[2022] JMSC Civ 43

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022FD00147

BETWEEN	**RR**	**CLAIMANT**
AND	**ZW**	**DEFENDANT**

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

Ms. Bianca Samuels instructed by Knight Junor Samuels for the Defendant

The Hague Convention on the Civil Aspects of International Child Abduction 1980- Articles 3, 11, 12, &13 -The Children (Guardianship and Custody) Amendment Act

Heard: March 16th and 8th April 2022

Habitual Residence - Grave risk - Discretion after one year

IN CHAMBERS

SHELLY-WILLIAMS, J

Background

[1] The Claimant is a nurse who presently resides in Texas in the United States of America. She is originally from Tanzania. The Defendant is a businessman who resides in Jamaica. The Claimant and the Defendant have a child, PW, born on the 18th of February 2012. After the birth of PW, the parties resided in Florida, United States of America for a number of years. The parties resided together between 2012 and 2014 and later, between 2015 and 2016. The Claimant had

primary care of PW with the Defendant taking care of PW whilst the Claimant was at work or when the Claimant attended school.

[2] The Claimant moved out of the shared accommodation with the Defendant and later successfully filed for maintenance of PW in Florida in March 2017. The Defendant, by his own admission, refused to honour the terms of the maintenance order and as such has never made any payments pursuant to the order. The Defendant left Florida in 2017 and eventually moved back to Jamaica. The Claimant has sole custody PW and solely cared for PW up to August 2019.

[3] The Claimant indicated in her affidavit that PW had disciplinary problems in school and had been suspended on a number of occasions. The Claimant had PW assessed by a psychologist who opined that the issues that PW was experiencing may have been as a result of the absence of a male figure.

[4] The Claimant, in her affidavit indicated that she entertained two options to establish a male figure in PW's life. The first option was to have PW reside in Jamaica with the Defendant to see whether this may lead to the improvement in behaviour. The second option was to send PW to her relatives in Tanzania, for a year.

[5] The Claimant and the Defendant agreed in August 2019 for PW to reside with the Defendant. The Claimant and the Defendant entered into what the Claimant described as an oral agreement. The Defendant defines it as an understanding, for PW to reside in Jamaica. In April 2020, the parties had a disagreement and the Claimant requested the return of PW to her in The United States of America. The Defendant refused. The Claimant then filed an application under The Hague Convention in the United States of America in August 2021. That application was then referred to Jamaica's Central Authority on the 16th of September 2021. The Central Authority then filed a Fixed Date Claim on the 14th of January 2022. This Fixed Date Claim Form was supported by affidavits, from the Claimant and Ms Maxine Bagalue. The Defendant filed an affidavit in response on the 28th of February 2022 and the Claimant filed a reply on the 7th of March 2022. There was an attempt at mediation which failed.

The Claimant in the Fixed Date Claim Form is seeking the following orders:-

1. An Order for the return of PW, born on February 18, 2012, in the Jackson North Medical Centre in North Miami Beach, Florida 33169, United States of America to the place of habitual residence in the 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, hand over PW to the Claimant or her personal representative;

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

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

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

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

The reasons proferred by the Claimant in her Fixed Date Claim Form for the requested orders are:-

1. Wrongful retention of PW by the Defendant as per section 7C (1) of the Children (Guardianship and Custody) Amendment Act;

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

3. An Order for the return of PW as per section 7M of the Children (Guardianship and Custody) Amendment Act;

4. The Central Authority regards the surrender of travel documents and bi-weekly reporting by the defendant as necessary measures within the meaning of section 7D (2) (a) of the Children (Guardianship and Custody) Amendment Act; and

5. 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) of the Children (Guardianship and Custody) Amendment Act.

Claimant's case

[6] The Claimant's case was that she has custody of PW and has never relinquished her custody. She has submitted that it was due to the fact that PW was constantly being suspended from school that she sought to address the issue as identified by the psychologist in the United States of America. The issue identified by the psychologist being that PW required a male role model. The Claimant submitted that she entered into an oral agreement with the Defendant for PW to reside in Jamaica under certain conditions. These conditions were:

a. That PW was to reside in Jamaica for one year.

b. That the Defendant was to be responsible for all of PW's expenses.

c. That she would terminate the maintenance order in Florida.

d. That she would have access to PW.

e. That she would be able to visit PW.

f. That PW would be enrolled in a school.

[7] The Claimant indicated in her affidavit that she made attempts to have the Defendant sign an agreement to reflect these condition but he failed to do so.

[8] In carrying out the terms of the agreement the Claimant averred that she:-

i) Filed an application in the court and terminated the maintenance order.

ii) Applied for and had the school records of PW forwarded to the Defendant so that he could have PW enrolled in school.

iii) Visited PW in Jamaica on one occasion in November 2019 and later made arrangements for a second visit in February 2020. The plan to visit Jamaica in February 2020 did not materialise.

iv) Voluntarily paid for PW dental visits and hair appointments. She also, on occasions, ordered and paid for food for PW on line.

[9] The Claimant stated in her affidavits that part of the agreement between herself and the Defendant was for the Defendant to be financially responsible for PW whilst in Jamaica. The Defendant, however, started to demand money from her. In her second affidavit, she admits that some of the funds she sent to Jamaica were voluntary but that a number of the payments were requested by the Defendant. She indicated that she forwarded three sums of money to the Defendant for the enrolment of PW in school. This money had been demanded from her by the Defendant.

[10] The Claimant indicated that she visited Jamaica in November 2019 and whilst here she and the Defendant visited Hillel School. After her visit to the school, she agreed with the Defendant that it would be a suitable school for PW. The Claimant then arranged for PW's school records to be forwarded to the Defendant so that he could be enrolled in school. In April 2020, after a disagreement with the Defendant, The Claimant decided that PW should be returned to her in the United States of America as the agreement between herself and the Defendant was not being honoured. The Defendant refused to return PW. In September 2020, she demanded to know which school PW was attending and the Defendant then sent her a receipt from The America International School in Kingston ("ASIK") School purporting to show that PW was enrolled there. The Claimant then contacted ("ASIK") to make enquiries about the progress of PW and was told by the school personnel that PW was not enrolled there. In support of this claim the Claimant exhibited to the court a copy of the receipt that she purports the Defendant had sent to her.

[11] On realising that PW was not enrolled in school, the Claimant averred that she sought to enrol PW in a school in Texas whilst the case was progressing through the court system. She averred that her son would have been provided with a

computer to access his classes on line, but that the Defendant refused to allow PW to participate in the classes.

[12] The Claimant stated in her affidavit that she had enrolled and paid for PW to attend classes through an online program with Khan Academy whilst PW was in the United States of America. The Claimant stated that she continued to pay for this course whilst PW was in Jamaica as she realised that he had not been enrolled in any local school. On a perusal of PW's attendance record for this course whilst he was in Jamaica with the Defendant, the Claimant realised that his attendance was quite poor.

[13] The Claimant submitted that she requested the return of PW in April 2020 as the Defendant had breached the agreement, and in particular, that PW had not been attending school in Jamaica. The Defendant refused to return PW to the Claimant. The Claimant then filed the Fixed Date Claim Form before the court seeking an order from the court for the return of PW, on the basis that the United States of America is PW's habitual place of residence. In support of this assertion, she gave a list of the schools PW had attended prior to arriving in Jamaica. In addition, she listed the extracurricular activities PW had been involved in, as well as the social groups PW had participated in. She also detailed the sporting events that PW had taken part in.

[14] The Claimant has stated in her affidavit, that in the event the orders she is seeking from the court are granted, she has already made preparation for PW's return. She has stated that she has already enrolled PW in a school in Texas, with assessment to be undertaken in the week of March 21st 2022. She has stated in her affidavit that PW would require additional help to catch up with his peers and as such, she has identified a tutoring centre to assist with this. She has indicated that she would take PW to a Paediatric Group so that she could obtain a referral to a child psychiatrist for PW's treatment. She has also identified a summer camp for the summer break.

[15] The Claimant has stated in her affidavit that she has a sister who resides in close proximity to her who would assist her with baby- sitting. She has also identified a baby sitter for the times her sister would be unable to assist.

The Defendant's submission

[16] The Defendant has not taken issue with the timelines that the Claimant had indicated that they resided together. In his affidavit, he gave reasons as to why the parties separated, and indicated that he had made certain offers to the Claimant to reside with him at a relative's house.

[17] The Defendant indicated in his affidavit that he played an active role in the life of PW, and he took issue to any reference that he was a mere baby sitter. He stated that he would drop the Claimant at work and pick her up when she works in the nights. He also indicated that he would keep PW whilst the Claimant was at work.

[18] The Defendant acknowledged that in 2017 the Claimant had applied for and received a maintenance order against him. He indicated that he did not make any payments pursuant to the order, as the Claimant had no need to apply for such an order. He averred that although he did not make any payments to the Claimant as required by the maintenance order, he gave her certain sums of money for the maintenance of PW. He also acknowledges that he left Florida after the maintenance order was made against him in 2017.

[19] The Defendant averred that he is aware that PW had some behavioural issues and when he was contacted by the Claimant, he agreed to have PW reside with him. He took issue that there was an agreement was for PW to reside with him for one year.

[20] The Defendant indicated that it was understood that he would accept financial responsibility for PW during the period PW resided with him. He averred that the Claimant did send money to him for PW, but that it was voluntarily given. He stated that there were occasions where he had requested money from the Claimant but it was as a result of the Claimant calling him and PW on his American telephone

which was costly. His evidence is that he had asked the Claimant not to call on that telephone and, however she continued to do so. In light of that he then asked her to pay for those calls. In support of this evidence, the Defendant exhibited an email that he had sent to the Claimant indicated that her debt to him was zero.

[21] The Defendant detailed in his evidence that he had made efforts to enrol PW in Hillel school and indicated that he constantly made enquires about the enrolment of PW in the school. His evidence is that Hillel school had requested a psychologist report and had provided a list of Doctors for the Defendant to choose from. His evidence is that he had taken PW to the psychologist and attached to his affidavit the report from Doctor K.A.D. Morgan.

[22] He acknowledged that PW has not attended school since his arrival in Jamaica from August 2019 except for two weeks when he attended a summer program at St Andrew Preparatory school. His evidence is that he home-schooled PW by having reading time with PW and undertaking writing exercises. He denied that PW could have attended on line classes in Texas. He had sought to verify the information regarding the online classes given to him by the Claimant but he was unable to do so. The Defendant did seek to hire a tutor prior to January 2022, but was unable to do so for a sustained period of time. The Defendant's evidence is that since February 2022 he has hired a tutor for PW.

[23] The Defendant denies forwarding any receipt from ASIK and submitted that this was fabricated by the Claimant.

[24] The Defendant avers that PW is now settled in Jamaica, having established strong ties with family members and has joined a football club. He also avers that PW has made friends with children in the community. He contends that PW no longer has aggressive tendencies and as such should be left in Jamaica with him.

[25] He has stated that PW would be at grave risk if he is returned to the Claimant, and detailed a number of incidents that suggested that the Claimant had abused PW

whilst PW resided with her. The Defendant also avers that If PW is sent to live with the Claimant again, the aggressive tendencies may return.

Facts not in issue

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

1. That prior to PW arriving in Jamaica in August 2019 he was habitually resident in the United States of America.

2. The Claimant is the mother of PW and that he resided with her prior to his arrival in Jamaica.

3. That PW has not been registered in any school since his arrival in Jamaica in August 2019 but for a two- week period where he attended a summer program.

4. That PW has been diagnosed with a learning disorder.

5. That the Claimant has relocated from Florida to Texas in the United States of America.

These are the contentious issues

1. Whether the Claimant had agreed for PW to permanently reside in Jamaica?

2. Whether the child PW is now settled in Jamaica?

3. Whether PW would be in grave risk if he is returned to the United States of America?

The Law

[27] The Fixed Date Claim Form requesting the return of PW is made pursuant to Section 7 of **the Children (Guardianship and Custody) Act** ('the Act'), which was amended on the 8th of February 2017. This amendment gives effect to **The Hague Convention on the Civil Aspects of International Child Abduction 1980** (The Hague Convention) to which Jamaica is now a signatory.

[28] The Claimant is alleging that there has been a breach of Section 7C of the **Children (Guardianship and Custody) Act**. Section 7C, which mirrors Article 3 of The Hague Convention, which 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"

The Claimant has submitted that she has standing to bring this claim before the court. In support of this submission, she relied on ***Section 10 of Chapter 742 of the Florida Statues*** which states that:-

"742.10 Establishment of paternity for children born out of wedlock. —

(1) Except as provided in chapters 39 and 63, this chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock. If the establishment of paternity has been raised and determined within an adjudicatory hearing brought under the statutes governing inheritance, or dependency under workers' compensation or similar compensation programs; if an affidavit acknowledging paternity or a stipulation of paternity is executed by both parties and filed with the clerk of the court; if an affidavit, a notarized voluntary acknowledgment of paternity, or a voluntary acknowledgment of paternity that is witnessed by two individuals and signed under penalty of perjury as provided for in s. 382.013 or s. 382.016 is executed by both parties; or if paternity is adjudicated by the Department of Revenue as provided in s. 409.256, such adjudication, affidavit, or acknowledgment constitutes

> *the establishment of paternity for purposes of this chapter. If an adjudicatory proceeding was not held, a notarized voluntary acknowledgment of paternity or voluntary acknowledgment of paternity, which is witnessed by two individuals and signed under penalty of perjury as specified by s. 92.525(2), creates a rebuttable presumption, as defined by s. 90.304, of paternity and is subject to the right of any signatory to rescind the acknowledgment within 60 days after the date the acknowledgment was signed or the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party, whichever is earlier."*

I find that the Claimant does have the standing to pursue this case before the court.

Whether the Claimant has agreed for PW to permanently reside in Jamaica

[29] There have been a number of cases that have been decided on this issue.

[30] 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…"

[31] In the case of **re R (Children) (Children Act Proceedings: Foreign Dimension) Practice Note [2018] 1 WLR 350**, the court opined on the law relating to acquiescence. The court stated that-

"*The law in relation to acquiescence is well settled. In re H (Minors) (Abduction: Acquiescence) [1998] AC 72, 90 Lord Browne- Wilkinson stated:*

"To bring these strands together, in my view the applicable principles are as follows: (1) For the purposes of article 13 of the Convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in In re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819, 838: "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with question whether the applicant acquiesced in fact.' (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than his bare assertions in evidence of his intention, but that is a question of the weight to be

attached to evidence and is not a question of law. (4) there is only on exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

[32] In the case of **B v D (Abduction: Inherent Jurisdiction)** [2009] 1 FLR 1015 Baron J. opined on the issue of a child travelling for the purpose of education. He outlined that-

> *"[43] It is clear that no child who is sent abroad merely for the purposes of education can be said to have changed his or her habitual residence. There are a number of authorities to which I have been referred which support that assertion. I note in particular Re A (Wardship: Jurisdiction) [1995] 1 FLR 767. The headnote reads:*
>
> *'If parents were together the habitual residence of the child is that of the parents unless there was a contrary agreement. One parent could not unilaterally change the child's habitual residence without the agreement of the other unless circumstances arose which quite independently pointed to a change in the child's habitual residence. It was open to the parents to agree to change their child's habitual residence without changing their own but an agreement to send a child abroad to a boarding school is not sufficient.'*

The child in that case was habitually resident in England and Wales and the court therefore had jurisdiction to determine the issue.

[44] In the case the agreement for the children to be educated more inexpensively in Portugal necessitated their stay with the paternal grandmother. In a sense that was the boarding element. So the children, by living with their grandmother in those circumstances, did not change their habitual residence.

[45] In P v P [2006] EWHC 2410 (Fam), [2007] 20FLR 439 Macur J also found, in different factual circumstances, that a child being abroad for the purposes of education did not change their underlying habitual residence."

[33] The issue to be decided is whether there was an agreement for PW to temporarily or permanently reside in Jamaica? That is a decision that will have to made based on the affidavit evidence before the court as there is no written document detailing an agreement between the parties.

[34] There remains the question of whether PW is now habitually resident in Jamaica. 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.

[35] 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 states: -

> *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.*

[36] The Defendant raised the defence of grave risk, which is one of the defences under The Hague Convention. There have been a number of cases that have opined as to the approach to be adopted when dealing with the issue of grave risk. In the case of **Re E (Children) (Abduction: Custody Appeal)** [2011] UKSC 27 it was stated 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.*

[37] Paragraph 36 of the said judgment sets out how the court should deal 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.*

[38] This position was reinforced by the case of **Rubio v. Castro,** No. 19-3740, 2020 U.S. App. LEXIS 14905 (2d Cir. May 11, 2020) it was held that even if a grave risk exists, there are measures in place in the habitual residence country to treat with any psychological or grave risks. 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.*

[39] In this case, the grave risk being alleged is the possible return of the aggressive behaviour exhibited by PW, which led to him being suspended from school on a number of occasions. The Court will have to decide whether the risk is so grave that he should not be returned, or if measures can be put in place to ameliorate any potential risk.

The Psychologist report

[40] PW was assessed by Doctor K.A.D. Morgan, a psychologist with the aim of having him admitted to Hillel School. This report is quite comprehensive, and I found the section relating to diagnosis and recommendations to be quite helpful in dealing with this case.

Social Enquiry Report

[41] The court requested a Social Enquiry Report from a Children's Officer. This was provided by Ms. Nelissia Pryce after she conducted an interview with PW and his father. The Children's Officer was also provided with a copy of the report of Doctor Morgan. Part of the findings of the Children's Officer was that: -

> *PW has critical psycho-educational needs and consideration for his carer should be in tandem with which parent will be able to adequately attend to these needs in a holistic manner.*

Recommendation

[42] The Children's Officer then went on to make the following recommendations: -

> *Based on the aforementioned, caseworker is recommending that a follow-up psychoeducational assessment be conducted on PW to determine his current condition and needs. It would be recommended that father follow through with recommendations of Doctor. Kai Morgan, however it has been two years and so it is uncertain if PW requires additional or different kinds of intervention given that the recommendations were never actioned.*

Analysis

The Agreement

[43] The crucial question to be decided is what was the agreement, if any, between the Claimant and the Defendant when PW was sent to Jamaica in August 2019? In approaching this issue, I considered not only the words of the parties but also their actions. The Claimant gave evidence that: -

a. She agreed for PW to travel to Jamaica, and gave written permission for him to do so.

b. She terminated the maintenance order she had received in Florida on the request of the Defendant.

c. She visited Jamaica in November 2019. During the visit she went to Hillel School with the Defendant to make enquires as to whether this would be a suitable school for PW.

d. The Claimant sourced and forwarded the school records of PW and forwarded them to the Defendant so that PW could be registered in school in Jamaica.

e. She voluntarily sent money to the Defendant for PW's maintenance and general expenses. She also gave evidence that she sent additional money to the Defendant when it was demanded of her.

f. The Claimant undertook and paid the expenses relating to the dental appointments and hair appointments for PW.

g. She maintained the payments for on-line tuition with Khan Academy for PW.

[44] The evidence of the Claimant is that in April 2020 she emailed the Defendant and requested the return of PW. She was cross-examined at length about this email as to whether it had mentioned that there was an agreement with a one- year time period? She agreed that the email did not indicate a one- year period. The Claimant also acknowledged that she had not placed any document before the court evincing an agreement for PW to reside in Jamaica for one year. She maintained however that the agreement was for one year.

[45] The Defendant gave evidence that there was no agreement between himself and the Claimant for PW to reside in Jamaica for one year. The Defendant exhibited the email of the 30th of April 2020 and pointed out that there was no mention of the one- year period in the email. A review of the evidence of the Defendant showed that: -

a. He registered and sent PW to summer school for two weeks.

b. He visited Hillel School and made enquires as to whether PW could be registered at that school.

c. He was informed by Hillel School that PW would have to be evaluated by a psychologist. The school provided him with a list of Doctors and he selected one from the list

d. The evaluation was requested in January 2020. In August 2021 the Defendant paid the outstanding balance owed to the Doctor and the report from Doctor Morgan was then given to Hillel School.

e. The report from Doctor Morgan indicated that PW has a learning disorder and as such, certain recommendations were made in the report. These recommendations have not been followed, however, the Defendant has indicated that he does engage PW in exercises that are similar to those recommended.

[46] In reviewing the actions of both parties, I find the approach of the Claimant to be in stark difference to that of the Defendant. I will commence with the actions of the Defendant. The Defendant had the responsibility of the day to day care for PW from August 2019 to present. I find first of all that the Defendant's account of his efforts to place PW in a school or to have him receive any form of formal education was quite insufficient. In his affidavit, he has averred that PW had attended St Andrew Preparatory School for six weeks in August 2021. The Children's Officer attended the school and found that PW attended the summer program, for two weeks, although the defendant had only paid for one week.

[47] The Defendant indicated that he had attended Hillel School and he was of the view that PW has received a probationary acceptance in the school pending the report from the psychologist. PW never attended classes at the school and it does not appear as if he was even given a class schedule. It is unclear as to how the Defendant would have formed this view. The most interaction, it would appear that PW had with Hillel, was when he attended two assessment and visitation days at the school. The Defendant was unable to provide any document showing that Hillel had ever registered PW in the school.

[48] I also considered the approach that the Defendant took to the psychologist's report. The report from the psychologist was required for the enrolment of PW into Hillel. The Defendant averred that PW started to attend the sessions with the psychologist from mid-January 2020 and in February 2020, he requested an interim report from

the Doctor. There is no indication whether such an interim report was provided by the Doctor. There is then an unexplained gap of eighteen months before the Defendant made contact with the Doctor to receive the report. During this eighteen-month period, whilst the Defendant was awaiting this report, he made no attempt to register PW in any other school.

[49] To compound the issue, the Defendant failed to make any attempt to follow any of the recommendations detailed in the report of Doctor Morgan. These recommendations were specific to address PW's learning disorder.

[50] The last area of concern is the online classes offered by Khan Academy. The Defendant, in outlining his efforts to home -school PW stated in paragraph 38 of his affidavit that PW would start his classes every morning with Khan Academy. This appears to be untrue. The Claimant produced the attendance record for PW for Khan Academy and it clearly shows that PW infrequently attended the online classes whilst he resided with the Defendant. The simple fact is that PW has not attended school, except for two weeks in a summer program, from August 2019 to present for over two years. This is despite the fact that the Defendant himself indicated in his evidence that it was understood that PW would attend school whilst he was living with him.

[51] The Defendant in his affidavit clearly stated that he had full responsibility for PW and that he had never requested money from the Claimant for maintenance for him. One of the exhibits attached to his affidavit, was an email exchange with the Claimant where he informed the Claimant that the sum owed for PW is zero. The Defendant's position is that the only discussion he ever had with the Claimant about money concerned the payment for calls made by Claimant on an overseas telephone. I then considered the Defendant's position against the Claimant's exhibit that shows a number of payments to the Defendant. The Claimant does state that some of these payments were voluntarily given, but that a number of them were made after Defendant demanded money from her. On a perusal of the payments made by the Claimant, it shows sums being forwarded by the Claimant

to the Defendant around the same time that PW was supposedly registered at Hillel. I find these payments to be too coincidental. I accept the evidence of the Claimant that the Defendant demanded payments from her in relation to PW being registered at Hillel.

[52] In looking at the actions of the Claimant it showed that she embarked on actions that appear in keeping with the agreement that she outlined in her affidavit. The Claimant as per the agreement: -

a. Terminated the maintenance order in Florida. If the Claimant made such a decision concerning the maintenance order without an agreement, she would have acted contrary to her own interest.

b. Travelled to Jamaica and visited Hillel School, with the aim of PW attending that school. The Claimant forwarded school records to the Defendant so that he could have PW registered in school and she then, on her case even sent money for PW to be registered in school.

c. Called PW to the extent that it became a source of conflict between the Claimant and the Defendant. The Defendant in his affidavit, spoke to this conflict and indicated that this led to him requesting money for payment for telephone bills.

[53] I therefore find that there was an agreement between the Claimant and the Defendant. In considering as to whether the agreement was for a period of one year I closely perused the affidavits of the Claimant. Paragraphs 18 and 19 of the second affidavit of the Claimant spoke to the fact that if the Defendant had not agreed to have PW reside with him in Jamaica, she had considered sending PW to Tanzania to her relatives for one year. The Defendant submitted that this showed that the Claimant had intentions to have PW live elsewhere than the United States of America with her. In reviewing these paragraphs of the affidavit of the Claimant I note that the Claimant had indicated that she did contemplate the option of sending

PW to Tanzania. I also note that she further stated in her affidavit that the move to Tanzania would have been for one year.

[54] In reviewing the actions of the Defendant, it is clear that he approached PW residing with him in Jamaica as temporary. That is the only logical explanation for his lackadaisical attitude to PW's education. I took into consideration that the Defendant attempted to enrol PW in one school. That school requested a report from a psychologist and the Defendant then had PW assessed. The report from the doctor is dated the 7th August 2020. That report was only collected by the Defendant one year later in August 2021. This report was of great importance as Hillel had indicated to the Defendant that PW would not be admitted without it, however the Defendant took one year to collect this report.

[55] After the Defendant was informed that PW would not be admitted into Hillel, he made no effort to have him enrolled in any other school. The Defendant makes mention in his affidavit of having spoken to persons at St. Andrew Preparatory School with the aim of having PW admitted to that school however, he made no application for PW to be enrolled in that school.

[56] The issue is compounded by the fact that the report from the psychologist, speaks to PW having a learning disorder. The report goes on to make recommendations. The Defendant admitted he did not follow any of the recommendations. A perusal of these recommendations shows that with very little effort they could have been followed. A number of the recommendations spoke to links to sites that could assist with PW's disorder.

[57] I find that although there was no written agreement, the Claimant's approach to PW's travelling and staying with the Defendant is in keeping with her seeking to address the behavioural issues of PW. I find that the agreement was for PW to reside with the Defendant on a temporary basis. I find the Defendant's attitude towards the education of PW is in keeping with PW residing with him on a temporary basis. I find that the Claimant in having PW travel to, and reside in Jamaica for one

year, was not abandoning her custodial rights. In fact, what she was doing was exercising these custodial rights.

Settled

[58] The next issue to be decided is whether PW has become settled in Jamaica? PW has been residing in Jamaica from August 2019. The Defendant has averred that PW has now become settled in Jamaica. His evidence is that PW has made friends in the community, he is part of a football team, and has bonded with his relatives in Jamaica. He submitted that PW ought not to be returned to the United States of America.

[59] In considering this issue I adopted the approach in the case of **Cunningham v Cunningham** (supra) where the court advocated that what is to be taken into consideration are: -

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.*

PW is currently ten years old. I accept the affidavit evidence of the Defendant that PW has bonded with family, has made friends and plays football with a club. I however have to consider the fact that PW has not attended school from August 2019. This lack of attendance of school, would also have precluded him from important education pursuits, participating in school activities, team sports and school events. After weighing all the variables in this case I do not find that PW is settled in Jamaica.

Grave Risk

[60] The final issue to be decided is whether PW would be placed at grave risk if he is returned to the United States of America? The Defendant has detailed a number of incidents in his affidavit where he alleged abuse of PW by the Claimant. In his affidavit he spoke to the Claimant locking PW in a closet, combing his hair in a rough manner that caused him to cry, and on one occasion slapping him in his face. These incidents are alleged to have occurred whilst the parties resided in Florida. The Defendant pointed to these incidents as part of the reason why PW should be returned to the Claimant.

[61] In reviewing these alleged incidents, I first note that they are alleged to have taken place prior to 2017, whilst the Defendant resided in Florida. The Defendant makes no mention of doing anything about these incidents, seeking any help or intervention from anyone after these incidents are alleged to have occurred. The Defendant then, on his own his evidence, left PW with the Claimant for two years ie, from 2017 to 2019 when he relocated from Florida. It is the Claimant who then contacted the Defendant to enquire if PW could reside with him due to the report of the psychologist. I find it remarkable that the Defendant is raising these alleged incidents in 2022 to point to PW being at grave risk, after he was confident enough to leave PW with the Claimant between 2017 and 2019. I do not find that there is much merit in these claims.

[62] The Defendant also averred that PW, under his care, no longer displays the disruptive behaviour that he exhibited prior to living in Jamaica. The Defendant submitted that he is fearful that if PW is returned to the Claimant he would revert to his disruptive behaviour. In assessing these submission, I referred to the report of Doctor Morgan. Doctor Morgan, found that PW's aggression may have been due to bullying and that PW did not feel he had the help he needed to manage his challenges. The Defendant has not offered a clear proposal to address the challenges of PW. The Claimant on the other hand has indicated that if PW is returned to her she would have him assessed by a psychiatrist, who would assist with his treatment. I find that the challenges that were faced by PW that led to his

aggressive behaviour can be addressed with the proper orders and supervision. I do not find that PW would be at grave risk if returned to the United States of America.

Conclusion

[63] In assessing this case I have considered the circumstances surrounding the travel of PW to Jamaica. I find that there was an oral agreement for PW to travel to Jamaica. I find that the agreement was for PW to reside in Jamaica for only one year. I find that PW was to temporarily reside in Jamaica with the Defendant as he had been suspended from school on a number of occasions and the psychologist had advised the Claimant that PW required a male figure in his life. I find that the Claimant, in an effort to address the problem with PW, agreed for him to temporarily reside with the Defendant in Jamaica. I find that the Defendant failed to uphold the agreement between the Claimant and the Defendant. One clause of the agreement was that the Defendant was to enrol PW in a school. I find the failure of the Defendant to enrol PW in school, among other things, points to the fact that PW is not settled in Jamaica. I do not find that if PW is returned to the United States of America he would be placed at grave risk. I find that even if he could be deemed to be at grave risk, that the risk can be ameliorated with proper court orders.

Orders

1. The United States of America is the place of habitual residence for the PW

2. PW is to be returned to the United States of America on or before the 13th of April 2022.

3. The travel documents of PW are to handed over to Claimant or Counsel for the Claimant's by the Registrar on the 11th of April 2022.

4. The Claimant is to accompany PW to the United States of America on the 13th of April 2022.

5. The Claimant is to purchase the ticket for the return of PW.

6. PW is to be handed over to the Claimant at 2 pm on the 12th of April 2022 at the offices of the Jamaica Central Authority.

7. The Defendant to be provided with reports from a psychiatrist every six months about PW.

8. The Defendant is to have telephone contact with PW at least five times per week.

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