[2022] JMSC Civ250

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV03811

BETWEEN	**DESMOND WILLIAM MCKENZIE**	**CLAIMANT**
AND	**DAISY ELIZABETH RAYMOND**	**1st DEFENDANT**
AND	**LACY-ANN SHERENE RAYMOND**	**2nd DEFENDANT**

IN CHAMBERS

Lorenzo J. Eccleston, Attorney–at–Law for and on behalf of the Claimant herein.

Heard: 23 June 2022, 21 September 2022, 14 & 26 October 2022.

Family Law - Application for the summary return of a child- the inherent jurisdiction of the court - welfare of the child- factors to be considered.

M. JACKSON, J (AG.)

Introduction

[1] The claimant, Desmond William McKenzie, seeks to make final an interim order granted to him on 29 November 2019 by Henry McKenzie J (Ag), against the 2nd defendant, Lacey-Ann Sherene Raymond, for the immediate summary return, as well as custody, care, and control of their son, MM, a minor.

[2] The proceedings stem from the 2nd defendant's retention of their child in breach of a consent to travel agreement. The orders are being sought under the court's inherent jurisdiction and are undefended.

The Factual Background

[3] The claimant and the 2nd defendant are both Jamaican. MM, a male child, is also Jamaican; he was born on 14 December 2011. In 2016, the 2nd defendant left Jamaica for the United States on a visitor's visa and has never returned. When the 2nd defendant departed in 2016, apart from a consent agreement made in 2013—which will be discussed further in this judgment—between the parties, no formal arrangements or discussions were made between the parents concerning the care and control of MM after the 2nd defendant's departure. MM automatically became the sole responsibility of the claimant. The claimant, therefore, had direct control over MM's emotional, physical, scholastic, religious, and social needs after she left.

[4] In December 2017, by an agreement, MM visited the 2nd defendant in the United States. MM returned in January 2018 before his school term started. On 1 August 2018, about seven months later, MM travelled again to the United States on a visitor's visa, accompanied by the 1st defendant, Daisy Elizabeth Raymond, his maternal grandmother. The 1st defendant had in her possession a Parental Consent to Travel Agreement, signed by the claimant and the 2nd defendant. The main terms of the agreement were as follows:

> *To whom it may concern*
>
> ***Re: Parental Consent for International Travel with MM***
>
> *We, Lacy Sherene Raymond and Desmond William McKenzie, are the lawful parents of MM, born on December 14, 2011, in Saint Andrew, Jamaica…*
>
> *MM has our consent to Travel with Daisy Elizabeth Raymond …to visit Newark, New Jersey, during the period of August 1, 2018, to August 31, 2018.*
>
> *During that period, MM will be residing with CL at…., New Jersey*
>
> *Any enquiries regarding this document may be addressed to us at…*

Email address: …Signed on this 13th day of July 2018.
Signature: Lacy Sherene Raymond Desmond William McKenzie

[5] At this point, it is important to clarify that although the agreement listed the name and address of a third party, CL, it was the understanding of both parents that MM would spend time with the 2nd defendant. Also, the agreement was signed in both the United States and Jamaica, for the obvious reason that the parents were not in the jurisdiction.

[6] On 3rd September 2018, the 1st defendant returned to Jamaica. MM, however, did not return with her, as had been agreed. The claimant made several requests to both defendants for MM to be brought back to Jamaica; these requests were either refused or ignored. The 1st defendant explained that the 2nd defendant decided to keep MM. Since she, as a grandmother, had no formal custody rights, she lacked the authority to take MM from his mother.

[7] The Claimant promptly initiated proceedings on 2 October 2018 in the Supreme Court by filing both a fixed date claim form and a notice of application for court orders, along with supporting affidavits. The orders sought in both the fixed date claim form and the notice of application were identical. They were formulated as follows:

a. That DM be granted sole custody of MM, a minor.
b. The 1st Defendant, DM, is required to return the minor, MM, to Jamaica forthwith.
c. The 2nd Defendant, LR, is required to return the minor, MM, to Jamaica forthwith.
d. That upon the return of the minor MM to Jamaica, the defendants, whether by themselves or their servants and or agents, be restrained from further removing the said minor MM from this jurisdiction.

[8] On 10 December 2018, roughly two months after the proceedings began, Henry McKenzie J (Ag) issued the orders requested in the notice of application for court orders. Despite being properly served, the orders were never obeyed.

[9] On 29 March 2019, the claimant filed a Further Amended Notice of Application for Court Orders to vary the orders made on 10 December 2018. On 29 November 2019, Henry McKenzie J (Ag) granted the application as requested. The learned judge also ordered that personal service of the fixed date claim form and all supporting affidavits on the 2nd defendant be dispensed with, and that service of these documents be effected at the 1st defendant's address. The learned judge further ordered that service on the 2nd defendant should also be carried out through two advertisements in the North American edition of The Gleaner Newspaper.

[10] The pertinent terms of the varied orders were as follows:

> "1. The interim formal order made on December 10, 2018, by the Honourable Mrs. Justice Henry-McKenzie(Ag) is varied in the following terms:
>
> a. The Claimant, Desmond William McKenzie, is granted sole custody, care and control of the relevant child, [M D M], until the determination of the Fixed Date Claim Form.
>
> b. The first Defendant, Daisy Elizabeth Raymond, is required to return the minor child [M D M] to Jamaica within fourteen (14) days of the date of the Order into the custody, care and control of the Claimant.
>
> c. The Second Defendant, Lacy-Ann Sherene Raymond, is required to return the minor child, [M D M], to Jamaica within fourteen (14) days of the date of this Order into the custody, care and control of the Claimant.
>
> …"

[11] The 2nd Defendant entered no appearance nor filed an acknowledgement of service. The 1st defendant, however, filed an acknowledgement of service, entered an appearance, and filed an affidavit.

[12] The 1st defendant failed to comply with any of the formal orders of Henry McKenzie J (Ag). For reasons of expediency and practicality, which this judgment will address shortly, the claimant has decided to proceed solely against the 2nd defendant. The orders being sought to be made final are 1 (a) and (c), issued by Henry McKenzie J (Ag) on 29 November 2019.

[13] The only issue I am therefore concerned about is whether to grant the orders as prayed.

[14] After a thorough examination of the facts, which was firmly rooted in what I consider a proper exercise of discretion, in my role as *parens patriae* and also in the best interests and welfare of MM*,* I made the following orders in the final resolution of the matter:

1. The Claimant, DM, the father of the child MM, is granted sole custody, care and control of the said MM.
2. MM is to be returned to DM, his father, for him to reside with him.
3. LR, the mother of MM, is to have access to him, upon her making an application in the Supreme Court of Judicature of Jamaica.
4. A Copy of this Final Order is to be served on LR by placing an advertisement in the North American Edition of the Gleaner, twice.
5. The deemed service of this Order on LR is to be twenty-eight days from the date of the 2nd publication.
6. A courtesy copy of this Formal Order is to be served on the 1st Defendant, DR, grandmother of the child MM, as well as her attorney-at-law, who represented her in these proceedings.
7. The Claimant’s Attorney at Law is to prepare, file and serve this order.

The Discontinuation of the Proceedings against the 1st Defendant

[15] Before proceeding any further, it would be helpful to briefly discuss the 1st defendant, whom the claimant has chosen not to pursue the claim against at this time.

[16] This matter has a complex history. Several applications and orders have been issued against both defendants. Specifically, regarding the 1st defendant, orders were made for her immediate return of MM; contempt proceedings were also initiated against her, and a nine-month prison sentence was imposed for contempt of court. These actions have also led to numerous satellite applications in both the Supreme Court and the Court of Appeal.

[17] The claimant considered her a key figure in what he described as a carefully planned operation to retain and remove MM from Jamaica. The 1st defendant, however, argued the opposite, claiming that she did not influence their decision when the agreement was drafted and handed to her; that she has no custody or control over MM, nor is she aware of MM's or the 2nd defendant's whereabouts, and she has not been in contact with them. Therefore, she is not in a position to comply with the court's order for his swift return.

[18] In the Supreme Court, the 1st defendant applied to have the order for her imprisonment discharged or stayed pending appeal, but her applications were unsuccessful. She then appealed to the Court of Appeal, and she requested a stay of execution pending the determination of the appeal. The Court of Appeal granted her the stay. See **Daisy Elizabeth Raymond v Desmond William McKenzie** [2021] JMCA App 10.

[19] In a comprehensive judgment delivered by Edwards JA, on 7 May 2021, the court held, among other things, that the appeal had a real prospect of success. The court also found that the claimant had provided no evidence to demonstrate that she knew the whereabouts of the 2nd defendant and MM, or that she had control or custody of MM, to comply with the order of Henry McKenzie J (Ag).

[20] In light of the above and considering the Court of Appeal's ruling, as well as the fact that the substantive appeal against the 1st defendant remains pending, the claimant decided to proceed only against the 2nd defendant.

[21] I propose to summarise the evidence presented to me, which has informed my decision in this matter, as set out at paragraph 14.

The Evidence

[22] The claimant relied on several affidavits submitted between 2018 and 2021. They were filed on 2 October 2018, 12 March 2019, 2 April 2019, 27 February 2020, 5 October 2020, 3 March 2021, and 8 March 2021. The content of each affidavit is essentially the same, apart from minor variations. I have only considered those facts that were relevant to the orders sought and what I deemed to be in the best interests of MM.

[23] The claimant also asked this court to rely on the affidavits filed by the 1st defendant. I considered this request carefully. While some parts of her evidence might be relevant to provide useful background and context, I have concluded that her evidence does not assist the court in making the decision I need to reach. Therefore, I found no merit in granting it.

[24] Additionally, her evidence aligns with that of the claimant in some key areas, such as both being unaware of MM's and the 2nd defendant's whereabouts. Furthermore, her affidavits do not offer any up-to-date information about them, which the court considers could be relevant in deciding whether a summary return is necessary and in MM's best interests, given that more than three years have passed since MM left Jamaica.

[25] Another important consideration is that the court finds that both affidavits contain allegations against each other. These are not relevant to this hearing, which must primarily and importantly focus on MM's best interests and welfare.

[26] Furthermore, those allegations should be examined more thoroughly through cross-examination during an *inter partes* hearing. They are more likely to carry greater evidential weight, and a full hearing on the merits can take place. This court would not have that opportunity because the action was undefended. Overall, I considered that the facts provided by the claimant were sufficient.

[27] The claimant has requested that this court grant him sole custody, in addition to the order for summary return. Regarding the issue of custody, as mentioned earlier, the claimant's evidence was that in 2013, at a custody hearing he initiated, a consent agreement was entered in the Family Court in the Parish of Portland. The agreement was reached between them after mediation, and both parties agreed to joint custody of MM. He explained that he made the application because the 2nd defendant had removed MM from the parish where they were both residing at the time. He further stated that she took him away for three months, and he had no contact with MM. Therefore, he initiated the custody proceedings.

[28] Regarding 2016, after the 2nd defendant left Jamaica, the claimant stated that he had sole responsibility, control, and care for MM, as the 2nd defendant did not return to the island. Additionally, when she left, she did not provide him with any contact details or an address. He emphasised that only the 2018 agreement listed the address and contact information of a third party, CL.

[29] He further stated that MM was attending the Liberty Learning Centre and was an "A" student at the time he was retained. He also presented a letter from the school with MM's grades. The letter stated, among other things, that MM would have been entering Year 2 in September of that year. It also noted that MM had been at the institution since 2014, starting in kindergarten. The school report also showed that MM's average grade was between 89% and 90.3%. The claimant also explained that MM was attending church, actively participating in vocational Bible study, and had formed close connections with families on both sides.

[30] The claimant further explained that the agreement permitted MM to travel to the United States with the 1st defendant from 1 August to 31 August 2018. However, towards the end of August, when MM was expected to return to Jamaica, the 2nd defendant sent a ticket with an itinerary for 3 September 2018, stating that this was the earliest she could obtain a ticket for his return to Jamaica. He noted that the 1st defendant returned on that date, but MM did not.

[31] He further informed the court that after MM arrived in the USA in August 2018, he had limited contact with him. He stated that the 2nd defendant initiated and managed all the calls. He described her as acting according to her “whims and fancies."

[32] He said that, during his conversation with MM, he informed him that he had received strict instructions not to disclose his location, including where he was living, the school he attended, and the name of the school. He also stated that, while speaking with MM, he often cried and repeatedly asked to be taken back to Jamaica. He noted that the only contact and address he had for them was for the third party, CL, who was mentioned in the agreement that permitted MM to travel. He stated that MM has not been in contact with his paternal grandparents or any of his other siblings, all of whom have nurtured and cared for him since birth.

[33] He stated that MM travelled to the United States on a visitor’s visa, and his immigration status remains unknown. He also mentioned that he is unaware of the 2nd defendant’s immigration status, as she also left the island on a visitor’s visa.

[34] In an effort to have MM return to Jamaica, the claimant stated that he travelled to New Jersey with a copy of the Formal Order of Henry McKenzie J (Ag). He said he sought assistance from the police. They contacted CL, the third party whose name appears on the letter of authorisation, and she told them she did not know MM's whereabouts but was aware of the 1st Defendant's location.

[35] He also stated that he applied to the Superior Court of New Jersey, Chancery Division, Family Part, armed with the order of Henry McKenzie, J. (Ag), and the court issued an order requiring the 2nd defendant to attend with MM. He stated that she did not comply with the court's order, and a Bench Warrant, which remains unexecuted, was issued under the hand of Judge Christopher Romanysyn on 25 January 2019. The warrant states as follows:

> *"It is hereby ordered: Ms Raymond (NM) failed to appear, nor has the court seen or heard from her. NM has not yet returned the child to Mr McKenzie's (NF) custody in Jamaica. For the reasons stated on the record, a warrant is hereby issued for Miss Lacy Ann Raymond's arrest. The court notes that the child's visitor visa expires on February 1, 2019. So ordered."*

[36] To support the need for the summary return of MM, he highlighted and summarised that the factual basis was that MM was unilaterally retained in the United States in breach of their agreement; MM's ordinary residence is in Jamaica; MM was settled in school, participating in vocational Bible studies, and had a close connection with family members. He pointed out that the United States was not MM's ordinary residence. He also emphasised that he is without proper immigration status, as his visitor's status would have expired from February 2019.

[37] Finally, he stated that the seco[nd] defendant's unilateral conduct had implicitly estranged him and the rest of MM's paternal family, who had nurtured him and jeopardised MM's immigration status. He reiterated that he last had contact with MM in December 2018.

The Law

[38] On November 24, 2017, Jamaica formally ratified the 1980 **Hague Convention on the Civil Aspects of International Child Abduction (The Convention)**.

Article 12 of the **Convention**, to which both Jamaica and the United States are contracting Parties, stipulates 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****. (My emphasis)*

[39] This application was not made pursuant to the **Convention** but under the court's inherent jurisdiction. MM has been away for well over a year. Article 18 of the **Convention** clearly states that the **Convention** does not restrict the power of a judicial or administrative authority to order the child's return at any time. Thus, authorities in Contracting States can obtain an order for the child's return at any time under the court's inherent jurisdiction if it is in the best interest of the child.

[40] In this country, it is the law that any court that determines any question with respect to the upbringing of a child has a statutory duty to regard the welfare of the child as the paramount consideration. The Judges have also developed this consideration in the exercise of their inherent jurisdiction.

[41] Sections 27, 28, 48(a), (f), (g), and 49 (i) of the **Judicature (Supreme Court) Act** as well as sections 2, 7, 18, and 20 of t**he Children (Guardianship and Custody) Act,** establish the foundation for the statutory pillar on which the court, in this jurisdiction can hear cases pursuant to its inherent jurisdiction and the welfare of the child.

[42] There are numerous cases, both within and outside this jurisdiction, that have decided the issue of the summary return of a child. These cases include **B v C** [2016] JMCA Civ 48, **Lisa Hanna Panton v David Panton (Panton v Panton)**

(unreported), Supreme Court Civil Appeal No: 21/06 (delivered 29 November 2006), **Suzeanna Sylvia Williamson v Gregory Winston Williams (unreported),** Supreme Court Civil Appeal No. 51/2007, **Judith Thompson v Ranald Thompson** [1993] 30 JLR 414, and **R v M and Another** [2019] JMSC Civ 156, **J v J** [2021] EWHC 2412 (Fam), **Re L (Minors) (Warship: Jurisdiction)** 1974 1WLR 250, **Re J (a child)** (FC) 2005 UKHL 40.

[43] In **B v C,** Brooks JA, as he then was, opined that:

> *"[19] The Supreme Court does have an inherent jurisdiction ... The jurisdiction of that court, in this context, has a rich history. That history includes the history of the Court of Chancery, which had exclusive jurisdiction in equity, providing relief where the common law offered no remedy. It is a history that is not without some uncertainty, but the more accepted view, in this context, is that the jurisdiction of the Court of Chancery, over children, was founded on the prerogative of the Crown as parens patriae.*
>
> *[20] The term parens patriae is defined in the ninth edition of Black"s Law Dictionary as meaning:*
>
> > *"...parent of his or her country"…The state regarded as a sovereign; the state in its capacity as provider of protection of those unable to care for themselves…"*
>
> *[21] The Crown's prerogative was delegated to the Lord Chancellor in England, who, at that time, was the King 's Chief Minister. The prerogative eventually came to be exercised by the Court of Chancery. In this jurisdiction, there was also a Court of Chancery. Its status and powers in relation to children were very similar to its English counterpart. Its operation was concisely set out in* ***Mackintosh v Mackintosh*** *(1871) Eq J B Vol 2 p 113 (reported in Vol 1 of Stephens" compilation of Supreme Court decisions of Jamaica and Privy Council decisions 1774-1923, at page 1068). In that case, Lucie Smith VC said, at page 1069 of Stephens" compilation:*
>
> > *"...In this Island the judicial business of the Court of Chancery is by virtue of local enactment transacted by the Vice-Chancellor, and the records show repeated instances of the jurisdiction in cases of*

> *infants having been exercised by my predecessors. When letters of guardianship come to be granted they will be issued by the Chancellor under the broad seal, which is in his custody, but the question of the individual to be chosen as guardian is a judicial question, to be determined by the Vice-Chancellor in due course of law and practice."*

[44] At paragraph 28, the learned Judge of Appeal went on to state that:

> *"[28] In **Panton v Panton**, this court recognised the power of the Supreme Court of Judicature of Jamaica to exercise the jurisdiction once held by the Court of Chancery. Harrison P, in his judgment, at page 3, stated that the Supreme Court should be "slow to decline to exercise such power whenever the occasion arises, because of its all-encompassing interest in the welfare of the child".*
>
> *[29] The power, of which Harrison P spoke, is set out in the Judicature (Supreme Court) Act. Three specific sections of that Act assist in identifying the jurisdiction of the Supreme Court. Firstly, section 4 of the Act stipulates which courts have been merged:*

On the commencement of this Act, the several Courts of this Island hereinafter mentioned, that is to say–

> The Supreme Court of Judicature,
>
> The High Court of Chancery,
>
> The Incumbered Estates' Court,
>
> The Court of Ordinary,
>
> The Court for Divorce and Matrimonial Causes,
>
> The Chief Court of Bankruptcy, and
>
> The Circuit Courts,
>
> shall be consolidated together, and shall constitute one Supreme Court of Judicature in Jamaica, under the name of the Supreme Court of Judicature of Jamaica, hereinafter called the Supreme Court.

Secondly, section 27 describes the jurisdiction of the merged court:

> "Subject to subsection (2) of section 3 the Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island, that is to say–
> The Supreme Court of Judicature,
> The High Court of Chancery,
> The Incumbered Estates Court,
> The Court of Ordinary,
> The Court for Divorce and Matrimonial Causes,
> The Chief Court of Bankruptcy, and
> The Circuit Courts, or
> Any of the Judges of the above Courts, or
> The Governor as Chancellor or Ordinary acting in any judicial capacity, and All ministerial powers, duties, and authorities, incident to any *part of such jurisdiction, power and authority."*

Finally, section 49 sets out certain consequences of the merger. The relevant portion states:

> *"With respect to the law to be administered by the Supreme Court, the following provisions shall apply, that is to say–*
>
> *(a) …*
>
> > *(l) In questions relating to the custody and education of infants the rules of equity shall prevail.*
> >
> > *(j) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail."*
>
> *[30] Against the background of that jurisdiction, inherited from the Court of Chancery, Parliament introduced, in 1957, legislation which specifically treated with the*

> *guardianship and custody of children. That legislation, the Children (Guardianship and Custody) Act."*

[45] In **Panton v Panton** at page 3, Harrison JA, as he then was, also opined that the **Children (Guardianship and Custody) Act** governs proceedings concerning the custody of a child. Section 18, among other things, states that the welfare of the child is the primary and most important consideration—a principle that underpins all other considerations.

[46] Harrison JA further stated that a court, when considering the summary return of a child to another jurisdiction, must be guided at all times by the principle of what is in the best interests of the child, and that a balance should exist between the summary return and a hearing on its merits regarding custody.

[47] The learned judge of appeal, at page 3, also opined that:

> *"The Supreme Court has jurisdiction in respect of the custody of children (section 2) and accordingly such a court will not decline jurisdiction when the parties are within the same jurisdiction. In addition, the power of the Court of Chancery as parens patriae to all children, which is now exercisable by the Supreme Court, compels such a court to be slow to decline to exercise such power whenever the occasion arises, because of its all-encompassing interest in the welfare of the child. This power is exercisable by the Court, despite the wishes of the respective parents.*
>
> *The true welfare of the child, which is paramount, has been described as:*
>
> *" .. the child happiness, its moral and moral religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings"(**Forsythe v Jones SCCA** No. 49/99 del. 6th April 2001, at page 8)*

[48] In **Re J (A Child)** [2005] UKHL 40, Baroness Hale of Richmond, in overturning the Court of Appeal's decision to order the summary return of the child to Saudi Arabia, states that the summary return should not be an automatic response to every unauthorised removal or retention of a child from their home country. She, however, added that "summary return may very well be in the interest of the

individual child." She further clarified that the decision to do so is always a matter of choice, and a judge undertaking this decision must consider the individual child in the specific circumstances of the case. She also proposed, as a practical starting point, "the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be resolved there." At paragraphs 18, 25, 28, 29, and 32, Baroness Hale also reiterated that it has been established that an application under the court's inherent jurisdiction is to be determined solely in the child's best interests.

[49] In **Re R (Minors) (Wardship: Jurisdiction)** (1981) 2 FLR 416, Ormrod LJ, at 425, opined that:

> *"…a swift, realistic and unsentimental assessment of the best interests of the child, leading, in proper cases, to the prompt return of the child to his or her own country, but not the sacrifice of the child's welfare to some other principle of law".*

[50] The need for the Judge to undertake this "swift and unsentimental decision", rooted firmly in welfare, was reinforced by Baroness Hale in her speech in ***R*e J(a child)** at [31] and [41]. The learned Judge expressed that position in accordance with the facts of that case as follows:

> *" [31]That approach is open to a number of objections. It would come so close to applying the Hague Convention principles by analogy that it would be indistinguishable from it in practice. It relies upon the Hague Convention concepts of 'habitual residence', 'unauthorised removal', and 'retention'; it then gives no indication of the sort of circumstances in which this 'strong presumption' might be rebutted; but at times Mr Setright appeared to be arguing for the same sort of serious risk to the child which might qualify as a defence under article 13(b) of the Convention. All of these concepts have their difficulties, even in Convention cases. For example, different approaches have been taken in different countries to the interpretation of the vital concept of habitual residence. By no means everyone shares our view, which is based on the exercise of parental authority: see R Schuz, "Habitual residence of children under the Hague Child Abduction Convention - theory and practice" [2001] 13 CFLQ 1. There is no warrant for*

> *introducing similar technicalities into the 'swift, realistic and unsentimental assessment of the best interests of the child' in non-Convention cases. Nor is such a presumption capable of taking into account the huge variety of circumstances in which these cases can arise, many of them very far removed from the public perception of kidnapping or abduction.*
>
> *[41] These considerations should not stand in the way of a swift and unsentimental decision to return the child to his home country, even if that home country is very different from our own. But they may result in a decision that immediate return would not be appropriate, because the child's interests will be better served by allowing the dispute to be fought and decided here. Our concept of child welfare is quite capable of taking cultural and religious factors into account in deciding how a child should be brought up. It also gives great weight to the child's need for a meaningful relationship with both his parents. It does not follow, therefore, that a Saudi Muslim boy who is mainly cared for by nannies and nursery schools will be better off living with his mother and maternal grandparents in multi-cultural London than with his father or some other female relative in his home country."*

[51] In **Re L (Minors) (Wardship: Jurisdiction***)* [1974] 1 WLR 250, (a pre-*1980 Hague Convention* decision, Buckley LJ had this to say:

> *" p.264F. To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be*

> *assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child."*
>
> *p.265A-B: "… judges have more than once reprobated the acts of "kidnappers" in cases of this kind. I do not in any way dissent from those strictures, but it would, in my judgment, be wrong to suppose that in making orders in relation to children in this jurisdiction the court is in any way concerned with penalising any adult for his conduct. That conduct may well be a consideration to be taken into account, but, whether the court makes a summary order or an order after investigating the merits, the cardinal rule applies that the welfare of the infant must always be the paramount consideration."*

[52] In **Panton v Panton** at page 5, Harrison, on the matter of a unilateral taking or breach of a custody agreement, the Judge of Appeal, had this to say:

> *"The summary return order may only be made after considering several factors. The fact that one parent is in breach of a custody order by preventing a child from returning to their former residence is undesirable, but it is not a disqualifying feature. In **McKee v McKee** [1951] 1 All ER 942, the father of an infant took him from the United States of America to Ontario, Canada, in breach of an order granting custody to the infant's mother, from whom the father was divorced. They were all American citizens. In habeas corpus proceedings in Canada, custody was granted to the father, but ultimately reversed by the Supreme Court of Canada and granted to the mother. On further appeal to the Judicial Committee of the Privy Council, their Lordship held that despite the fact that the father had taken away the child to avoid obedience to the American court, he was entitled to have the question of custody re-tried in Canada. Their Lordships (per Lord Simonds) at page 946 said:*
>
> *"The fact that the father had broken an agreement*
>
> *Solemnly entered into was, therefore, a circumstance which the learned judge had to take into account and*

> *weigh in determining what was the welfare of the child. That he expressly did, and their Lordships see no ground for saying that he gave too little weight to what was only one of many elements in the case."*
>
> *Although the conduct of the parent is a relevant factor in*
>
> *In determining the grant of custody of a child in its best interests (section 7 of the Act), it was held that despite the prima facie unlawful behaviour of a parent who kidnapped its child, that will not disentitle such parent from custody…"*

[53] Lord Wilson in **Re NY (A Child***)* [2019] UKSC 49 sets out some questions that a trial judge should consider when contemplating the summary return of a minor child. These were detailed in paragraphs 56–63 and have been helpfully summarised by Cobb J, in **J v J (Return to Non–Hague Convention Country)** [2021] EWHC 2412, as follows:

> *"i) The court needs to consider whether the evidence before it is sufficiently up to date to enable it then to make the summary order ([56]);*
>
> *ii) The court ought to consider the evidence and decide what if any findings it should make in order for the court to justify the summary order (esp. in relation to the child's habitual residence) ([57]);*
>
> *iii) In order sufficiently to identify what the child's welfare required for the purposes of a summary order, an inquiry should be conducted into any or all of the aspects of welfare specified in section 1(3) of the 1989 Act; a decision has to be taken on the individual facts as to how extensive that inquiry should be ([58]);*
>
> *iv) In a case where domestic abuse is alleged, the court should consider whether in the light of Practice Direction 12J, an inquiry should be conducted into the disputed allegations made by one party of domestic abuse and, if so, how extensive that inquiry should be ([59]);*
>
> *v)The court should consider whether it would be right to determine the summary return on the basis of welfare without at least rudimentary evidence about basic living arrangements for the child and carer ([60])*
>
> *vi)The court should consider whether it would benefit from oral evidence ([61]) and if so, to what extent;*

> *vii) The court should consider whether to obtain a Cafcass report ([62]): and, if so, upon what aspects and to what extent.*
>
> *viii) The court should consider whether it needs to make a comparison of the respective judicial systems in the competing countries – having regard to the speed with which the courts will be able to resolve matters, and whether there is an effective relocation jurisdiction in the other court ([63])."*

The Analysis

[54] Adjudicating cases involving child abduction or retention is a complex task for any judge; this case, which is before me, is no exception. This remains true whether the parties are within the same jurisdiction or have crossed borders, as in this instance. These proceedings inevitably require a court to decide how a child should be raised, where the child should be taken, and which of the two countries—such as in this case—are best suited to address the issues that caused the abduction or retention, or to consider the merits of the case.

[55] These proceedings, as I have previously stated, are unopposed, unlike other cases involving the application of summary return, which present evidence from both sides; the evidence before this court comes from only one party. The court also lacked information on MM's welfare, status, and other relevant details. The evidence before this court, narrowing it down to the core, reveals these facts: MM was unilaterally retained in breach of an agreement, MM's immigration status is unknown, his biological father has had no contact with him for over three years, his visitor status has expired, and his current location in the United States is unknown. He had been unilaterally taken or retained in a country not his usual residence, and his stability and security are also unknown. These facts were of paramount importance for the court when considering what would be in the best interests and welfare of MM.

[56] At the end of the day, the position is that MM is currently not in Jamaica. Likewise, there can be no genuine dispute that he is in the United States of

America and has been there for over three years. The court, therefore, had to focus on the welfare of MM.

[57] Notably, this case differs from those I previously cited because, in those instances, the application for the summary return of the minor(s) involved two countries, one of which was not a party to the **Convention** or had never been a party when the application was made, for example, **Panton v Panton**. Despite this difference, however, the principles and laws established in those cases remain relevant to this case. The welfare of MM is of the utmost importance. Both Jamaica and the United States are now signatories to the **Convention**. However, considering the spirit and tone of the **Convention** and the issues in this matter, it is clear why the application is made under the court's inherent jurisdiction.

[58] The 2nd defendant left Jamaica in 2016; there was no formal arrangement for the custody, care, and control of MM after her departure. However, MM visited her in the United States in 2017. MM travelled to the United States with a Jamaican passport that included a visitor's visa. His legal status as a visitor expired in February 2019, as indicated on the Bench Warrant issued by Judge Romanysyn of the Superior Court of New Jersey. The warrant stated that: "*The court notes that the child's visitor visa expires on February 1, 2019."* This court will emphasise that this was a relevant factor in determining what was in MM's best interests. The undisputed fact is that his current immigration status is unknown, which this court must regard as highly important. Equally, the time for which MM has been away from Jamaica is now over three years, a significant and material fact that cannot be ignored when considering MM's welfare.

[59] The evidence presented showed that despite prompt and swift efforts by the claimant to secure the return of MM, those attempts have been futile. The clear evidence, as Mr Eccleston submitted, is that MM was not habitually resident in the United States immediately before his retention. The country of ordinary or habitual residence, or with which he had a closer or stronger connection, was Jamaica. Counsel also submitted that MM was well settled in school, excelling

academically and was an “A” student. He further submitted that, in Jamaica, MM's religious needs were also met as he attended Sunday school.

[60] Mr Eccleston, in his submission, also reminded the court to consider the fact that MM was unilaterally taken from Jamaica, in breach of a mutually agreed arrangement. I bear in mind that the authorities have stated that while the court disapproves of the unilateral retention of a minor by one parent, the court must carefully balance whether a summary return may be appropriate. However, it may nevertheless be a factor to consider. The fundamental rule, however, that I gleaned from the authorities is that I must prioritise the welfare of MM, which must always be paramount. See **Re L (Minors) (Wardship): Jurisdiction** paras 265A-B.

[61] There is no evidence before me regarding his current circumstances, including whether the child has settled into his new environment or the level of any risks he might have faced. It has been over three years since MM has been outside Jamaica. Inevitably, questions will arise about whether he has established roots in the new environment (the United States), which is a natural consideration, given that such roots can grow quickly, as the decided cases have held. Issues concerning potential conflicts may also emerge and must be given relevant consideration by this court.

[62] The claimant stated that MM was crying and pleading to return to Jamaica. This serves as evidence suggesting that MM may not have adapted well to the environment in which he was unilaterally retained.

[63] The immigration status of the 2nd defendant is currently unknown. After leaving the jurisdiction, MM visited her twice. The first visit was a year after her departure in 2017, when MM spent Christmas with her. He returned in January 2018, and she saw him again in August of that year. She unilaterally retained him that year and enrolled him in a school. At that time, the only known status he held in the United States was that he was a visitor to the country.

[64] In **Re J (a child),** the House of Lords agreed with the trial judge that returning to Saudi Arabia would not have been in the child's best interests; the main reason was the allegations made against the mother by the father and their potential impact under Saudi Arabian Sharia law. Therefore, a summary return would not serve the child's best interests. However, in this case, no such facts are present, and the court has no evidence for retention.

[65] Although the facts and circumstances of this case before me differ and present their own unique challenges, I must consider the orders being sought. These involve whether to make final the orders of Henry McKenie J (Ag) for the summary return of MM, and for custody, care, and control to the claimant.

[66] Based on my own assessment of the decided cases, I have distilled the following as useful guidance to assist in exercising my discretion and resolving this matter:

a. A court has the inherent jurisdiction to issue an order for the summary return of a child who was wrongfully removed or wrongfully retained by one parent.
b. An application under the court’s inherent jurisdiction must conduct a quick, realistic, and unemotional assessment of the child’s best interests, leading, where appropriate, to the swift return of the child to his or her own country, without sacrificing the child’s welfare for any legal principle.
c. When deciding whether to return a child to their home country, a convenient starting point is the proposition that it is likely to be in the child's best interest.
d. The court can act in its capacity as *parens patriae*
e. In determining whether an application to return a child under its inherent jurisdiction, the court must have regard to the “*individual child in the particular circumstances of the case” and the* welfare of the child, which is a primary and paramount consideration.

f. A summary return should not be the automatic response to every unauthorised removal or retention of a child from their home country. However, a summary return may be in the best interests of the child.

g. Once the child's ordinary residence is established, that jurisdiction is the appropriate forum. When a minor is a habitual resident of a specific jurisdiction with his home and settled life, the interests of the case require that the minor child be returned to that jurisdiction.

h. A child's ordinary residence cannot be altered through kidnapping or retention of the minor by the other parent. Furthermore, one parent cannot change the child's ordinary residence without the consent of the other parent.

i. When one parent unilaterally removes or retains a minor child from his ordinary residence, there can be no change of the child's ordinary residence unless the other parent acquiesces.

j. Unilateral decisions taken by one parent to remove or retain a minor child are frowned upon by the courts, and the courts tend to return the child to its ordinary residence.

k. A court has jurisdiction to make an order for custody even in circumstances where the minor is outside the jurisdiction.

l. The best interest of the child includes the maintenance and development of the relationship between the child and his parent(s), as it relates in particular to the child's future welfare.

[67] In this case, although the evidence comes solely from one parent, it nonetheless establishes some undisputed and well-known facts. These include the absence of details on the whereabouts of MM and the 2nd defendant, as well as their immigration status. In the court's view, these factors tipped the balance in favour of ordering the immediate summary return of the child.

[68] In light of the specific facts and circumstances of the case, I am cognisant that my decision needed to be firmly based on the welfare of MM and what is in his best interest. I have evidence, based on the conduct of the 2nd defendant, that

he was removed from his country of ordinary or habitual residence by the unilateral action, at a time when he had no immigrant status other than that of a visitor. Concerning the issue of ordinary or habitual residence, it is important to note that I did not apply the technical definition of habitual residence as outlined in the Convention, but rather a common-sense interpretation of the concept. This simply means the country with which he had a closer connection.

[69] In this context, I find the sage words of Lord Denning M.R. in **Re P(G.E.) (an infant)** [1964] 3 All ER 977, at page 982 to be apt. He said:

> *"…what is the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say under the age of sixteen? So long as the father and mother are living together in the matrimonial home, the child's ordinary residence is the home and is still his ordinary residence, even whilst he is away at boarding school. It is base, from whence he goes out and to which he returns. When father and mother are at variance and living separate and apart, and by arrangement, the child makes his home with one of them then that home is his ordinary residence, even though the other parent has access and the child goes to see him from time to time. I do not see that a child's ordinary residence so found can be changed by kidnapping him and taking him away him from his home; even if one of his parents is the kidnapper. Quite generally, I do not think that a child's ordinary residence can be changed by one parent without the consent of the other. It will not be changed until the parent who is left at home, childless, acquiesces in the change, or delays so long in bringing proceedings that he or she must be taken to acquiesce"*

[70] Jamaica is MM's home country; he is a Jamaican national and has lived here his entire life. His religious and vocational education also began in Jamaica, and he attended school until the age of seven, when he was unilaterally retained. He has spent his whole life here, starting school in 2014 at the age of three in kindergarten and progressing to the preparatory level. He was quickly moved into

a new environment, where he enrolled in school. Therefore, I have concluded that MM has a stronger connection with Jamaica.

[71] The claimant's last contact with MM was in December 2018. The child's welfare in these circumstances requires action, as the court's role as *parens patriae* is to correct and provide certainty and stability for MM, who is now 10 years and six months old. The 2nd defendant is in breach of the United States' Immigration Law.

[72] This court has no evidence regarding his current wishes and feelings, his physical, educational, and emotional needs, or whether there are effects of any changes concerning his religion, culture, or any harm he has endured.

[73] In light of the circumstances of this case, I will rely on the proposition of Baroness Hale in **Re J (a child),** that it is likely to be better for a child to be returned to his home country for any dispute about his future to be decided there. In reaching this decision, these are specific circumstances that tipped the scales in favour of making such an order:

a. The claimant, who is MM's father, has been alienated from his child due to the unilateral act of retention by the 2nd defendant, which breaches an agreement they both consented to.
b. The court is devoid of any explanation or evidence for such drastic and immediate action.
c. MM has been uprooted from a stable environment to a foreign one, with little or no established roots and familiarity.
d. The child, MM, was not habitually resident in the United States immediately prior to his retention.
e. He was taken from his home country of ordinary residence
f. MM is still a minor
g. MM was expected to return to his school and other familiar environments, but he now finds himself in a place disconnected from those norms.

h. His education was interrupted,
i. The claimant had sole care, custody, and control of MM since at least 2016, when the 2nd defendant left Jamaica.
j. Following the departure of the 2nd defendant in 2016, no formal custody arrangement has been in place since 2013.
k. The move is likely to be psychologically distressing for him. The claimant asserts that he cries, wanting to return home.
l. The immigrant status of MM is unknown.
m. The 2nd defendant's immigrant status is also unknown.
n. MM's family life, at least with his father and siblings in Jamaica, has been disrupted.
o. The circumstances of his current stay, education, religious and psychological connections are unknown.

[74] Regarding the order for custody, care, and control in issuing the summary return order, I find that in the absence of any formal custody arrangement before me, in making the order for MM's immediate return, I am of the view that it will be also necessary to make the final order for care, custody in the best interests and welfare of MM.

[75] Finally, if the 2nd defendant wishes to approach the court as stated in paragraph 3 of my final orders, which is outlined at paragraph 14 of this judgment, she would not be prevented from doing so. These orders are made in the best interests of MM and primarily aim to restore a stable environment, as previously established. This, of necessity, will include returning him to the care and control of his father, subject to any future proceedings to be brought in this jurisdiction.

The Execution of the Order

[76] In conclusion, I observe that the claimant has exerted continuous effort to locate MM and the second defendant. He travelled under the orders of Henry McKenzie J(Ag). A warrant remains outstanding from the New Jersey Superior Court.

[77] Despite the obstacles faced, I must act in the best interest of MM. It is not acceptable for the court to ignore the potential harm caused by relocating a child to a country with non-immigrant status or to prevent the other parent from seeking or bonding with the child. This court cannot disregard these circumstances. To ignore them would not be in MM's welfare and best interests.

[78] Mr Eccleston urged upon this court the case of **Maurice D. Dyce v. Camille Christie,** 17 S. 3d 892 (2009), as an authority that may assist this court. He asked me to consider **the Uniform Child Custody Jurisdiction and Enforcement Act** (UCCJEA) in the USA, which is incorporated into the **Domestic Relations Law**, which was used in the case.

[79] He submitted that Article 5-A, sections 75, 75-D, 77-B, and 77-E, are relevant:

"SECTION 77-B

Duty to enforce

Domestic Relations (DOM) CHAPTER 14, ARTICLE 5-A, TITLE 3

> *77-b. Duty to enforce. 1. A court of this state shall recognise and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this article or the determination was made under factual circumstances meeting the jurisdictional standards of this article and the determination has not been modified in accordance with this article..."*

"SECTION 75-D

International application of the article

Domestic Relations (DOM) CHAPTER 14, ARTICLE 5-A, TITLE 1

> *75-d. International application of article. 1. A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this title and title two of this article. 2. Except as otherwise provided in subdivision three of this section, a child custody*

> *determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this article must be recognised and enforced under title three of this article. 3. A court of this state need not apply this article if the child custody law of a foreign country, as written or as applied, violates fundamental principles of human rights."*

[80] This case involves an appeal by a father following a Jamaican custody decree that granted custody of his child to the mother. The mother's request was based on two Florida Statutes that require an evaluation of whether the father had proper notice and opportunity to be heard in the Jamaican proceedings. The father claims that the court should not have recognised the Jamaican decree on the grounds that it was entered in violation of Florida's public policy. The court concluded that it does not believe public policy obliges them to reassess the merits of every foreign custody decree to determine whether the best interests of the child were considered.

[81] The court also emphasised that the **Uniform Child Custody Jurisdiction and Enforcement Act** aims to prevent jurisdictional conflicts and repeated legal proceedings in other jurisdictions. It further stated that it is the responsibility of the foreign court (in this case, the Jamaican court) to determine whether it has correctly applied its relevant laws.

[82] I find the authority persuasive and can assist the claimant in ensuring the 2nd defendant complies with the final orders issued by this court at paragraph 14.