission to bring a “live with” application for A to live with her on a permanent basis.

15. Once it became clear that A was not travelling back to London and that G had commenced legal proceedings in England seeking an order that A could continue to live in England, the Father and A had an extended telephone conversation. Unknown to the Father, A was recording the call. I have been provided with a transcript of this call in which, in summary, the Father expresses his disappointment and frustration that A is still in London and not coming to live with him in Spain. In that call A expresses the view that she wishes to stay here, and her concern that her Father is not listening to her wishes.
16. The Father travelled to London on 6 September with the intention of trying to persuade G to allow him to take A to Spain, but G refused to agree to this and the Father said that she threatened to bring in social services if the Father tried to take A to Spain. By this stage lawyers had been instructed on both sides. A has continued to live at G’s house since September and has resumed attending school in London.

The respective cases.

17. It follows that there are two sets of live proceedings at present, namely these proceedings and the West London Family Court proceedings, although the latter proceedings have been stayed awaiting a decision in this action. The Father’s case, in summary, is that A was habitually resident in the UK until July 2023 when she ceased to be habitually resident in London because she moved to Spain. He thus asserts that, as G does not have parental responsibility for A, it is wrongful for G to seek to retain A here. He does not accept that there is evidence which amounts to objections by A to returning to Spain or, if the evidence demonstrates that A is objecting, he invites me to exercise my discretion to override those objections and make a return order.
18. G’s case is that A has been habitually resident in the UK since July 2020 and that she has never lost her UK habitual residence. Alternatively, if A has become habitually resident in Spain, G invites me to find that A objects to returning to Spain and submits that I should not exercise my discretion to make a return order.
19. There was virtually no dispute between counsel, to whom I express my thanks, as to the legal principles which I must apply. But there were some significant disputes about the facts and further disputes about the inferences I should draw from the facts. The

Father's counsel, Mr Green, in his Position Statement, helpfully set out the main facts that he invited me to find. These were:

- (i) The Father and A have and have always had a close and positive relationship;
- (ii) A also has a very close and warm relationship with D;
- (iii) The Father and the Mother had a positive and constructive co-parenting relationship, which included D;
- (iv) G has dishonestly minimised and devalued that co-parenting relationship, seeking to characterise the Father as 'unreliable' and 'an absent Father';
- (v) The Father and the Mother agreed that, after her death, A should live with him and D;
- (vi) G and A had a clear understanding of the agreed plan for relocation and were supportive of the move;
- (vii) G has been dishonest about the extent of her knowledge about and support of the planned relocation.

I have already indicated that I accept points (i) to (iii) which appear to me to amply supported by the evidence.

20. G's written evidence about where A should live after her Mother's death was as follows:

"Unfortunately, C did not write a will. Everything happened so fast during her last few months. I know she intended to confirm arrangements for A's care but ran out of time in the end. In various discussions, [The Mother] expressed to me her wish for A to remain in my care in the UK"

21. The Father's evidence is completely at odds with that evidence. He says that he and the Mother discussed A's future in detail and agreed that she should go to live with the Father after her death. There is ample evidence that the Father's evidence is more reliable on this central point, namely that there was a clear and settled agreement between the Father and the Mother that A should live with the Father in Spain after the Mother's death. A helpful CAFCASS report was prepared by Ms Cull-Fitzpatrick dated 14 September 2023 which confirmed A's understanding that a plan was in existence for her to move to Spain following her Mother's death. The report records:

"I asked A if it had been agreed that she would be moving to Spain. She confirmed that it had been agreed but now she doesn't feel ready to go"

22. That evidence is supported by the evidence of the Child Protection Officer at A's school which said:

"During the last academic year, the school were notified that A would be moving to Spain, to live with her Father. [The Child Protection Officer] stated that initially A seemed open to the idea of moving to Spain but as time passed and as it was coming closer to the end of the academic year, A had more reservations. A expressed worries that she would not be able to see her maternal family regularly"

23. However perhaps the strongest evidence to explain how and why the Mother reached an agreement with the Father that A should live in Spain after her death comes from the Mother herself. In May 2022, when the Mother was in hospital at a time when the Father and D were in Spain. The Mother recorded a short video on her mobile phone to set out her views and sent this video to the Father. It is a remarkable 3-minute video because it shows the Mother carefully, softly and lovingly explaining the family dynamics and why she wants A to be brought up by her Father after her death. The English translation of her words is as follows:

“Well, while I wait here for them to collect me, I am telling you that I also have my little heart and I am very affectionate, in my own way, obviously and the only thing is that I have to really trust a person. I don't know, our relationship is like this, like....surprising, isn't it? It's wonderful because in such a short time we have established ties but I have to recognise that this has been because you (plural) have insisted, because you (plural) have not left me on my own, you (plural) have not let me crumble at any time and that, darn it, believe me, no matter how cold or no matter how, you know, I don't know, you are, you have it in here (speaker is pointing to her heart) and, come on, it is the real truth, because it is not a question of moments but life has put us in this path and it has delivered it to us like this and we have faced it in this wonderful way and I am really happy to be able to count on you (plural), on your energy because you (plural) always transmit it to me and that for me is amazing and believe me, even if sometimes I may say "sugar, everyone is a pain" but no, it is really useful for me. Today I spoke with a doctor about those feelings I had but obviously, right now I cannot see a future because I need and want to live this present and live it to the most and do as much as I can because you never know, we don't know and I don't know anything. Every time I speak to medical doctors, the hope is less and less, but I don't feel like that, you know? I feel that if I fight with all my strength and pray to God with all my heart, with all the hope I have in him to allow to live long enough to do all the wonderful things I wish to do, then my life will be prolonged and if not... One day we asked: "If we leave at this time, if we leave in peace", and I think that after all I have achieved and after feeling that love and that affection, I think that I would leave really in peace because I know A is going to be in amazing hands. Well, mum still doesn't trust B very much, to be honest, because she thinks he is a bit crazy, that he has changed a lot but obviously mum is saying all of that based on her lack of knowledge and she is saying that based on a different point of view. She has always believed that A must be brought by me, I mean, by her Mother because obviously they, your Mother and mine had to experience different things, then she thinks like that but I am really sure that A, apart from already being a great woman, she is going to continue being that with your guidance, that's is really clear”

24. I have set out that text in full because it seems to me it tells me a great deal about the Mother's insight into how her family interacted. It makes it quite clear that the Mother was aware that G did not trust the Father and yet, in contrast to her Mother's assessment of the Father, the Mother had complete faith in the Father. The reference to A being in “*amazing hands*” is plainly a reference to A living with her Father in future. I draw from this evidence that the Mother trusted the Father and wanted A to

live with him after her death and also that she understood that the Mother disagreed with that plan and wanted A to stay with her, but the Mother was confident that living with the Father was the best thing for A.

25. I have had heard the Father and G give live evidence. The Father was an impressive and careful witness. He was content to concede matters that were not to his advantage and struck me as honest and I am sure he is doing his best to assist the court. In contrast, I have to say that G was a much less impressive witness. She seemed to go out of her way to try to say negative things about the Father although there was precious little, if any, supporting evidence to back up her concerns about the Father's conduct. There were many times when she was asked a question and failed to answer it, instead making a statement in response which did not directly engage with the question. Even giving full consideration for the fact that she was giving her evidence through translation and that she has recently gone through the death of her daughter, I did not get the impression that she was a witness on whom I could rely unless her evidence was backed up by other material.
26. An example is that G accused the Father of putting the Mother under pressure to make videos at a time when she was vulnerable so that these could later be used in evidence. I have watched the videos and from the Mother's tone in the videos, it seems to me that this is plainly wrong. I accept the Father's evidence that he was not even in the UK when that video I have set out above was made. G also criticised the Father for discussing the arrangements for A with the Mother for the period after the Mother died and she claimed that this discussion made the Mother's illness worse. I do not accept that criticism. On the contrary it seems to me far more likely that G was refusing to accept that her daughter was dying and thus did not want to hear any discussion about what would happen after the Mother's death as this discussion upset her. Whilst I can understand G's reaction in a tragically difficult situation, it seems to me that the evidence shows the Mother and the Father were both sensitively and honestly facing up to the inevitability of the Mother's death and were acting in an entirely responsible way in discussing the arrangements for their child after the Mother had died. I am confident that the allegation that this discussion aggravated the Mother's illness is no more than a manifestation of G's entirely understandable difficulties in confronting the fact her daughter had a terminal illness and her hostility to the Father.
27. Having heard the evidence, I am confident that the Father's evidence is correct and that the Mother and the Father developed a clear and settled plan that A should move to live with the Father after the A's death. I therefore accept the fifth point set out above.
28. There is limited evidence that G sought to characterise the Father as absent or unreliable parent but plenty of evidence of her underlying hostility to the Father. An example is that, in closing, Ms Gasparro for G sought to criticise the Father for going to sea during this period as opposed to asking for compassionate leave and being available to support his daughter. The problem with that submission is that the suggestion that the Father should have sought compassionate leave was not explored

in evidence and thus I have no idea whether it would have been practical or not. It is clear from his evidence that the Father very much regretted that this mission occurred so soon after the Mother's death, but he was not challenged on the fact that he had not had any real choice but to fulfil his naval duties and thus, in effect, was only able to speak to his daughter on the phone during the period when he was at sea. That meant that the practical arrangements for A to move to Spain were largely left to D to organise. I therefore do not accept G's criticism of the Father in failing to be in London for his daughter following the death of her Mother. However, I do accept that the burden of dealing with a grief-stricken child fell mainly on G who was, of course, also having to deal with her own grief at the death of her daughter.

29. Once the Mother had died, the evidence shows that the Father and D worked to put the plan into effect to move A to live with the Father and D in City C. It was put to the Father in cross-examination that this was a major move for A because she was moving to a house she had never visited in a city where she had no friends. However, on closer examination this did not prove to be wholly correct. The Father explained, and I accept, that A spent each summer with him and D, and that she had developed a friendship group in City C and had members of her paternal extended family in the city. She was, of course, fluent in Spanish and had lived in Spain for the first 10 years of her life. Whilst I accept that her friendship group in City C was not as extensive or solid as the friends she developed in London, it is not correct that she was moving to an entirely new city or a new environment. The Father also explained that he needed to take considerable efforts to persuade A that she should return to London at the end of each holiday she spent in City C. I accept that, whilst A may not be a child who welcomes change, this is strong evidence that A felt at home living with the Father and D.
30. G complained that, whilst she was aware that, after the Mother's death, the Father was making plans for A to move to City C, she was not involved in those arrangements and, for example, did not know anything about the arrangements that D was making to arrange a school for A once she arrived in Spain. On the first day of the trial I gave leave to the Father to admit translations of text messages between him, D and G into evidence. Far from showing that G was not involved in these plans, the text messages show that G was being asked to provide the family book and other details in connection with a school application. This is another occasion on which G's evidence was not supported by the contemporaneous material.
31. A flew to Spain on her own on 8 July 2023, having been taken to the airport by her grandmother. There is a considerable dispute between the parties as to the nature of A's stay in Spain between 8 and 13 July 2023. G's case is that this was a short trip to Spain without any particular significance, just as A had taken many previous trips to Spain. In contrast, the Father's case is that this was A moving her base from London to City C on a permanent basis and that she only left Spain a few days later for the specific purpose of going on holiday to the USA, and that she was expected to return to City C once that holiday was over. There is a wealth of evidence in this case, some of which I have referred to above, which shows that the Father's case on the facts is

correct. This was, in my judgment, the key move for A which resulted in her primary home moving from London to City C.

32. For all the reasons set out above, I accept that this move to Spain on 8 July was the culmination of a long-held plan that A would move her home from London to Spain after her Mother had died. She did not move earlier because of her Father's work commitments and the need for A to substantially finish the school year in London and then move before starting the new school year in City C.
33. D arranged for A to be registered at a local school in City F and I accept that that registration was completed in early July 2023. Once A arrived in Spain in early July, the Father took her to see her proposed new school and the school registration process was completed, albeit they could only look at it from the outside because the school was closed for the summer holidays. On 11 July 2023 the Father also completed the Municipal Register of Inhabitants to show that A was now living with his and D at his house.
34. G accepted that the Father had asked for all of A's belongings to come to Spain, either accompanying him when he flew back on 3 July or with A when she flew on 8 July. He frankly said in evidence that if there were any further of A's belongings left in London, he would have expected A to bring them when she came on 26 August, having arrived back from the USA the day before. G made much of the fact that A did not appear to have taken time to personalise her bedroom in the City C house during the 5 days that she was there in July. Whilst that appears to be correct from the photographs, there is also no evidence that A left any of her belongings in London or that she had, for example, retained personal items in a bedroom at G's house in London.
35. However, G ran an alternative case which was, in effect, that even if the move on 8 July was proposed to be a permanent relocation from London to City C, A's place of habitual residence did not change because A consistently opposed to the move and never agreed to change her place of residence. She submits that a 12-year-old child cannot change her place of habitual residence quickly if she is actively opposing the relocation and that, given A was physically in Spain for only a week before going on holiday, A's place of habitual residence never changed from London. In order to respond to this submission it is necessary to make factual findings about the state of A's mind at the time she moved to Spain.

A's own state of mind about her move.

36. The Father was candid in saying that there came a time when A started to express concerns about the plan to move back to Spain. At this point, it seems to me to be important to note the evidence which is lacking in this case, namely an explanation from G or any other members of her family about discussions within the family and an explanation as to what led A to having concerns about the proposed move. That evidence could only have come from G's side but the evidence on this point is thin.
37. In the absence of direct evidence, it seems to me that I have to draw inferences from the evidence that I have. A was living in a house with her grandmother and two

aunts, albeit her relationship with the aunts may well have been nearer to a relationship with older sisters. It is reasonably clear from the Mother's revealing video message and the attitudes that G demonstrated when she gave evidence that G did not support the plan for A to move back to live with her Father. There is limited evidence from A herself but G said as follows:

“A trusts me and feels able to confide in me. A has expressed to me on multiple occasions that she wishes to continue living with me and our family in the UK. At this time, whilst she is still grieving the death of her Mother it is vital that her wishes and feelings are heard. It has been difficult for A to navigate such a significant loss. She requires stability, security and emotional support now more than ever”

38. Having heard G give evidence and having regard to the totality of the evidence in this case, I do not accept that evidence. G's account presents A as if she were able to form her own views entirely separately from the opinions of those around her. That does not seem to me to be realistic given that A was a hugely vulnerable 12-year-old girl. Drawing the threads of the evidence together, whilst I can understand that A may have had her own concerns about moving away from London, leaving the city where she had lived for the last 3 years and coming under direct supervision from her Father on a continuous basis for the first time, in my judgment a greater factor was that A was influenced by the fact that she was living in a house where she was aware that G did not approve of her Father, disapproved of the plan for her to move back to Spain and where G considered it would be far better if A were to continue to live and be cared for by Gin London. A was an emotionally vulnerable girl who had recently lost her Mother and had and continues to have a deep bond with her grandmother. In those circumstances it seems to me to be inevitable that A would have picked up on G's disapproval of her Father becoming A's primary carer and G's disapproval of the plan for A to move to Spain. Given the bonds of love and respect A feels for her grandmother, as she was living in that atmosphere, she would be bound to start asking herself if moving to Spain was what she really wanted. The fact that A started out supporting the idea of going to live with her Father in Spain but then began to question whether this is what she wanted confirmed by the CAFCASS report.

“I asked A how she would feel if the Judge decided that she must travel to Spain. A said that if she moves to Spain, she doesn't know the area and she doesn't have any family nearby. A said that she is worried that she will not be able to see her maternal family because her Father and maternal grandmother don't like each other, they only communicate with one another because they need to”

39. The Father has been consistent in accepting that A's relationship with her maternal family is important and there is no evidence that he has ever threatened to prevent her having contact with G's and other members of her family. Accordingly, it seems to me that any suggestion that a move to Spain would prevent A seeing her maternal family regularly is far more likely to have come from G than from the Father.
40. When speaking to the CAFCASS officer A said:

“A said that when she was going to live in Spain, they told her that she would be fine, and that it will just take her time for her to adjust. When she told them she wanted to remain in England, they said that they would need to speak to her Father”

41. Whilst I do not doubt that is A’s perspective in September 2023, looking at the evidence as a whole I conclude that this perspective may not tell the whole story. It does not seem necessary for me to go as far as saying that G deliberately set out to undermine the plan agreed by the Mother and the Father for A to move to Spain, but the evidence clearly shows that G deeply disapproved of A moving to Spain and I cannot believe that she wholly hid her disapproval or that she actively encouraged A to work to make the plan a success. I thus consider that, instead of providing support to a vulnerable girl who was dealing with the death of her Mother and supporting her to move back to her home country, G’s disapproval of this plan is likely to have created a climate in which A was encouraged to doubt whether this would be best for her.
42. The Father came to London on 28 June and had a series of conversations with A about the plan to move to Spain. He accepts that A had reservations, but his evidence is that he had long discussions with her and *“clarified all her doubts”*. It was put to the Father that, although A had told her Father that she was happy to come to live in Spain and supported the plan, in fact she was not telling him the complete truth and that she only said this because she did not want to have a confrontation with her Father which might have led to him not allowing her to go to the USA on holiday. The suggestion that A was not telling the truth when she said she supported going to Spain also comes from the CAFCASS report which was subsequently produced in this case which reported A as saying:

“Whilst exploring A’s understanding of what the plan had been in respect to her residency, she told me that she did not want to live with her Father anymore. She feels that he is forcing her to live with him. A said that no one is forcing her to stay in England. She has told her Father how she feels but she does not believe that he is listening to her. She acknowledges that initially she did tell her Father that she wanted to live in Spain, but she did this because she was worried that if she didn’t tell him this, then he wouldn’t allow her to go to America during the summer holidays because he had her passport. Upon returning from American, she told him that she wants to remain in England”

43. The Father rejected the suggestion that A was misleading him in June 2023. As I understand his evidence, he primarily relies on three points. First, he says that he knows his daughter and would have known if she was not being honest with him. He says that he believes she was reassured after these conversations and was committed to the plan to live in Spain. Secondly, he has produced a video which shows that A was overjoyed at arriving in Spain at the airport on 8 July and he says that and her approach during the days she was in Spain is completely inconsistent with her having hidden hostility to a return to Spain. Thirdly, he says that he did not have her passport in any event. She had her own passport because she travelled on it when she came to Spain on 8 July 2023 and if she had not wanted to come to Spain at that point, she would not have come.

44. It does not seem to me that there is weight in the third point but there is weight in the first and second points. Having heard live evidence in this case it seems to me that the truth about A's state of mind in July 2023 is much more likely to be that her mind was wavering about where she wanted to live but that, as a 12-year-old child, she accepted that she was not in a position to make decisions for herself. I accept that A said to her Father that she supported a move to Spain in late June and early July 2023 when she was in Spain and I accept the Father's evidence that this reflected her state of mind at that point, because he had largely assuaged her concerns. However, A was a vulnerable child who had divided loyalties between her Father and her grandmother. She had been living in a household since February 2023 where it must have been clear to her that there was a deep undercurrent of disapproval of the plan that she should move to Spain. It seems far more likely to me that her divided loyalties meant that she believed different things at different times. I think it is more likely that she did not want to disappoint or upset either her Father or her grandmother and thus said things to them which partially reflected her own views at that point but may also have partly reflected what she felt the adult wanted to hear. Such an approach would be entirely understandable for a vulnerable child who was torn between competing adults.
45. It is, to say the least, unfortunate that a vulnerable 12-year-old child was placed in this position by the conflict between the adults who cared for her. The evidence is clear that her Mother and Father had agreed a plan for A to return to live in Spain with the Father and I have no doubt that, whatever strong views may have been held by other members of the family, it would have been in A's best interests for everyone to have supported A, and to have reassured her in the face of any concerns that she may have had about the planned move to Spain. Looking at the evidence as a whole, I am confident that this did not happen and that A's concerns about the move arose mainly out of the atmosphere of opposition to the plan in which she was living in G's house.
46. I accept that, once she had spent time with her aunts in the USA, she came to a decision that she wanted to stay in England. I know nothing of the conversations that took place on the holiday in the United States, what was said between the aunts and G and when G first sought the legal advice which resulted in the Family Court application of 22 August 2023. However, I consider that the evidence that A has given to the CAFCASS officer has to be seen through the prism of her later decision.
47. It seems to me that the balance of the evidence is against me reaching any conclusion that A came to Spain in July 2023 with a firm plan in her mind that she would not return to Spain after the USA holiday. It seems to me far more likely that, when she moved to Spain on 8 July 2023, she realised that she was not the ultimate decision maker about where she would live and, maybe with some measure of trepidation because of the new environment in which she would be living, accepted that City C was where she would be living going forward. That decision had been taken by her Father and Mother and it seems to me much more likely that, in July 2023, she had accepted that decision and expected to start school in Spain in September after her return from her USA holiday. Looking at the evidence as a whole, I do not accept that this vulnerable 12-year-old girl was being duplicitous in pretending she was agreeing with

this plan but was hiding her real opposition to living in Spain or that she was hiding a determination that she would stay in London as soon as she was able to do so.

48. It also follows that I cannot go as far as the Father wishes to me to go in labelling the G's actions as being dishonest. I accept that she genuinely believed that the Father was 'unreliable' and there were times when she, wrongly in my view, she criticised the Father and labelled him 'an absent Father'. I reject her evidence that the Mother either had not reached a decision about where A should live or has suggested that the Mother expressed a preference for A staying in London. However, it seems to me that all of G's opinions in this matter are driven by her belief as to what would be in A's best interests and that, rather than deliberate dishonesty, she was trying to interpret the words and actions of others to fit with her own views and that the firmness of her convictions about what would be best for A.
49. In summary therefore I conclude that A moved to Spain on 8 July 2023 under a plan where this change of country was intended to be a permanent move for A and that, although she was only physically in Spain for less than a week before going on holiday, both she and her Father expected her to return to Spain and to go to school in Spain after her holiday in the USA. In my judgment, all that changed in A's mind as a result of what happened on her USA holiday. I know nothing of the conversations that took place with her aunts and how she was persuaded to change her mind and to transfer her loyalties from her Father to her grandmother, or what caused her to take the position that she wanted to stay living in London. I do however find that this was a change of heart and that, when she was in Spain in early July, she was not actively opposing the plan to move to Spain and expected to return to Spain after her holiday and to start school in City C.

The recorded telephone call.

50. I have considerable reservations about the evidential value of the recorded telephone call, mainly because I find it difficult to believe that this particular 12-year-old child could have made her own independent decision surreptitiously to record this call, without telling her Father that it was being recorded. By that stage legal proceedings had been commenced in the court in London and it may have occurred to adults that a recording of this call might be useful evidence, but it seems highly unlikely that that would occur to a child. It is significant that A did not tell her Father that she was recording the call. The failure to tell the Father that the call was being recorded seems to me to imply a degree of preparation and sophistication which is hard to attribute to a 12-year-old child alone. G said in her evidence that A was recording conversations from March onwards. However no other recordings have been disclosed and, if there were other recordings, it seems strange they have not been disclosed. That part of G's evidence is not supported by other evidence, and it seems to me to be highly unlikely to be correct.
51. However, the recording of this call is linked to another of G's complaints, namely that the Father was having "secret" telephone calls with his daughter by asking his daughter to put headphones on so that G was unable to listen in on the calls. This complaint seems to me to reveal something about G's attitude. It seems to me that it

suggests that, following the death of the Mother, G saw herself as A's primary carer and wanted to exert a measure of control over the Father's influence on A. I can entirely understand why the Father did not want to have G listening in and commenting on every aspect of his calls with his daughter, particularly when G was so opposed to the plan for A to go to live with the Father. The fact that G complained that the Father was having "secret" calls with his daughter suggests to me that G may well have been behind the plan to record the calls and not to tell the Father that the calls were being recorded. However, I do not need to make any final findings on that point.

52. Overall, save on the issue of child objections, I consider that the recording provides very little if any assistance in resolving this case. In particular, it does not provide any real evidence as to A's state of mind 6 weeks earlier when I am satisfied that her head was in a very different place. All it shows is that, by 26 August and after having spent over 4 weeks exclusively in the company of her aunts, A was expressing a clear desire to stay in London as opposed to returning to Spain.

The law on habitual residence.

53. I was referred to the helpful observations of Hayden J in *Re B (A Minor: Habitual Residence)* [2016] EWHC 2174 (Fam) [2016] 4 WLR 156. The Judge said at paragraph 17 that the following approach should be taken to determining the place of a child's habitual residence:

"i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).

ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).

*iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (para 42) applying *Mercredi v Chaffe* at para 46).*

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (Re KL, Re R and Re B);

vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);

viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B – see in particular the guidance at para 46);

*ix) It is the **stability** of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi);*

*x) The relevant question is whether a child has achieved **some degree** of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (Re R) (emphasis added);*

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).

xiii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra)"

54. The references to Brussels IIa are no longer relevant but it was not argued that the test for habitual residence under the Convention has been changed following the UK's

departure from the EU, and thus the observations are still indirectly relevant. Hayden J also made the following observations at paragraph 18:

“If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven. I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties. It is all too common for the Court to have to drill deep for information about the child's life and routine. This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements. I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident. I must also say that this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties”

55. It is common ground that A was habitually resident in Spain before she moved to England in the summer of 2020 and that she became habitually resident in the UK following her move. The findings about the circumstances in which A moved to Spain I have made above mean that I accept that her stay in Spain from 8 July was intended to be the start of a permanent change in her home, and thus, if things had worked out as her one surviving parent had intended, there could have been no dispute that A had become habitually resident in Spain. It seems to me that the important question is whether A had sufficient stability in her new life in City C that she had either lost her habitual residence in England and whether she had become habitually resident in Spain at the date when she left Spain to go on holiday to the United States on 13 July 2023. If she had either lost her habitual residence in England, whether or not she had become habitually resident in Spain by that date, Ms Gasparro on behalf of G accepts that, if the Court were to find that A became habitually resident in Spain in July 2023, then there is jurisdiction for this court to make a return order because, on that assumed basis, A has been wrongfully retained in England after 26 August 2023.
56. There is some guidance in the caselaw on how quickly a person will become habitually resident in a new country after moving there for what is intended to be a permanent move. In *In re J* [1990] 2 AC 562, 578–579, Lord Brandon said that “A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead”. Lord Brandon then referred to the need for a person to spend “an appreciable period of time” in a country before a new habitual residence was acquired. That approach would mean that, where a child was permanently relocating to another country to join a parent who was already living there, for the first days after arrival the

parent would be habitually resident in the country, but the child would have lost their old place of habitual residence but had not yet acquired a new habitual residence.

57. In *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1 Baroness Hale, speaking for 4 of the 5 Judges said at paragraph 45 distanced herself from that approach that an appreciable time was needed in all cases before a new place of habitual residence was acquired. She said:

“There has been a tendency to construe this fourth statement as if it were a statute, and debate the meaning of “appreciable time”. I would not accept that it is impossible to become habitually resident in a single day. It will all depend on the circumstances. But I would accept that one may cease to be habitually resident in one country without having yet become habitually resident in another”

58. In the same case, Lord Hughes also distanced himself from the requirement that a child always has to spend an appreciable amount of time in a new country before acquiring habitual residence. He said at paragraph 74:

“A person arriving in a foreign country hoping to make his permanent home there will no doubt in many cases not be regarded as habitually resident there until he has established himself, with home, occupation, permission to reside and so on. But if he has prearranged all of this and is joining his spouse and family, it might well be that his habitual residence would be established more or less immediately on arrival”

59. Having made factual findings that this move was intended to be a permanent move for A, it seems to me that it inevitably follows that A must have lost her habitual residence in the UK on 8 July 2023 when she took a flight to Spain. That finding, of itself, is sufficient to provide that the Convention is engaged because she is being retained in the UK by G who does not have parental responsibilities defiance of the wishes of the Father in a place where she is not habitually resident.

60. However, as Hayden J said *“It will be highly unusual for a child to have no habitual residence”*. It seems to me that, almost immediately upon her arrival in Spain, A acquired *“some degree of integration by the child in a social and family environment”*. She was moving to live in her Father’s house, which she knew well. She was becoming part of the family with her Father and D and would be picking up with the circle of friends she had made during her previous visits. She was registered as a resident in City C and was registered to attend school there. As this was a planned relation, in my judgment Lord Hughes’ observations, her new place of habitual residence would have been acquired *“more or less immediately on arrival”* applies here. Thus all the external indicators confirm that, as a matter of fact, A acquired a new place of habitual residence in City F by 13 July 2023.

61. Ms Gasparro's primary case was that, on the facts, this was not a relocation. I have decided against G on the facts. The evidence shows that this was the start of a permanent relocation. However, as a fallback position, Ms Gasparro has referred me to *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 concerning the relevance of A's state of mind during her short period in Spain in July 2023. She has, in effect, invited me to treat the statements made by A to the Cafcass officer as being indicative of her real state of mind in July 2023 and thus submits that even if external indicators suggested A had become habitually resident, her state of mind showed that this was not the case.
62. In *re LC* Lord Wilson emphasised at paragraph 37 that, whilst the parent may well be the effective decision maker as to where a child lives, a decision by a parent cannot automatically change the place of habitual residence of the child although it will be "*highly unusual for that child not to acquire habitual residence*" in the place where the parent is making the child live.
63. As this is a child centred inquiry, I accept that I have to look at A's state of mind during the period when she was resident in Spain. As I have indicated above, I do not accept that A was being duplicitous in pretending to be happy arriving in Spain (as the arrival video plainly shows) or that she had, at that stage, clearly decided not to come back to Spain after her holiday in the United States. One of the reasons this inquiry is difficult is the reason identified by Lord Wilson in *Re LC* at paragraph 42(ii) namely:
- "T's assertions were made after she had left Spain and may not deserve the weight which might attach, for example, to any emails or letters which she might have sent, or to any statements which she might have made on social networking sites, while she was there"*
64. Here the evidence from A about what she thought in early July 2023 comes from her statements in late August and September, and is thus sometime after the relevant events. I have found that, in as much as it is possible to discern A's state of mind during her time in Spain in July 2023, she had accepted that this was her new home and that she would be going to school in City C in September. I therefore do not consider that A's state of mind during that week (as opposed to how she later described her state of mind) meant there was a conflict between her thoughts and her actions. In those circumstances I do not consider that her state of mind in July 2023 meant that she did not quickly acquire her new place of habitual residence, or prevented her from doing so within a very short period of time.
65. A had a group of friends in City C and was moving to live with her Father and D, to whom she was devoted. She was recommencing life in a country where she had spent the first 10 years of her life, where she had extended family and where she had spent extended periods of time in the holidays when she was living in England. A is and has always been a Spanish national, speaks fluent Spanish and I have no doubt is entirely at home in Spanish culture. Given those facts, in my judgment, this is a paradigm example of a case where Lord Wilson's see-saw will very quickly operate to change a child's place of habitual residence. Ultimately, as both Counsel accepted, habitual

residence is a question of fact and I find as a fact that, by 13 July 2023 when A left to travel to the United States via London, she had (a) lost her habitual residence in England and (b) had become habitually resident in Spain.

66. I have therefore concluded that this court does have jurisdiction under the Convention and the 1985 Act.

67. Article 12 of the Convention provides:

“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”

68. G’s Counsel accepted that, if A had become habitually resident in Spain, A has been wrongfully retained in England following her holiday to the United States in August 2023. I am therefore obliged to make a return order unless one of the exceptions in the Convention applies. The only exception relied upon by G is under article 13, the material part of which is as follows:

“The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”

69. I have set out the material parts of the Cafcass report above. Ms Cull-Fitzpatrick reported as follows:

“Whilst exploring A’s understanding of what the plan had been in respect to her residency, she told me that she did not want to live with her Father anymore. She feels that he is forcing her to live with him. A said that no one is forcing her to stay in England. She has told her Father how she feels but she does not believe that he is listening to her”

70. Mr Green, on behalf of the Father submits that this is evidence of A expressing a preference to stay in England but is insufficient to amount to objections. I do not accept that submission because, whilst I have to look primarily at the Cafcass report, I have to set the observations in the Cafcass report in the context of all of the evidence in this case. The phone recording shows that, by 26 August, A had expressed objections to returning to Spain because she wanted to stay living in London. She was not just objecting to going to live with her Father but objecting to living in Spain because she said she wanted to remain living in London. I therefore consider that G has established that A objects to returning to Spain.

71. That means that I have a discretion to exercise as to whether to make a return order or not. I have not found this at all easy and have agonised about whether I should

require A to return to Spain given that she is presently expressing a firm view that she wants to remain living in London. However, having looked at the case as a whole, I have come to the firm conclusion that I should make a return order for the following reasons.

72. First, it is relevant that her Mother and Father both came to a clear and settled agreement that she should return to live with the Father in Spain. That means that both adults with parental responsibility for A, and who I accept knew her best of all and had her best interests at the forefront of their minds, came to the clear conclusion that it would be better for A to return to live with her Father in Spain. I consider that I should give very considerable weight to the joint, informed decision of the parents as to where A should live after her Mother's death.
73. Secondly, I accept that A has found herself in a situation where she has divided loyalties between her Father and her grandmother. Although I have accepted that she presently objects to returning to Spain, I note from the Cafcass report that those objections do not appear to me to be deep rooted and she initially was in favour of the move to Spain. Her objections appear to be primarily based on a concern that a move to Spain may lead to her not regularly seeing her grandmother. I am confident that that concern can be met by undertakings being offered by the Father, as he has offered. It thus seems to me that the primary concern that A has expressed about returning to Spain can be met by appropriate undertakings and therefore need not stand in the way of her return.
74. Thirdly, I note that A's main objective is that there should be a "fair" outcome. I read that observation as meaning that she is mainly concerned that the outcome should be fair to her Father and to G as opposed to being fair for her. In my judgment, it is most unfortunate that a vulnerable child in A's position has been placed in a situation where she has been faced with divided loyalties. I have to conclude that primary responsibility for the turmoil that A finds herself in lies with G's determination that A should not return to live with her Father, as her Father and Mother had agreed, but should stay living with her in London. Even if, which I accept, G came to that view because she feels that this outcome would be best for A, G is not A's parent and her views are, in my judgment, not based on a fair or informed assessment of the benefits to A of living with her Father and D. It therefore seems to me that, in these unfortunate circumstances which have arisen mainly due to the misperceptions of G, the fairest outcome for A and one which most meets her best interests would be for her to live primarily with her Father and D and to spend time during the holidays with G and her relatives based in the UK.
75. The evidence from the Father that he needed to persuade A to return to London each summer after she had spent time in Spain shows that A is able to re-adapt relatively easily to living in Spain and enjoys doing so. I am therefore confident that, whatever she feels at the moment, it will not be long before she is fully involved in life in City C and in her new school and is committed to her life with her Father and D. However, I hope that arrangements can be agreed which ensure that she can maintain strong contacts with G and her family, with whom she has lived for the last 3 years, and that

the decision I have made in these proceedings will be accepted by all parties and they will focus hereafter in making the new arrangements work for A.