IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *G.A.G.R. v. T.D.W.,*
2013 BCSC 586

Date: 20130405
Docket: E10400
Registry: Campbell River

Between:

G.A.G.R.

Petitioner

And

T.D.W.

Respondent

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Petitioner: Paul Armstrong

Counsel for the Respondent: Harold A. Henning

Place and Date of Hearing: Campbell River, B.C.
January 21 and 22, 2013

Place and Date of Judgment: Campbell River, B.C.
April 5, 2013

[1] The petitioner, G.A.G.R., applies pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 U.N.T.S. 22514 (the "*Convention*") for the return of his 11 year old daughter, E., to El Salvador. E.'s mother, T.D.W. opposes the application. She says that E. would face a grave risk of harm if she was returned to El Salvador. Alternatively, T.D.W. says that E. wants to stay in British Columbia and her views should be taken into account.

Background

[2] G.A.G.R. was born and raised in El Salvador. In 1999 or 2000, when he was 24 years old, he came to Canada and became romantically involved with T.D.W. At the time, she was 15 or 16 years old. E. was born on June 1, 2001, in Vancouver. G.A.G.R. applied for refugee status in Canada but was turned down. T.D.W. alleges that when G.A.G.R. was in British Columbia he was involved in selling illegal drugs. He was ordered to leave Canada in September 2001, a few

months after E.'s birth. He was detained in the United States for a few months but returned to El Salvador in early 2002 and has lived there ever since.

[3] E. stayed with her mother in Canada but in 2002, T.D.W. went to El Salvador. She briefly returned to Canada on one occasion without E. but went back to El Salvador and married G.A.G.R. in August 2002. In October 2002, she applied for residency status in El Salvador but was turned down because of a Canadian criminal conviction for robbery. She eventually moved back to Vancouver in 2003 but left E., who has dual citizenship, in El Salvador to live with her father. T.D.W. has not returned to El Salvador.

[4] For a number of years, T.D.W. had limited contact with E. However, as time went by, the frequency of telephone contact increased. In 2010, the parties tried to facilitate a visit to Canada for E. The intent was to have G.A.G.R. accompany her to Vancouver. He was unable to obtain a visa to enter Canada and so a chaperoned visit never took place. The parties persisted with attempts to arrange a visit for E. Eventually, in November 2011, G.A.G.R. agreed that E. could come to Canada on her own to visit her mother. T.D.W. purchased the airline ticket for her. She left El Salvador on November 2, 2011, and was scheduled to return on January 18, 2012.

[5] When E. arrived in British Columbia, she stayed with T.D.W., her new partner and their two young daughters in Campbell River. During the course of the visit the telephone conversations between T.D.W. and G.A.G.R. became highly acrimonious. T.D.W. says she was threatened by both G.A.G.R. and his brother Roberto who lives in British Columbia. On January 12, 2012, she applied *ex parte* in the British Columbia Provincial Court for a restraining order to prevent G.A.G.R. and his brother from having any contact with her family and E.

[6] T.D.W. says that in the first few weeks of the visit, E. told her about emotional, physical and one instance of sexual abuse she suffered in El Salvador. Eventually, T.D.W. decided she should keep E. in British Columbia as that would be in her best interests. E. did not return to El Salvador as scheduled on January 18th. T.D.W. continued the proceedings in Provincial Court and on May 22, 2012, obtained an *ex parte* order granting her sole interim custody and guardianship.

[7] G.A.G.R. was served with the materials filed in the Provincial Court as well as the orders granted by that court. On May 29, 2012, he filed an Article 16 application under the *Convention* seeking E.'s return to El Salvador. The petition was filed on July 3, 2012. The proceeding was case managed in an effort to expedite the hearing. At the first case management conference, counsel for T.D.W. indicated that E. wanted to stay in British Columbia and that her views should be placed before the court. G.A.G.R. does not accept that E. wants to remain in British Columbia and believes that E. has been alienated from him. G.A.G.R.'s counsel agreed that it was appropriate to have a Views of the Child Report prepared so long as the report considered parental alienation. The parties agreed to have Dr. Larry Waterman prepare the report if funding could be obtained from Legal Services. Funding was obtained but the report was not completed

by September 26, 2012, the date set for the hearing and so it was adjourned to December 6, 2012. Unfortunately, Dr. Waterman's report was not delivered prior to that date and the hearing was again adjourned. His report was eventually released on December 10, 2012.

[8] As I will indicate in more detail later in these reasons, Dr. Waterman found that E. has a clear preference: she wants to stay with her mother in British Columbia. At the time of the interview with Dr. Waterman, E. was 11 ¼ years old. He found her level of cognitive functioning to be age appropriate and says she is exercising formal operational thought. He found nothing to suggest that parent-child alienation is a factor in her preference. He concluded that E. has a stronger emotional attachment with her mother than with her father and that she prefers her living arrangements in British Columbia.

The Hague *Convention*

[9] The *Convention* has the force of law in British Columbia pursuant to the provisions of s. 55 of the *Family Relations Act*, R.S.B.C. 1996, c. 128 (now s. 80 of the *Family Law Act*, S.B.C. 2011, c. 25). One of the primary objects of the *Convention*, as set out in Article 1, is to secure the prompt return of children wrongfully removed to or retained in a contracting state. The preamble of the *Convention* provides that the procedures in the *Convention* to ensure the prompt return of children are intended "to protect children internationally from the harmful effects of their wrongful removal or retention". In other words, the *Convention* is concerned not only with the interests of the individual child but also to see that the rights of access and custody under the law of a contracting state are respected in other states.

[10] Article 3 of the *Convention* provides that a removal or retention is wrongful if it is in breach of custody rights attributable to a person in the state where the child was habitually resident at the time of the removal or retention, so long as those rights were actually being exercised. Other provisions of the *Convention* which are relevant to the issues in this case include:

> Article 12
>
> 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.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
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> Article 13
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> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> (a) the person, institution or other body having the care of the person of the

child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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

Issues

[11] It is evident from my brief recital of the background facts that E. was habitually resident in El Salvador immediately before her visit to British Columbia. There is also no question G.A.G.R. was exercising rights of custody at the time of the visit. E. had lived with him and his extended family for more than eight years. Pursuant to the Family Code of El Salvador, the powers and duties granted to and imposed upon a father and mother of a minor child are defined as "parental authority", a concept which is similar to custody. Pursuant to the Family Code, the exercise of parental authority belongs to the father and mother together or to one of them in the absence of the other. G.A.G.R. had exercised parental authority and thus, rights of custody, for many years and was doing so when he agreed to permit E. to visit her mother. That agreement was based on the understanding she would return to El Salvador, her place of residence, on January 18, 2012. There is no suggestion G.A.G.R. agreed to any longer stay in British Columbia. He certainly never agreed to a change of her place of residence.

[12] In these circumstances I must conclude that the retention of E. in British Columbia was wrongful as defined by Article 3 of the *Convention*. The wrongful retention occurred on January 18, 2012, when T.D.W. did not return E. to El Salvador as agreed. G.A.G.R.'s Article 16 application for the return of E. was brought well within the one year period set out in Article 12. As a result, I am obliged to order the return of E. to El Salvador forthwith unless I conclude either:

- there is a grave risk E.'s return would expose her to physical or psychological harm or otherwise place her in an intolerable situation (Article 13(b)); or
- E. objects to being returned to El Salvador and it is appropriate to take her views into account given her age and degree of maturity.

[13] Accordingly, the issues for consideration are:

1. Has T.D.W. established that there is a grave risk E. would be exposed to physical or psychological harm or otherwise placed in an intolerable situation if she is returned to El Salvador?

2. Should I take account of E.'s views and, if so, should I refuse to order her return to

El Salvador?

[14] For the reasons that follow, I have concluded that T.D.W. has failed to establish that E. would be exposed to a grave risk of harm if she is returned to El Salvador. However, I have also concluded that given E.'s age and level of maturity, it is appropriate to take her views into account. I accept Dr. Waterman's report regarding E.'s views and find that she objects to being returned to El Salvador. In the circumstances of this case, I exercise my discretion to refuse to order E.'s return.

Issue 1. Has T.D.W. established that there is a grave risk E. would be exposed to physical or psychological harm or otherwise placed in an intolerable situation if she is returned to El Salvador?

Position of T.D.W.

[15] T.D.W. says there are two bodies of evidence to support her claim that E. would be exposed to physical or psychological harm if she is returned. First, there is the evidence regarding her relationship with G.A.G.R. She says he was abusive and controlling throughout the relationship. She reported an incident of abuse in October 2000 before E. was born, which caused the Director of Child Family and Community Services to obtain an order restricting G.A.G.R.'s access with E. When T.D.W. moved to El Salvador, she says that G.A.G.R. continued to be manipulative and physically abusive. She says she was locked in the house and not permitted to move about freely. She was not permitted to return to Canada with E. which is why she eventually left without her. She says the affidavits and letters from friends and family members substantiate her allegations.

[16] Second, she says E. has reported numerous incidents of physical and psychological abuse in El Salvador. E. describes frequent punishment by G.A.G.R. and his family. They allegedly pull her hair and hit her with belts, sandals and other objects. In addition, they emotionally abuse E. through yelling, swearing and demeaning her. She is also exposed to incidents of violence and conflict between other family members including G.A.G.R. and his girlfriend. In addition, T.D.W. says that E. reported an incident of sexual abuse by a thirteen year old boy when she was five years old.

[17] T.D.W. also says that there is sufficient evidence to support the inference that G.A.G.R. is involved in illegal activities, just as he was when he lived in Vancouver. Further, she says that El Salvador is a dangerous place and that this should be a factor in the application of Article 13(b).

[18] T.D.W. says that when all of the evidence is considered, she has met the test of establishing that E. faces a grave risk of harm if she is returned to El Salvador.

Position of G.A.G.R.

[19] G.A.G.R. says the evidence before the court falls far short of establishing any risk of harm

let alone a grave risk as that term has been interpreted in the case law. He says that T.D.W. is not a credible witness and so her evidence regarding allegations of physical and psychological abuse should not be accepted. He denies ever restricting her freedom of movement in El Salvador and says he did not abuse her physically. He also denies being involved in any criminal activities in El Salvador. He notes that T.D.W. willingly went to El Salvador and even returned to that country a second time. Most significantly, he says that she voluntarily left E. in El Salvador to be raised by him because he had greater family support. G.A.G.R. argues that T.D.W.'s suggestion she did not understand she was going through a marriage ceremony with him in August 2002 lacks all credibility.

[20] With regard to the allegations that E. has been abused, he says the report of Dr. Waterman clearly establishes that she has not been the victim of abuse which could cause physical or psychological harm. He says that the incidents described by E. to Dr. Waterman are nothing more than parental punishment which cannot be considered abuse when regarded from the proper cultural viewpoint. In El Salvador the kind of corporal punishment described is accepted and expected. He argues that the allegation of sexual abuse lacks sufficient particularity to even be considered.

Law on Article 13(b)

[21] The leading decision in Canada regarding the test to be applied in situations where a party relies on Article 13(b) remains *Thomson v. Thomson*, [1994] 3 S.C.R. 551. The Court concluded that the nature of the "grave risk of harm" must be informed by the concept of placement of the child in "an intolerable situation". Accordingly, to satisfy the test a party opposing the return of a child must show that the child would suffer harm to a degree that amounts to an intolerable situation. The Court quoted with approval the description of the proper test set out in *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.) at 372:

> . . . the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree . . . that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'.

[22] As a matter of common sense, a court can conclude that returning a child to a violent environment places that child in an inherently intolerable situation and exposes him or her to a serious risk of psychological and physical harm: *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (C.A.). However, the evidence to establish a risk of physical or psychological harm must be credible and meet a high threshold: *Pollastro*; and *K.J.G. v. K.J.B.*, [2000] A.J. No. 290 (Q.B.) at para. 92. In *Friedrich v. Freidrich*, 78 F. 3d 1060 (6th Cir. 1996), the leading American decision on Article 13(b), the court concluded a grave risk of harm could only arise in two situations:

> 1) Where the return of the child may put her in imminent danger prior to the resolution of the custody dispute, for instance, returning the child to a war zone, famine or disease; and

2) Where there is serious abuse or neglect or extraordinary emotional dependence where the court of the country of habitual residence may be incapable or unwilling to give the child adequate protection.

[23] In summary, before a court will apply the exception in Article 13(b), there must be credible evidence to establish that the child will be placed in an intolerable situation if returned to the country of habitual residence. It matters not how that risk might arise, and it is possible for a violent home environment to create such a risk. The evidence to establish a risk of physical or psychological harm must be credible and the risk must be weighty and substantial. Further, it must be the kind of risk against which the courts or government services of the country are unable or unwilling to protect the child. The threshold for reliance on Article 13(b) is, indeed, very high.

Analysis

[24] G.A.G.R. invites me to reject all of T.D.W.'s evidence regarding allegations of abuse on the basis that her evidence is not credible. I have concerns about portions of T.D.W.'s evidence. Her statement that she did not understand she was getting married is difficult to accept although her understanding of written Spanish was likely elementary. I also have serious concerns regarding the admissibility of the hearsay evidence of C.A.D. and C.L.S. However, I am not prepared to reject T.D.W.'s evidence. Indeed, the allegation that she was physically abused while pregnant is supported by the court records from 2000. The affidavits of other witnesses do provide some support for her statements. While I do not reject the allegations, given the decision I have arrived at, I need not examine the evidence regarding those allegations in great detail. This is because I have concluded that even if I accept all of the allegations of abuse of T.D.W., I cannot conclude that the return of E. to El Salvador would place her in an intolerable situation.

[25] T.D.W.'s evidence regarding her personal experience of abuse includes the following:

- On October 26, 2000, T.D.W. was repeatedly struck in the face by G.A.G.R. She reported this to a social worker. When E. was born, concern over G.A.G.R.'s treatment of T.D.W. caused the Director of Child, Family and Community Service to obtain a court order limiting G.A.G.R.'s access to E.

- T.D.W. says G.A.G.R. was physically and psychologically abusive to her on a daily basis during most of their relationship. The abuse included punching, slapping, kicking, yelling and swearing. She says G.A.G.R. was able to control her in part because of her youth and inexperience.

- When she went to El Salvador she says the abuse continued. In addition, she was locked in the house and required to cook and clean to G.A.G.R.'s wishes failing which she would suffer additional abuse.

- She returned to British Columbia in September 2002 to testify at a criminal proceeding to which she was subpoenaed. She was not permitted to take E. with her. The physical abuse continued when she returned to El Salvador.

- She eventually left El Salvador a second time in May 2003 in response to a subpoena. She was not permitted to take E. with her. The last incident of abuse shortly before she left was a punch to her face which occurred in the presence of E. She did not return because she could not continue to face the physical abuse.

- She was not permitted to speak with E. for the first two years after her departure. She says that G.A.G.R. threatened to kill her because she had established a new relationship.

[26] G.A.G.R. denies the majority of T.D.W.'s allegations and says her evidence should be disregarded. He does admit to being physically abusive with her on "about three or four" occasions, although provides no details of those. He says that letters from T.D.W. properly reflect the nature of their relationship. In the letters she expresses her love for him as well as the desire to get married. He also points to letters from T.D.W.'s grandmother and aunt which were written when he was detained in the United States. The letters were intended to provide character references for government officials and he says they would not have been written if he was abusive. Further, he says that it would not have been logical for T.D.W. to bring E. to El Salvador and leave her there if she was being abused.

[27] It is difficult to resolve the contradictory statements regarding the nature of the parties' relationship. However, in the unusual circumstances of this case, I need not do so. There is no question that the abuse of a spouse can be a relevant consideration when considering whether the return of a child might place her in an intolerable situation. In *Pollastro*, the father's treatment of the mother was a significant factor in the court's decision to deny the return application. Similarly, in *Husid v. Daviau*, 2012 ONSC 547, aff'd 2012 ONCA 655, the court concluded that the treatment of the mother by the father and his family in Peru would create a risk of harm to the child if she was returned.

[28] The unusual feature here is that the alleged abuse of T.D.W. took place more than ten years ago. As a result of T.D.W.'s absence from El Salvador and G.A.G.R.'s inability to travel to Canada, there has been no physical contact between the parties and no allegations of abuse in the past ten years. Accordingly, there is no possibility that E. has suffered psychological harm as a result of abusive treatment of her mother in that time period. Further, T.D.W. has no intention of returning to El Salvador. As a result, there is no possibility that E. will suffer the psychological harm that would normally be anticipated to arise where a child is placed in the midst of an abusive relationship.

[29] In the unique circumstances of this case, the only evidence which should properly be

considered is the evidence of E.'s upbringing and treatment in El Salvador. There are three sources for this evidence: G.A.G.R.'s evidence, T.D.W.'s assertions about information obtained from E., and E.'s statements to Dr. Waterman. When I examine this evidence in more detail, I cannot conclude that E. will be placed in an intolerable situation if she is returned to her father in El Salvador.

[30] G.A.G.R. described the living arrangements in El Salvador. E. lived in a house with G.A.G.R., his girlfriend and their daughter. Other family members lived with them and nearby. He describes a close and happy family situation involving grandparents, aunts, uncles and cousins. He says that the family argues and shouts but not constantly. He admits that E. is spanked on occasion for discipline but says such instances are infrequent and not harsh. G.A.G.R. knows nothing about the alleged sexual assault of E. when she was five years old. He indicated that he would like to be given more details of the alleged assault so he can ensure nothing similar happens in the future.

[31] T.D.W. says E. described how she was disciplined by G.A.G.R., her aunt and her grandmother in El Salvador. They pulled her hair and hit her with belts, shoes, sandals and other objects. She says E. has scars on her leg from being hit by a belt as well as a scar on her cheek from being hit by a brush. She says E. had to take her three year old sister out of the house when G.A.G.R. was being abusive to his girlfriend. She says E. was frequently spanked for not being properly dressed. In addition, E. was exposed to constant tension in the home where there was continual arguing, swearing and yelling.

[32] T.D.W. also reports that E. was sexually abused when she was five by a thirteen year old boy. This was a single event when she was in the back seat of a car and her grandmother was present in the front seat.

[33] As I have indicated, Dr. Waterman conducted a Views of the Child assessment, prepared a report and gave oral evidence at the hearing of the petition. He is a Clinical Psychologist with expertise in Child Development, as well as Child and Adult Clinical Psychology. I will comment on his report in greater detail later in these reasons. He is well qualified to carry out a Views of the Child assessment. I found him to be a careful witness who conducted a thorough interview of E. with considerable sensitivity. He elicited information from her regarding her living situation in El Salvador. I accept Dr. Waterman's conclusion that E. was not unduly influenced and that her statements about her situation and her preferences were her own views. Accordingly, I place a great deal of reliance on E.'s description of her living situation in El Salvador as described to Dr. Waterman.

[34] Dr. Waterman's report includes the following descriptions of E.'s treatment in El Salvador:

> She reported that her father would hit her if she did not do her chores. She reported that sometimes she had lots of chores including sweeping, doing the dishes, cleaning the counter and watching her three-year-old little sister all day. [E.] stated that she sometimes got tired with everything she had to do. When asked what she was hit with,

> [E.] responded that her father hit her with his belt or with his sandal. She stated that sometimes getting hit left marks on her legs and really hurt.
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> …
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> … [E.] stated that her grandmother would sometimes get angry with her and would pull her hair or slap her. She stated that her grandmother would also say mean things to her and call her names, which made her feel bad.
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> …
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> … When asked further about her father, E. reported that he sometimes got angry at her grandmother, at her auntie and at his girlfriend. When asked what she would do when her father got angry, she reported that she would take her little sister and go to the park because she felt fairly safe at the park.

[35] There is some consistency to the evidence regarding the administration of discipline in G.A.G.R.'s home: some form of corporal punishment was used. Dr. Waterman concluded that E.'s statements in this regard were not the product of parental pressure or influence by T.D.W. He found them to be believable and indicated that the behavior ascribed to G.A.G.R. and his family would be considered inappropriate in Canada. He is of the view that this behavior could cause some psychological harm because it could affect the level of trust between parent and child.

[36] I conclude that E. was subjected to the kind of discipline she described to Dr. Waterman. It is very similar to the descriptions given to T.D.W. I also conclude that the home in El Salvador had a higher degree of tension and confrontation than what E. has experienced in her mother's home. However, this evidence cannot be considered out of context. One of the ways in which Dr. Waterman tested for parental alienation was to ask E. to rate how much she thought each parent loved her on a scale of one to ten. She gave her father a score of "five". Dr. Waterman was of the view that this score indicates a lack of alienation. It also indicates that she has genuine affection for her father. The description of life in G.A.G.R.'s home does not rise to the level of "intolerable" and this is confirmed by E.'s rating of her father's love for her.

[37] When I assess the entirety of Dr. Waterman's report, and consider how easily and successfully E. has become accustomed to her new circumstances, I conclude that her situation in El Salvador was not intolerable. E. could not have made the transition to Canadian society so easily if she had suffered significant psychological harm for eight or nine years before coming to this country. In reaching my conclusion, I am taking into account the fact that the type of discipline used in G.A.G.R.'s home, while contrary to current Canadian mores, may well be within the acceptable range of behavior in El Salvador.

[38] In arriving at this conclusion I have not ignored the allegation of sexual assault. However, this was a single incident that occurred many years earlier. There is insufficient information to evaluate it in any way or determine whether there was any parental responsibility for the occurrence. Further, it was not mentioned by E. to Dr. Waterman. This indicates, at the very least, that the incident is not a significant factor in E.'s preference to live with her mother.

[39] I should also indicate that I have not taken into account the fact that a return to El Salvador will likely result in a situation where E. will not have an opportunity for an ongoing relationship with her mother. As a child she will not be permitted to ever visit Canada again and T.D.W. will not be welcome in G.A.G.R.'s home. Now that E. has established a close emotional connection with her mother, there will certainly be some psychological harm from the loss of that relationship if she is returned. However, this is the kind of risk of harm which is not considered to be intolerable: *Thomson* at 597.

[40] Further, in the unusual circumstances of this case, any order that I make will result in that kind of risk of harm. Both parties have extremely limited resources which makes travel difficult. Further, G.A.G.R. is not permitted to come to Canada and if E. is not returned, there is no chance that T.D.W. will permit her to travel to El Salvador to visit her father. As a result, there is some risk of psychological harm to E. regardless of the order made.

[41] In summary, I conclude that the evidence of T.D.W.'s relationship with G.A.G.R. is not relevant to the Article 13(b) consideration. It happened too long ago to have caused psychological harm to E. Further, there is no possibility that E. will be placed in the midst of an ongoing abusive relationship if she is ordered to return to El Salvador. I have also concluded that E. was not in an intolerable situation when she was living in El Salvador with her father and his family. Accordingly, the evidence does not establish a weighty and substantial risk of harm amounting to an intolerable situation should E. be returned to El Salvador.

Issue 2. Should I take account of E.'s views and, if so, should I refuse to order her return to El Salvador?

Position of T.D.W.

[42] T.D.W. argues that E. is mature for her age and has formed a strong view about where and with which parent she wishes to live. She says I can infer from Dr. Waterman's report and testimony that E. objects to being returned to El Salvador. She argues that E.'s views are very much her own and denies any parental alienation. She says that I should accept Dr. Waterman's opinion in that regard. Finally, she argues it is appropriate in all of the circumstances of this case for the court to exercise its discretion and refuse the application.

Position of G.A.G.R.

[43] G.A.G.R. argues that E.'s views should not be taken into account for two reasons. First, he says she has not reached a sufficient level of maturity. Second, and more importantly, he argues that her views have been significantly affected by parental alienation. With regard to E.'s level of maturity, he says the court should be reluctant to take into account the views of an 11-year-old. That is particularly the case here where E.'s reasons for wanting to stay in British Columbia are centered on simplistic material advantages offered by her current living situation. G.A.G.R. argues that it would be inappropriate for the court to make such an important decision based on E.'s contentment over such things as having her own room painted in her favourite

colour.

[44] With regard to parental alienation, G.A.G.R. argues that T.D.W. has effectively removed him from E.'s life for more than a year. He had no contact with E. for almost eight months and in the few months prior to Dr. Waterman's interview he was permitted only limited and unsatisfactory telephone access. These circumstances have been manipulated by T.D.W. and should be considered parental alienation regardless of Dr. Waterman's opinion.

[45] G.A.G.R. submits that E.'s lack of maturity combined with the manipulation and alienation exercised by T.D.W. are such that E.'s views should not be taken into consideration by the court. Even if her views are considered, they should be given little weight and E. should be returned to El Salvador.

Law regarding Article 13, Views of the Child

[46] The relevant portion of Article 13 reads:

> 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.

[47] The concept of giving effect, where appropriate, to the views of a child is consistent with the provisions of the United Nations *Convention on the Rights of a Child* to which Canada is a signatory. Article 12 of that convention provides in part:

> State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

[48] That convention has not been implemented by statute in Canada but it has been ratified and the provincial and federal governments presume that domestic family law respects the rights and values set out in the convention: *B.J.G. v. D.L.G.*, 2010 YKSC 44 at para. 5. Further, s. 37(2)(b) of the *Family Law Act* which came into force on March 18, 2013, specifically provides that the views of the child should be considered in family proceedings.

[49] The proper approach to be applied when exercising the court's discretion in Article 13 of the *Convention* was examined by Martinson J. in *Beatty v. Schatz*, 2009 BCSC 706. She concluded that the correct approach was as described by the House of Lords in *Re M*, [2007] UKHL 55 at para. 46:

> In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion come into play, the court may have to consider the nature and strength of the child's objections, the extent to

> which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances. [Emphasis added]

[50] The Court of Appeal affirmed the trial decision in *Beatty* and found that Martinson J.'s interpretation of Article 13 was correct: 2009 BCCA 310 at para. 20. The court emphasized that all Article 13 cases concerning views of the child turn on their particular facts.

[51] The courts in the United Kingdom have frequently considered how the discretion granted by Article 13 should be exercised. The decision in *re: S. (a Minor) (Abduction: Custody Rights)* [1993] Fam. 242 (Eng. C.A.), sets out the principles applicable to the exercise of discretion. These include:

- the provision regarding the child's views is completely separate from paragraph (b) of Article 13;
- the question as to whether a child objects to being returned and has attained the age of maturity at which it is appropriate to take her views into account is a question of fact peculiarly within the province of the trial judge;
- it is necessary to determine why the child objects to returning to her place of habitual residence;
- there is no age below which the child's views should not be taken into account. Indeed, the views of children as young as nine have prevailed (for example see *The Ontario Court v. M & M (Abduction: Children's objections)* [1997] 1 F.L.R. 475, which involved a nine year old child);
- if it is determined that the child's views have been influenced by some other person or that the objection to return is solely because of a wish to remain with the abducting parent, the views should be given little weight; and
- where the court finds the child has valid reasons for objecting to a return, then it may refuse to order the return.

[52] In addition to *Beatty*, I was referred to a number of British Columbia cases where parties have opposed the return of a child based on his or her objections. These include *Wubben v. Lang-Ernst*, 2000 BCSC 1546 (refusal to return a 14 year old girl to Switzerland); *W.K.I. v. B.W.I.*, 2005 BCSC 771 (refusal to return a 12 year old boy to North Carolina); and *Thorne v. Thorne* (1995), 18 R.F.L. (4th) 15 (B.C.S.C.) (return of 10 and 8 year old sisters to the United Kingdom). I have also considered *R.M. v. J.S.*, 2012 ABQB 669, affirming 2012 ABPC 184,

where the Alberta court refused to return a 10 year old boy to his mother in Israel. A review of these cases brings home the accuracy of the observation by Newbury J.A. that each case turns on its particular facts. None of these cases call into question the approach to the exercise of discretion that is suggested in *Beatty* and *re: S.*

[53] In summary, the proper approach to the exercise of discretion under Article 13 includes the following:

a) While courts are increasingly encouraged to take account of the views of children, that does not mean that their views are determinative or even presumptively so.

b) The question as to whether a child has reached an age and degree of maturity where it is appropriate to take her views into account must be determined based on all of the evidence. The relevant evidence will include the nature, strength and reasons for the child's objection.

c) A child's views should only be regarded if they are authentically her own. If the views have been influenced by someone else, or are based solely on a desire to stay with the abducting parent, then they should be given little weight.

d) The exercise of discretion may take into account the child's welfare.

e) The policy considerations underlying the *Convention* are an important factor in the exercise of discretion.

f) The older the child, the more weight her objections are likely to carry, however, there is no minimum age at which the objections can be taken into account.

g) A child's views can prevail even where the circumstances are not exceptional.

Evidence of Dr. Waterman regarding E.'s level of maturity and her views

[54] As I have indicated, Dr. Waterman provided a report, gave *viva voce* evidence and was cross-examined at some length. He followed the proper approach for a psychologist conducting a Views of the Child assessment and so did not make recommendations. Rather, he provided an opinion as to E.'s level of maturity and specifically:

a) whether the information provided by E. was based on her own conclusions; and

b) whether the information provided by her can be considered reasonably valid and reliable.

[55] Dr. Waterman has frequently appeared in the courts of British Columbia and has been qualified to give opinion evidence many times. I found Dr. Waterman to be an excellent witness. He approached the assessment and provided evidence to the Court in a fair and impartial

manner. He did not advocate for a particular position or party. He clearly and carefully outlined E.'s views and his opinions. I have no hesitation in accepting his opinions as well as his evidence regarding E.'s views.

[56] When conducting a Views of the Child assessment, Dr. Waterman interviews each of the parents for approximately one hour. Dr. Waterman's interview with G.A.G.R. took place over the phone and necessarily required the presence of an interpreter. However, G.A.G.R. has reasonable facility both speaking and understanding English so that the interpreter was used infrequently. Dr. Waterman was of the view that he was able to communicate effectively with G.A.G.R. He received adequate background information from both parents.

[57] The process involves a single interview of the child. Normally he requires the child to be brought to the interview by a neutral third party. Here, the parties could not agree on a neutral third party and so T.D.W. brought E. to the interview. While this is not ideal, Dr. Waterman concluded that E. was not unduly influenced by having her mother bring her to the interview.

[58] Ultimately, Dr. Waterman concluded the information provided by E. could be relied upon with a reasonable amount of confidence. He also concluded that her views were her own. He was of the opinion that E.'s perception that she did not have a close emotional connection with her father was not unduly influenced by parent-child alienation.

[59] Dr. Waterman described E. "as a pleasant, verbal, bright and responsive little girl who, from the beginning of her interview, seemed to be reasonably at ease with the assessor." She explained to Dr. Waterman why she liked living with her mother:

> …She stated that her mother doesn't lie to her and tells her the truth all the time. [E.] then volunteered that "she (mom) trusts me better than my dad". When asked what she meant, [E.] stated that her mother listens to her and understands her feelings. She stated that her mother is easy to talk to and has never spanked or hit her.

[60] E. explained to Dr. Waterman "that she feels happy living with her mother and feels more relaxed living in Canada than she did when she was living with her father in El Salvador." Dr. Waterman asked E. what it was like living with her father. She described that as being "really hard for her", as "her father wouldn't listen to her feelings and doesn't care about her". She went on to describe the punishment she receives in her father's home which I described earlier in these reasons at para. 34.

[61] E. also said that she and her father "didn't do very much because her father didn't have much money". She believes that it is safer living in Canada than El Salvador and described an incident where her father was kidnapped because of his new car.

[62] Dr. Waterman reported on E.'s views about her current relationship with her father:

> [E.] was asked if she ever had contact with her father and reported that she usually talks to her father on the phone twice a week. She stated that sometimes her father gets angry with her because she doesn't want to use Skype to talk to him. She stated that he

> also gets angry because her hair is growing long. When asked what she thought it would be like if she were to visit her father, [E.] stated that she is afraid that he would try to keep her in El Salvador and would not let her come back to Canada.
>
> When asked why she thought her father wanted her to live with him, [E.] responded that she didn't know because he didn't do very much with her.

[63] When asked about living with her mother, E. said she had her own room which she has painted purple, her favourite colour, and has posters of Justin Bieber and Selena Gomez on the wall. She has a TV in her room and a closet with lots of toys including dolls and teddy bears. She has drawing books, magazines and nail polish and is excited about learning to carve with her mother's partner.

[64] E. was asked to rate how much each parent loved her on a scale of one to ten and gave her mother a score of ten and her father a score of five. She reported that her mother hugged her much more and told her that she loved her a lot more than her father did.

[65] When setting out his conclusions, Dr. Waterman notes that E. did not appear to be "parroting" information that she might have heard from her mother. She did not give black and white opinions about her feelings for each of her parents. Both of these factors indicate that E. has not been alienated from her father.

[66] Dr. Waterman found E. to have a reasonable understanding of why she was being interviewed. She showed an age appropriate understanding of her living situation with each parent. E. has reached a level of cognitive functioning that gives her an understanding not only of concrete information but also of the implications involved in her present situation. She reported a concern about visiting her father: "she was afraid he may keep her and not allow her to return to Canada." As Dr. Waterman reported, this is the reverse of what happened after her current visit so it is not surprising she had considered this possibility.

[67] When asked by Dr. Waterman, she was able to provide reasons in support of the opinions she expressed about topics to do with both parents. The reasons were logical and reasonable and appeared to be her own. Dr. Waterman stated:

> ... there was no indication that [E.] was responding by "rote" or was providing "memorized" answers that had been provided by her mother. In such situations, children's responses are "robot-like" in the sense that they repeat what they have learned but cannot expand on what they report or provide any other information ... This was clearly not the case with [E.].

[68] Dr. Waterman states that E. "clearly expressed a preference for living with her mother on Vancouver Island as opposed to being returned to live with her father in South America." He found that her reasons made reasonable sense. Further, he concluded that "... [E.] appears to have a very strong positive emotional connection with her mother and less of a connection with her father. There are probably a number of different reasons for this but parent-child alienation was not considered to be a major factor." E. indicated she would like to have contact with her

father but was not particularly satisfied with the recent contact as he got angry with her because of her wish to stay with her mother, the fact that she is growing her hair long and does not want to use Skype to speak with him. Dr. Waterman concluded by stating:

> [E.]'s reluctance to have more contact with her father or to be returned to his care would appear to be based on her experience of living with her father and how he has reacted toward her since she came to live with her mother in Canada. Until the situation improves and [E.]'s confidence in her father increases and she sees herself as having a more positive relationship with her father, it is unlikely that she will want to spend more time with him and certainly not want to be returned to live with him...

[69] In cross-examination, Dr. Waterman expanded somewhat on his report. However, he did not resile from his views. He agreed that E. would have been influenced by the fact that she had been absent from El Salvador for ten months at the time of the interview. He also agreed she was influenced by the perceived material benefits of her present living situation. However, he stated that he did not get any sense of manipulation or alienation by T.D.W. Dr. Waterman watches closely for indications of both and did not find them. He did agree that E.'s views about El Salvador being less safe than Canada may have come from her mother but this was not a significant factor in his conclusions.

[70] Dr. Waterman found that E.'s fear of her father was an important contributing factor to her views. She discussed the punishment she received from her father and family with some regularity. Dr. Waterman found her to be entirely credible when describing these incidents. By Canadian standards, Dr. Waterman would characterize the punishment as abuse. It is the kind of behaviour that impacts a child and affects the level of trust between parent and child. He believes that has occurred here; E.'s views about staying with her mother are based on her comparison of the relationship with her two parents.

Analysis

[71] I will begin the analysis by examining the two prerequisites to considering E.'s views: does she object to being returned; and has she attained an age and degree of maturity such that it is appropriate to consider her views. I will then outline the additional factors I have taken into account in arriving at the decision to dismiss G.A.G.R.'s application for E.'s return to El Salvador.

Does E. object to being returned to El Salvador?

[72] Dr. Waterman did not state directly in his report or oral testimony that E. "objected" to a return to El Salvador. However, he did find that she "clearly expressed a preference for living with her mother on Vancouver Island as opposed to being returned to live with her father in South America" and, further, that she "certainly [did] not want to be returned to live with him". In his interview of E., Dr. Waterman, quite appropriately, took an indirect approach to the central issue. Taking into account all of the views she expressed, there is no doubt that she objects to being returned to El Salvador.

Has E. attained an age and degree of maturity such that it is appropriate to consider her views?

[73] I conclude that E. has reached an age and degree of maturity sufficient for her views to be considered. I have arrived at this decision in part because of Dr. Waterman's opinion on this issue and in part because of my consideration of the nature and strength of her objections.

[74] I have set out Dr. Waterman's opinion on this issue above. He found that E. has reached a level of cognitive functioning such that she has a good understanding of both concrete information and the implications of her situation. As stated in his oral testimony, Dr. Waterman is clearly of the opinion that E.'s views should be considered in light of her age and level of maturity.

[75] E.'s level of maturity was demonstrated by the reasons she gave for her views. She considered and compared not only the concrete facts of her living situation in the two locales but also her emotional connection with her two parents. She preferred the comfort of her own room in British Columbia with personal belongings which appear to hold considerable attraction for her. However, this was only one part of her rationale. She reasoned that her father does not love her as much as her mother given his limited involvement with her and his lack of expression of those emotions. She considered the nature and extent of the activities her parents and close family undertook with her in each home. She also took into account the way in which her father expressed his anger or displeasure with her, and the fact that she felt compelled to remove her little sister from the home in El Salvador when her father became angry. The sense of fear or concern experienced by E. was, as explained by Dr. Waterman, part of her reasoning process.

[76] When I examine the nature and strength of these considerations, I am led to the conclusion that her reasoning is logical and rational. It is a mature, rather than simplistic, comparison of her relationship with her parents. Further, as Dr. Waterman noted, it is not a one-sided, black and white, evaluation of her two homes and parents which would suggest immaturity or lack of thought.

Are E.'s views her own, or the product of manipulation or parental alienation?

[77] As I have indicated, I accept Dr. Waterman's opinion that E. did not show signs of having been alienated from her father. He arrived at that opinion because of the nature and strength of E.'s reasoning and his observations of her. He found nothing to suggest E. had been manipulated by her mother. She did not parrot information, give opinions that were not her own, or express a one-sided view of her father.

[78] I also find that E.'s views were genuinely her own. Her reasoning was that of a mature 11 year old with a good knowledge of her circumstances and some understanding of the implications of the situation. She considered her relationship with her parents and her living situation and expressed a clear preference.

[79] However, that does not end the inquiry; I have to consider as well the fact that T.D.W. manipulated the process by refusing to return E. to El Salvador as agreed and by obtaining the order from the Provincial Court which restricted G.A.G.R.'s access. As a result, for many months he had no contact at all with his daughter. There is little doubt that the lack of contact between G.A.G.R. and E. would distance him from her and have an impact on her views about a possible return to El Salvador. Dr. Waterman agreed that the lack of contact would have a negative effect on the relationship between father and daughter.

[80] There are two reasons why T.D.W.'s actions do not cause me to change my conclusion that E.'s views are her own and not the result of manipulation. First, E.'s lack of contact with her father, while undoubtedly significant to their relationship, does not appear to have been a factor in E.'s reasoning. According to Dr. Waterman, E. was accurately relating her personal views based on her own recollection of her life in El Salvador and her interaction with her father. There is no suggestion that she has a poor memory or that her recollections were somehow distorted by the actions of T.D.W.

[81] Second, I cannot discount T.D.W.'s reasons for the steps she took. I have concluded there is some merit to the allegations of harsh treatment of E. by her family in El Salvador. She undoubtedly told her mother about that treatment. That information combined with T.D.W.'s recollection of the harsh treatment that she says she received from G.A.G.R. explains her actions. Her failure to return E. contrary to her agreement with G.A.G.R. is not commendable, but I conclude that it was not done in an effort to manipulate E.'s views.

> *Are there factors relating to E.'s welfare that are relevant to the exercise of discretion?*

[82] I must be careful not to undertake a best interest's evaluation. E.'s welfare is not the primary consideration on this return application. However, as noted in *Re: M*, there is a limited way in which a child's welfare is relevant when considering Article 13. A court is permitted to examine the extent to which the child's views "coincide or are at odds with other considerations which are relevant to her welfare".

[83] In the circumstances of this case, there is one important way in which E.'s views are consistent with her welfare. The concern she has expressed about the punishment she receives in her home in El Salvador is a valid concern about her welfare that is directly related to her objection to being returned. While I have concluded a return would not expose her to such physical or psychological harm as to place her in an intolerable situation, that does not preclude consideration of whether her views on this issue coincide with her welfare.

[84] Dr. Waterman noted that the kind of punishment used by G.A.G.R. does contribute to psychological harm because it reduces the level of trust between parent and child. I have concluded that E.'s relationship with her father was negatively impacted by his behaviour and that she may benefit from not returning to that home situation. Accordingly, E.'s desire not to

return to her father's home thus coincides with her welfare. This is an additional factor that is relevant to the exercise of my discretion.

> *Do the policy factors underlying the Convention mandate a return of E. to El Salvador?*

[85] The policy factors underlying the *Convention* are of prime importance when considering an Article 13 objection. The prompt return of children wrongfully retained, and the expression of comity towards access and custody rights under the laws of a contracting state are the foundation of the *Convention*. As noted in *Re M*, one of the objects of the *Convention* is to prevent wrongful abductions or retentions from taking place. One of the ways this is achieved is to uphold the orders of courts in contracting states. Any time a child is wrongfully retained, as E. was here, these policy factors favour a return.

[86] While these factors favour a return, in the circumstances of this case, the policy considerations do not have the same force that they do in most Article 13 cases. Here, prior to the wrongful retention, the parents did not bring the issue of custody or access to any court. They were not operating under a court order or parenting agreement. T.D.W.'s breach of her verbal agreement with G.A.G.R. to return E. after the 2 ½ month visit does not engage the second policy factor in the same way that it is engaged where there is a breach of an existing order made by a court of a contracting state. By wrongfully retaining the child she removed her from the jurisdiction of the courts of El Salvador, but she did not breach a court order. In this respect this case is distinguishable from most cases where courts have considered a child's objection to a return.

[87] In *Beatty*, the parents were involved in proceedings before the courts in Ireland. Mr. Beatty wrongfully retained the son in Canada in breach of an undertaking which he gave to the Irish court. In *Wubben*, the child was not returned even though there was an order of the Swiss court which gave custody to the father. In *Thorne*, the mother had custody of the children pursuant to an order of the English court, but prior to the removal, her application to relocate to Canada with the children was denied by the court: [1995] B.C.J. No. 2009 (S.C.). The removal was thus in breach of the English court order and the exercise of custody by that court.

[88] The case which bears similarity to the present circumstances is *R.M.*, where the Alberta court refused an application to return a ten year old to Israel. The mother lived in Israel and was divorced from the father when he moved to Canada. There was no court order regarding custody or access but the parties had agreed that their son would live in Israel with his mother and visit his father in the summers. In breach of that agreement, the father did not return the child after one of the summer visits. In dismissing the application for return Kenney J. stated as follows at para. 18:

> This is a most difficult case. Counsel for the mother describes the father's behavior in withholding the child at the end of the summer holidays in 2011 as "egregious". I agree. He should have returned the child as he had each summer before and then made his

> application for custody to the court in Israel so that his son could come to live with him in Canada. Clearly Judge O'Gorman was of the same view, having dismissed all of the father's arguments under the Hague Convention. The Hague Convention does however provide a defence to the return of the child even when such return is found appropriate. Article 13 is part of the Hague Convention. It has to have a purpose. It cannot simply be ignored.

[89] The court nevertheless concluded that the trial judge had correctly determined that the child objected to a return, was of an age and maturity where his views could be considered, and appropriately weighed the factors in arriving at his conclusion. The fact that neither court directly commented on the weight that should be given to the *Convention* policy considerations stems, in my view, from the fact that the parents in that case, like the parents here, were operating under a personal agreement regarding care, rather than a court ordered agreement. Where a child is detained or removed in clear violation of a court order or the court's jurisdiction which has been engaged by the parties, the policy factors will carry more weight. Quite simply, the actions of a parent who knowingly removes a child in direct violation of the order of a court of a contracting state will be seen as more egregious.

Weighing the factors

[90] Considering all of the circumstances, I am exercising my discretion to refuse the return of E. to El Salvador.

[91] I have concluded that her views are the product of her own reasoning and have not been unduly influenced by her mother. I recognize that the process was manipulated in that T.D.W. retained E. in British Columbia contrary to the parties' agreement and obtained court orders which limited contact between father and daughter. However, as I have found, her actions were motivated by concerns that have some legitimacy.

[92] Further, the lack of contact with her father was not an important factor in the formation of E.'s views. In the time that E. has stayed in British Columbia she has developed an extremely close emotional bond with her mother. This bond is stronger than the bond E. and her father were able to create over an eight year period. The lack of a similar emotional bond with her father was explained by circumstances other than the lack of contact for approximately six months.

[93] I have also concluded that E.'s views are reasonable, as they are based on her own rational and mature thought process. Further, her objection is strongly held, perhaps because she understands that it is extremely unlikely she would be permitted to return to Canada if she is sent back to El Salvador.

[94] I have taken into account the limited means of both parents and G.A.G.R.'s inability to visit Canada. I appreciate that in these circumstances G.A.G.R. will likely see this decision as having a stark finality. He is not able to visit Canada and will likely have difficulty mounting a

serious challenge on a custody application in Canada. Therefore, if E. is permitted to stay in British Columbia, he may not see her until she becomes an adult. However, given T.D.W.'s personal circumstances, there would be a similar finality to the decision if E. was returned to El Salvador. It is unlikely that she could mount a serious custody challenge in El Salvador, and she would have difficulty visiting. T.D.W. has limited financial resources. T.D.W. and her partner, both of whom are First Nations, are currently receiving Band assistance. Further, given the circumstances of this case, regardless of the order made it is extremely unlikely that either parent would permit E. to travel to visit the other parent. Therefore, in these circumstances, this has not been an important factor to weigh in the exercise of discretion.

[95] In arriving at the decision, I have also considered the strong policy concerns which underlie the *Convention*. T.D.W.'s actions were clearly wrongful as she breached an agreement with G.A.G.R. and did not raise the issue of E.'s custody in El Salvador which clearly had the jurisdiction to consider the issue. However, unlike the father in *Beatty* and the mother in *Thorne,* she did not act knowingly in violation of a foreign court order. The failure of a parent to respect the active exercise of jurisdiction by a foreign court is significant to the exercise of discretion under Article 13. As Martinson J. succinctly stated in *Beatty* at para. 58:

> Not returning A would send the wrong message that, when a case is before the courts in another jurisdiction, it is acceptable to wrongfully retain a child in another country, even in the face of an undertaking to the court to return the child, so long as the child says that he or she does not want to return.

[96] In the circumstances of this case, a failure to return E. would not send that message. This case was never before the courts of either country. The retention of E. was wrongful, but she has reached an age and level of maturity where her views can be considered. When I look at the nature and strength of her views and consider the other relevant factors, this is an appropriate case in which to give effect to those views. Accordingly, I dismiss G.A.G.R.'s application for the return of E. to El Salvador.

[97] The issues of custody and guardianship have not been considered in this application but T.D.W. may now continue the proceedings in British Columbia to deal with those issues.

[98] I understand that both parties were represented by legal aid counsel. Each party to this application will bear their own costs.

"Butler J."