[2022] JMSC Civ 64

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV05260

BETWEEN	**JG**	**CLAIMANT**
AND	**ST**	**DEFENDANT**

IN CHAMBERS

Mr Charles Young, Assistant Legal Officer for The Jamaican Central Authority appearing for the Claimant.

Mr Clifton Campbell instructed by Archer Cummings and Co appearing for the Defendant.

Heard: May 5th and 30th 2022

The Hague Convention on the Civil Aspects of International Child Abduction 1980- Articles 3, 11, 12, &13 -The Children (Guardianship and Custody) Amendment Act- Habitual Residence- Verbal agreement- Grave risk- Objection-Application within one year

L. SHELLY - WILLIAMS, J

In Chambers

Background

[1] The Claimant is a security guard who resides in Pennsylvania in the United States of America. The Defendant is a customer care representative who resides in Jamaica. The parties had a relationship that produced one child, KG, who was

born in Jamaica, on the 10th December 2013, and primarily resided with the Defendant in Jamaica up to July 2019. The Claimant who resided in Jamaica, migrated to the United States of America in July 2017. During the time the Claimant resided in Jamaica he had weekly contact with KG and financially assisted with KG's maintenance.

[2] Subsequent to the Claimant migrating to the United States of America, KG visited with him in the summer of 2018. In 2019 the Claimant and the Defendant then entered into a verbal agreement that facilitated KG's relocation to the United States of America.

[3] The agreement was for KG to reside with the Claimant and his wife, with the Defendant having visitation every summer, winter and alternate Easter vacations. The parties abided by this agreement until July 2021, when KG travelled to Jamaica for summer vacation as per the agreement, but, was not returned to Claimant in the United States of America. Despite numerous request by the Claimant, the Defendant refused to return KG. The Claimant then filed an application under The Hague Convention in the United States of America. That application was then forwarded to the Central Authority in Jamaica, who then filed a Fixed Date Claim Form in this matter.

[4] The Fixed Date Claim sought the following orders: -

1. An Order for the return of KG, born on December 10, 2013, in the University Hospital of the West Indies in the Parish of St. Andrew, Jamaica to her place of habitual residence at 400 W Magnolia Avenue, Aiden, Pennsylvania 19018, United States of America;

2. An order that the Defendant, within twenty-four (24) hours of being notified of the confirmed date of return to the United States of America, hands over KG to the Claimant or his personal representative;

3. An Order directing that the Defendant surrenders to the Central Authority all travel documents in her possession belonging to KG;

4. An Order requiring the Defendant to visit the Central Authority, located at 48 Duke Street in the parish of Kingston, with KG every Monday and Friday on or before 3:00 p.m., from the date this Order is given until the date of return to her country of habitual residence;

5. An Order for travel expenses to be borne by Defendant;

6. Such further and other relief as this Honourable Court deems fit.

The Claimant gave reasons for the orders being sought, which included-

1. Wrongful retention of KG by the Defendant as per section 7C.

    (i) Of the Children (Guardianship and Custody) Amendment Act;

2. Application for the return of KG being made pursuant to section 7E (1) (f) of the Children (Guardianship and Custody) Amendment Act;

    The Court may make an Order for the return of KG as per sections 7K and 7M of the Children (Guardianship and Custody) Amendment Act;

3. The Central Authority regards the surrender of travel documents and biweekly reporting by the Defendant as necessary measures within the meaning of section 7D (2) (a); and

4. The Court may make an order for the Defendant to pay expenses associated with travel and the return of the child as per section 7S (3).

The Claimant's case

[5] The Claimant avers in his affidavits that he has always been part of the life of KG since birth. He submitted that after he migrated in July 2017 to the United States of America, he has gotten married and now has another child with his wife. KG migrated to the United States of America in 2019 and has become a part of this family. His evidence is that KG interacts and has a strong bond with her sibling. His evidence is that the relationship that KG has with his wife is so close that KG refers to his wife as Mommy. He avers that KG is habitually resident in the United States of America. In support of this position he exhibited to the court copies of the academic records of KG. He also opined on and exhibited pictures showing not only KG's interaction and involvement in church and extra-curricular activities, but also enrolment and participation in a dance academy.

[6] The Claimant avers to an incident in which KG reported to him about being molested whilst visiting the Defendant. This report having been made to him, the Claimant then made a report to the relevant authorities in the United States of America. KG was taken to be assessed by a psychologist and later received counselling. The Claimant gave evidence that he spoke to the Defendant about the incident and insisted that she make a report about it at the police station. His evidence is that the Defendant appeared to be reluctant to make the report.

[7] The Defendant, in her affidavit, gave evidence that KG had reported to being physically abused by the Claimant and his wife. The Claimant in response to the allegations acknowledged that he had slapped KG with his hand. His evidence is that whenever KG misbehaved, he would first speak to her, but if it persisted he would slap her. His evidence is that he did so as that is how he was raised. He acknowledged that it is wrong and he would not go so again. His evidence is that he is prepared to enter into therapy in relation to this. The Claimant denied that his wife abused KG.

[8] He submitted that the United States of America is KG's place of habitual residence and as such, he asked the court to make the order for the return of KG.

The Defendant's case

[9] The Defendant's case is that she agreed for KG to migrate to the United States of America in 2019 and for her to reside with the Claimant and his wife. Her evidence is that the agreement was for KG to visit with her during summer and winter holidays, whilst she would have KG on alternate Easter holidays.

[10] She averred that KG did visit her as per the agreement in July 2021 and she was to return to the Claimant in August 2021. Her evidence is that whilst making preparations for KG to return to the Claimant, KG started to cry and indicated that she did not wish to return to the United States of America. The Defendant's stated that KG informed her that she was being abused by her father and stepmother and proceeded to relay instances when and how she was beaten by them. The Defendant's evidence is that KG told her she did not wish to be returned to the United States. The Defendant also averred that KG indicated to her that if she returned her to the United States of America, she would consider the Defendant to be wicked.

[11] The Defendant averred that she had visited KG whilst she was residing in the United States of America. She indicated that when she did so, she was not allowed to visit the house where KG resided. The Defendant's evidence is that she had to meet KG at malls and when she did so it was as if she was having supervised visits.

[12] The Defendant gave evidence that she was informed of the report that KG was abused. Although she did not believe it, she, however, made a report to the police about the incident. She had disbelieved the allegations as KG had always been supervised when she was in Jamaica.

[13] Her evidence is that KG is now settled in Jamaica. In support of this position she gave evidence that KG has been enrolled in school and participates in school activities. The Defendant spoke also of extra curricula activities that KG is now involved in.

[14] The Defendant gave evidence that the agreement between herself and the Claimant had been a temporary one. She had agreed that KG should reside with the Claimant until she became more financially secure. In support of her position she exhibited a letter that was forwarded to her by the Claimant, that she refused to sign. Her position is that she is now in a better financial position and as such KG should not be returned to the Claimant.

The Social Enquiry report.

[15] The court had requested, and received a social enquiry report from a Children's Officer. That report was filed with the court and circulated to the parties. That report was tendered and admitted into evidence as an exhibit in this case. That social enquiry report indicated that KG that did not wish to return to the United States of America. The report detailed the reasons KG objected to returning to the United States of America. The main reason appeared to be that the Claimant and his wife had hit KG on a few occasions which were described to the Children's Officer. The Children's officerwent on to recommend that family counselling may be required as well as further mediation.

Facts not in dispute

[16] There are a number of facts that are not in issue. They include: -

a. That the Defendant agreed to have KG reside with the Claimant in the United States of America.

b. That the Defendant signed the immigration documents to allow KG to migrate and reside with the Claimant in the United States of America.

c. That the agreement between the parties was that KG was to visit with the Defendant on summer and winter holidays and alternate Easter holidays.

Issues in the case

[17] There are a number of issues to be decided in this case. These are: -

a. Whether United States of America is the country in which KG is habitually resident?

b. Whether the Claimant's agreement for KG to travel to Jamaica was an indication that he had relinquished his parental rights?

c. Whether KG is now settled in Jamaica?

d. Whether KG would be at grave risk if returned to the United States of America?

e. Should KG's objection be taken into consideration in deciding whether she should be returned to the United States of America?

The Law

[18] Jamaica became a signatory to **The Hague Convention on the Civil Aspects of International Child Abduction 1980 (The Hague Convention)** in 2017. Subsequently, the Children (Guardianship and Custody) Act (the Act) was amended on the 8th of February 2017 to give effect to the Convention.

[19] This application is filed pursuant to Sections 7 C (1), 7E, 7K and 7M of the Act.

[20] The first issue to be dealt with is whether KG can be considered to be a child that has been retained or removed as envisioned by this Act. Section 7C (1) of the Acts states that: -

For the purpose of this Act, the removal to, or retention of a child in, a Contracting State is considered wrongful, where-

> *(a) Such removal or retention is breach of rights of custody or rights of access of an individual or institution or other body, whether attributed to the individual, institution or body either jointly or solely; and*
>
> *(b) At the time of such removal or retention, those rights were actually exercised either jointly or solely, or would have been so exercised, but for such removal or retention"*

In this case the Claimant is alleging that there is an agreement between the parties whereby he would have primary care of KG with the Defendant having visitation during holiday periods. This allegation having been raised, I find that this is a case where the issue of the return of KG must be decided under this Act.

[21] In approaching this case, the court would have to consider the timelines as it relates to the retention. The Claimant's evidence is that KG travelled to Jamaica in July 2021 with the agreement being that she would be returned in August 2021. That agreement was not honoured, with KG being retained. A Fixed Date Claim Form for the return of KG was filed on the 13th of December 2021. The time period between when KG was to return to the United States of America, and the Fixed Date Claim Form being filed was less than one year. The Act speaks to time periods that the court should abide by when considering these applications. Section 7 K of the Act states that: -

> *7K. Notwithstanding sections 7I and 7J.*
>
> *a) Where, at the date of commencement of Court proceedings, a period of less than one year has elapsed from the date the child was wrongfully removed or retained, the Court shall order the return of the child; or*
>
> *b) Where the Court proceedings are initiated after the expiration of one year from the date of the wrongful removal or retention of the child, the Court shall order the return of the child, unless it is demonstrated to the Court that the child is now settled in his new environment.*

[22] This is in keeping with Article 12 of The Hague Convention which states that:-

> *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.*
>
> *Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.*

[23] It would appear that once it is established that the child is being retained or removed, as per Section 7 C of the Act, the court does not have a discretion as to whether KG should be returned. I note also that the court has a general power to order the return of a minor who falls under this act at any time. Section 7 M of the Act states that:-

> *Notwithstanding the provisions of sections 7J to 7L, the Court may at any time order the return of the child wrongfully removed or retained as determined in 7C.*

[24] In deciding whether or not a child has been retained. There are three issues that a court has to consider. They are: -

i) What is the agreement or understanding between the parents as it relates to the custody or care of the child?

ii) Whether the child is habitually resident in a country?

iii) Whether the child has been become settled in the country that child has been retained in?

[25] In deciding the agreement or understanding relating to custody and or care of a minor, the court would take into consideration court orders and/or verbal agreements between the parties. In the absence of any such agreements, the actions of the parties would have to be analysed. In this case both parties gave evidence that there was a verbal agreement between them. There have been cases that have opined about verbal agreements. In the case of ***Commonwealth ex rel. Veihdeffer v. Veihdeffer, 235 Pa. Super. 447, 344 A.2d 613 (Pa. Super. Ct. 1975)*** Watkins, P.J. in analysing the approach to adopted in cases of verbal agreements stated that –

> *It is well settled that an agreement between the parties as to custody is not controlling but should be given weight taking into consideration all the circumstances.*

[26] The next issue to be decided is whether or not KG is ordinarily resident in the United States of America? There have been a number of cases that have opined and defined what is meant by habitual residence. In the case of **Re B (a minor) (habitual residence)** 2016 (EWHC) 2174 Hayden J at paragraph 18 of his judgment sought to place down markers that the court could rely on the establish a minor's habitual residence. Paragraph 18 states: -

> *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. Thus:*
>
> *i. The solicitors charged with preparation of the statements must familiarize themselves with the recent case law which emphasizes the scope and ambit of the enquiry when assessing habitual residence, (para 17 above maybe a convenient summary);*
> *ii. If the statements do not address the salient issues, counsel, if instructed, should bring the failure to do so his instructing solicitors attention;*
>
> *iii. An application should be made expeditiously to the Court for leave to file an amended statement, even though that will inevitably result in a further statement in response;*
>
> *iv. Lawyers specializing in these international children cases, where the guiding principle is international comity and where the jurisdiction is therefore summary, have become unfamiliar, in my judgement, with the forensic discipline involved in identifying and evaluating the practical realities of children's lives. They must relearn these skills if they are going to be in a position to apply the law as it is now clarified.*
>
> *The simple message must get through to those who prepared the statements that habitual residence of a child is all about his or her life and not about parental dispute. It is a factual exploration*.

[27] The counter position to habitual residence is where the parent that has retained the child alleges that the child is now settled, as is the position in this case. The concept of being settled is not defined in either the Convention or the Act. There have been a number of cases that have sought to define the meaning of the terminology. In the case of **Cunningham v Cunningham** 237 F. Supp. 3d 1246 (M.D. Fla. 2017) in deciding whether or not the child had been settled the court opined at 1281 that :-

"*Generally, courts consider . . . '*

(1) the child's age;

(2) the stability and duration of the child's residence in the new environment;

(3) whether the child attends school or day care consistently;

(4) whether the child has friends and relatives in the new area;

5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and

(6) the respondent's employment and financial stability.

[28] In the case of **RE N (Minors) (Abduction)** [1991] 1 FLR 413, Bracewell J dealt with the factors to be considered by the court in relation to settlement. He stated:

> *What is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the mother can establish the degree of settlement, which is more than mere adjustment to surroundings. I found that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability. Purchas LJ in Re S did advert to at 12 at p. 35 of the judgment and he said:*
>
> *If in those circumstance it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art. 18 the court may or may not order such a return.*

[29] The minor in this case has remained in Jamaica for about nine months and as such the issue as to whether or not she has become settled is one that I will consider. Although this interval cannot be considered extensive, the question is whether it ought to be joined with the period prior to KG migrating to the United States of America.

[30] The next issue is whether the agreement by the Claimant for KG to travel to Jamaica could amount to an intention for her to remain in Jamaica. In the case of **Re C (Children) 2018 3All ER 1,** Lord Hughes opined that in consenting to the child's travel a parent is exercising, not abandoning his right to custody. He stated at paragraph 43 that: -

> *when left behind parent agrees to the child travelling abroad, he is exercising not abandoning his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movement abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left behind parent's right of custody. But once he repudiates the agreement, and keeps the chid without the intention to return, and denying the temporary nature of the stay, his retention is on longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live…*

I find favour with this approach and will adopt it.

[31] There are a number of defences that may be raised that could preclude the return of KG to the Claimant. These defences are detailed in Article 13 of the Convention which states that :-

> *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.*
>
> *In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.*

[32] The first defence being alleged in this case is one of grave risk. The approach the court should adopt in cases where the defence of grave risk has been raised has been detailed in a number of cases. In the case of **Re E (Children) (Abduction: Custody Appeal)** [2011] UKSC 27 the issue of grave risks was opined upon. It stated, starting at paragraph 31 that: -

> *[31] Both Professor Pérez-Vera and the House of Lords referred to the application, rather than the interpretation, of art 13. We share the view expressed in the High Court of Australia in DP v Commonwealth Central Authority [2001] HCA 39, (2001) 206 CLR 401, paras 9, 44, that there is no need for the article to be "narrowly construed". By its very terms, it is of restricted application. The words of art 13 are quite plain and need no further elaboration or "gloss".*
>
> *[32] First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under art 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.*

[33] Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

[34] Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in Re D, at para 52 "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'." Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

[35] Fourth, art 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home.

[33] Paragraph 36 of the said judgment sets out the approach the court should adopt in dealing with contested allegations within the confines of Article 13(b):

> *36 There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.*

[34] In the case of **Rubio v. Castro,** No. 19-3740, 2020 U.S. App. LEXIS 14905 (2d Cir. May 11, 2020) the court opined upon the approach the court should adopt where the defence of grave risk is raised. It held that once there are measures in place in the habitual residence country to treat with any psychological or grave risks then the child should be returned. The Second Circuit stated that ;-

> *…in cases of serious abuse, before a court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b) [of The Hague Convention], it must examine the full range of options that might make possible the safe return of a child to the home country." Such ameliorative conditions "balance our commitment to ensuring that children are not exposed to a grave risk of harm with our general obligation under The Hague Convention to allow courts in the country of habitual residence to address the merits of custody disputes."*
>
> *Thus, where repatriation would return a child to the sole physical custody of their abuser, a district court does not properly weigh the safety of the child if it fails to examine the full range of ameliorative measures, including those that are enforceable when the respondent parent has chosen not to return.* "

[35] In this case there are allegations made by KG of physical abuse by both the Claimant and his wife. The Court will have to decide whether measures can be put in place to ameliorate or treat with such risk.

[36] The final issue that was raised was the objection of KG to being returned to the Claimant. This objection was detailed in the affidavit of the Defendant. The court then requested a report from a Children's officer. The report of the Children's officer detailed the objection made by KG. In deciding this issue, I considered the approach adopted in the case ***of re M (FC) and another (FC) (Children) (FC), [2007] UKHL 55***. In that case Baroness Hale in paragraph 46 of her judgment stated "-

> *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 comes 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.*

Analysis

The Agreement

[37] There appears to be consensus as to where, and with whom, KG lived prior to her migrating to the Unites States of America. The Claimant and the Defendant both averred to the fact that KG resided with the Defendant up to July 2019. The Claimant had resided in Jamaica, but migrated to the United States in July 2017. KG graduated from kindergarten in 2019 and the Claimant, his wife and the Defendant had a meeting after the graduation. The meeting concerned KG migrating to the United States of America. The parties arrived at an agreement during that meeting which was that KG was to migrate to the United States of America to reside with the Claimant and his wife. The parties also agreed that the Defendant was to have visitation with KG during the summer holidays, winter holidays and alternate Easter holidays. In addition, the Defendant was to have access to KG when she visited the United States of America.

[38] The parties appeared to have abided by the agreement as KG did visit the Defendant during the holidays as stipulated, with the Defendant having access to KG when she visited the United States of America. The Defendant's evidence was that KG arrived in Jamaica in July 2021 and that she had every intention of returning her to the Claimant at the end of the holiday period.

[39] It is clear from this evidence that the Claimant would then be the parent who had primary care of KG with the Defendant having visitation.

Was the agreement temporary

[40] The next issue to be decided is whether or not this agreement was temporary. The Defendant's position is that the agreement was temporary. Her evidence is that she had agreed to KG migrating to the United States of America as receiving a green card was a good idea, however this agreement was temporary. In support of this position she produced a document that she claimed was created

by the Claimant that she refused to sign. This letter was attached as an exhibit to her affidavit.

[41] The Defendant, in support of this position also gave evidence that the agreement for KG to migrate and reside with the Claimant was only until she was financially secure. She averred that the understanding was that once she became more financially secure KG would be returned to her. She submitted that she is now working and that she would be assisted financially by other family members.

[42] The evidence of the Claimant is that the agreement between the parties was not temporary. His evidence is that he had drafted the letter that was produced by the Defendant, prior to KG migrating to the United States of America. His evidence is that he had drafted the letter from precedents that he had been given as he was of the view that it was required for immigration purposes. His evidence is that the Defendant was of the view that if she signed the letter she would be giving up her parental rights. He went on to aver that the Defendant did sign all the immigration documents that allowed KG to migrate to the United States of America.

[43] In considering as to whether the agreement was temporary I first perused the draft letter that was attached to the affidavit of the Defendant. That letter spoke to the Defendant being the biological mother of KG and that she was giving her written consent for KG to immigrate to the United States of America to live with her biological father and her step mother. The letter went on to state that the letter of consent was being issued in compliance with the immigration requirements for unmarried minors immigrating to the United States of America.

[44] In reviewing this letter is unclear as how it supports the Defendant's position that KG migrating to the United States of America was temporary. Although the Defendant did not sign the draft letter, she did sign the documents that allowed KG to migrate. The contents of the letter appear to merely confirm what had already been verbally agreed.

[45] In assessing the evidence from both parties as to whether the agreement had been temporary, I took into consideration not only what the parties averred to, but also their actions. In this case the agreement that was formulated in July 2019 was for KG to migrate and reside with the Claimant and his wife. The agreement as stated above was for the Defendant to have KG for summer and winter holidays with the parties alternating with Easter holidays. In looking at how the parties operated as per the agreement it is clear that it was still in existence up to the time KG travelled to Jamaica in July 2021. The Defendant in her affidavit clearly stated that she was making preparations to return her to the Claimant, when KG expressed the view that she did not wish to return. In cross examination the Defendant also indicated that when KG visited Jamaica in July 2021 she had the intention of honouring the verbal agreement.

[46] I also took into consideration the evidence of the Defendant where she had expressed a wish to migrate to the United States of America. The agreement between the parties has vested the Claimant with primary care of KG with the Defendant having visitation rights. I find that this was not a temporary agreement between the parties

KG travelling to Jamaica

[47] The evidence of the Claimant is that pursuant to the verbal agreement, he had made the arrangements for KG to travel to Jamaica. to spend the summer holiday with the Defendant. The verbal agreement was quite clear between the parties and the parties had been abiding by it. KG travelling to Jamaica could be viewed under the circumstances as the Claimant exercising his parental rights.

Habitual Residence

[48] The Claimant gave evidence that since KG relocated to the United States of America, she has been fully integrated into life there. The Claimant's evidence was that KG, was registered in school after migrating to the United States of America. His evidence is that she has attained good grades in school, she

participates in extra-curricular activities and she took part in school activities. He also averred that she is part of a dance group. In support of his evidence, he had exhibited pictures and copies of school reports. The Claimant submitted that the United States of America is KG's place of habitual residence.

[49] The Defendant has averred that KG was residing in Jamaica from the time of her birth in 2013 to the time she migrated to the United States of America in July 2019. The Defendant's position is that KG has now reintegrated into her life in Jamaica and as such Jamaica is her place of habitual residence.

[50] In deciding this issue, I took into consideration the evidence of KG's day to day activities, school activities and her family life. I find that subsequent to the verbal agreement made in 2019 and the signing of the immigration documents by the Defendant allowing KG to migrate, that the Claimant had become the parent with primary care of KG. I find that based on the evidence submitted by the Claimant that the United States of America is the place of habitual residence for KG. That is where she has been attending school for two years, where she has participated in extra-curricular activities not only at school but outside of school.

[51] KG has been residing in Jamaica since the retention for nine months. During the nine months she has attended a different school from the one she had previously attended, she is residing in a new home, and has been engaging in new activities. I find that the Defendant was unable to establish that during the short period of time that KG has been retained in Jamaica, she had become settled.

Grave Risk

[52] The Defendant has raised, and is relying on two defences, that she argues should preclude the return of KG to the United States of America. The first defence was grave risk. The Defendant had indicated that KG has been physically abused by the Claimant and his wife, and as such she should not be returned to him. The Defendant was informed of this abuse by KG.

[53] The abuse in question that was detailed by KG to the Children's officeris that she was beaten with a belt by the Claimant and his wife. KG gave instances when she was beaten which included occasions for not brushing her teeth, or when she was present in the room and her sibling fell off the bed.

[54] The Claimant gave evidence that there had been a few occasions when KG had misbehaved and he had slapped her with his hand. He indicated that he had done so as that is how he was raised. He acknowledged that he was wrong and he would not do so in the future. He also indicated that he is willing to attend therapy to ensure that he is a better father. The Claimant denies hitting KG with a belt and gave evidence that he would never do so. The Claimant also denied that his wife ever hit KG. His evidence is that he was the disciplinarian in his household.

[55] In considering the issue of grave risk, I took into consideration not only whether orders can be put in place to alleviate those risks but also the approach of the parties to the risk.

[56] In considering the approach of the parties I took into consideration the report made by KG to the Claimant. The Claimant was informed of KG viewing unacceptable material on the internet. The Claimant spoke to KG about it and it led to KG informing him of an alleged case of sexual abuse. The incident is alleged to have taken place in Jamaica. The Claimant sought assistance for KG by having her receive counselling. The Claimant also insisted that the matter be reported to the police in Jamaica. The Defendant in response to the issue, stated in her affidavit that she did not believe that it had happened.

[57] The approach that is to be adopted, as opined in a number of cases such as **Re E (Children) (Abduction: Custody Appeal)** (sic) and **Rubio v. Castro** (sic) is to enquire in the place of habitual residence whether there are measures that can be put in place to alleviate the psychological and grave risks.

[58] The Claimant in this case immediately owned up to the fact that he had punished KG by slapping her with his hand. He admitted that this approach was wrong and he would find other means of dealing with KG if she misbehaves. He also volunteered to attend therapy. I considered the approach the Claimant adopted when confronted with allegations of KG being sexually abused. The Claimant was proactive is dealing with the issue immediately. I am of the belief that orders and measures can be made to alleviate any risk that may exist.

Objection to return

[59] The second defence that was raised in this case is the objection of KG to being returned to the United States of America. The Defendant gave evidence that she was prepared to return KG to the Claimant, but that KG expressed a reluctance to return to him. The evidence of the Defendant is that KG told her that if she the Defendant sent her back to the Claimant, then she would be wicked. In addressing the issue of the objection of KG to be returned to the Claimant, the court would normally take into consideration two factors, namely: -

a. Whether the objection is raised by the child herself.

b. The age of the child that is raising it.

[60] In this case the objection appears to have been raised by KG herself. KG was interviewed by the Children's Officer. KG raised, and detailed the objection she had to being returned to the Claimant. This objection stems from the abuse that she indicated was inflicted on her by the Claimant and his wife. The Children's officerindicated that KG did not, however, object to living in the Unites States of America per se, nor that she had any issues with her sibling.

[61] KG is an eight-years child who was able to articulate her objection to the Children's Officer. This court, would never seek to make light of the views of an eight year- old child, but that objection must be taken in context.

[62] The objection arises from the actions of the Claimant that was argued would place KG at grave risk. I note the objection of KG but I find that orders can be made to deal with the underlying problem.

Request made within a one- year period.

[63] The Defendant, as per the verbal agreement was to return KG to the Claimant in August 2021. The Claimant filed an application under The Hague Convention to have KG returned to the United States of America in September 2021. A Fixed Date Claim Form was filed for the return of KG on the 13th of December 2021. From the time of the retention of KG to time the Fixed Date was filed was three months. Section 7 K (a) of the Act states that :-

> *Where, at the date of commencement of Court proceedings, a period of less than one year has elapsed from the date the child was wrongfully removed or retained, the Court shall order the return of the child; or*

[64] In this case less than one year has elapsed since the retention of KG and the commencement of Court proceedings. I have found that KG is wrongfully retained in Jamaica and as such I will order her return.

Conclusion

[65] I find that there was a verbal agreement for KG to reside with the Claimant in the United States of America. I find that the parties agreed that KG was to migrate and reside with the Claimant and his wife and for the Defendant to have visitation rights. The agreement was for KG to visit the Defendant every summer, winter and alternate Easters. I find that KG travelled to Jamaica pursuant to that agreement. I find that this was not a temporary agreement which the Defendant could terminate at any time. I find that the Claimant in agreeing for KG to travel to Jamaica, was an exercise his of parental rights, not relinquishing them. I find that the United States of America is the country where KG is habitually resident. I find that due to the short period of time that KG has been retained in Jamaica

she has not become settled in here. I have considered the defences of grave risks and the objection of KG to be returned, however, I find that orders can be made to address these issues. I find and will order that KG be returned to the Claimant.

Orders

1. Having found that the United States of America is the place of habitual residence, KG is to be returned to her place of habitual residence.

2. KG is to be returned to the United States of America, to reside with the Claimant, on or before the 6th of June 2022.

3. The Claimant is purchase the ticket for KG to return to the United States of America.

4. The Claimant is to accompany KG on her return trip.

5. KG is to be handed over to the Claimant on the 2nd of June 2022 at 3 pm at the Office of the Central Authourity so that her travel documents can be renewed.

6. The Registrar is to hand over the travel documents to the representative of the Central Authority on or before the 1st of June 2022.

7. A report concerning any physical abuse being experienced by KG is to be made promptly to the relevant authorities, so that investigations can be conducted.

8. The Defendant is to have daily calls with KG between the hours of 7 am and 7 pm.

9. The Claimant to attend parenting classes and the reports from the classes to be forwarded to the Defendant.

10. The Defendant is to have unsupervised visits with KG whenever she visits the United States of America. The Defendant is to inform the Claimant whenever she is visiting the United States of America at least five days before each visit.

11. The Claimant's attorney is to prepare file and serve the order.