IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FAMILY DIVISION

CLAIM NO. 2010 HCV-2702

BETWEEN	F	CLAIMANT
AND	B	DEFENDANT

Ms. Ayana Thomas instructed by Nunes Scholefield DeLeon & Co. for the Claimant.

Mr. Gordon Steer instructed by Chambers Bunny and Steer for the Defendant.

Heard: **27th January, 2nd March, 11th April, 2nd and 3rd May, 2nd June, 1st July and 16th September, 2011.**

CUSTODY – CARE AND CONTROL OF 5 YEAR OLD GIRL – WELFARE OF THE CHILD – PARAMOUNTCY PRINCIPLE – RELOCATION APPLICATION – PRACTICE AND PROCEDURE – APPLICATION TO STRIKE OUT PORTIONS OF AFFIDAVITS MADE AT TRIAL – UNDESIRABILITY OF SUCH PROCEDURE AT TRIAL – MAINTENANCE – RESPONSIBILITY OF BOTH PARENTS

MANGATAL, J:

[1] "F" and "B" were married in March 2005. L is their five year old daughter. F is L's mother and B is L's father. Both are loving parents who have come before the Court to resolve issues which unfortunately they have not been able to resolve amicably. This Court is faced with the difficult task of deciding as between these two parents, amongst other matters, which of them should have care and control of young L. I shall in this Judgment refer to the parties simply by initials in order to protect their privacy.

[2] F by way of Fixed Date Claim Form filed June 4, 2010 is seeking orders from the Court, including orders that F and B have joint custody, with F being granted care and control of L. She seeks the Court's permission for her to take L outside of the jurisdiction to live in the Bahamas with her. F was born and grew up in the Bahamas. She has also made proposals for B's access to L and is seeking that B pay maintenance in respect of L.

[3] On the 11th of August 2010, an interim order was made by Brooks J. in the following terms:

Pending the determination of the claim and until further order of the court:

a. (F) is to have the care and control of the relevant child of the marriage, (L).

b. (B) is to have access to the relevant child as follows:

   i. During the school term on every alternative weekend beginning at 3:30 pm on Fridays and ending at 4 pm on Sundays. (L) is to be collected by (B) at (F)'s residence at 3:30 p.m. on Fridays. (L) is to be collected by (F) at (B)'s residence at 4 pm on Sundays.

   ii. Residential access for half of all major holidays namely Christmas, Easter and Summer. For the remainder of the Summer vacation for 2010 (B) is to have access to (L) every alternative week ending the 27th of August 2010 with access on alternative weekends to resume on the 10th of September 2010 and continue on an alternative weekend basis.

c. By consent, (B) is to pay (F) the sum of $12,000.00 per month for the day to day maintenance of (L) in addition to her school fees and extra curricular activities of swimming and ballet. The payments are to commence on the 1st of September 2010 and are to be made on the 1st day of each month thereafter.

d. All medical, dental and optical expenses for (L) are to be borne by the parties equally.

e. Social Enquiry Report and a means report are to be requested from the Family Court Probation Office.

f. (L) is not to be removed from the jurisdiction without the permission of the Court.

[4] On the 15th of September 2010, after F's application had been filed, and after the interim order had been made, B filed an application seeking to have care and control of L granted to him to be carried out here in Jamaica, with liberal access to F.

[5] The parties have filed numerous affidavits, and F's mother MF has also filed an Affidavit on behalf of her daughter. The trial has been lengthy, with extensive cross- examination taking place. The Court has in addition been provided with a Report from the Family Court Probation Office.

Applications to Strike Out Hearsay in Affidavits

[6] At the commencement of this trial, a considerable period of time (over a day and a third), had to be spent dealing with without notice applications. This matter was originally fixed for one day only. These applications sought to have substantial portions of Affidavits and exhibits, which were filed some time ago, struck out on the grounds that they constitute hearsay evidence. Since the advent of the Civil Procedure Rules 2002, "the C.P.R.", I have noticed a practice developing in civil matters in both Chambers and Open Court trials. Attorneys make these applications to strike out portions of Affidavits or Witness Statements during the time that has been fixed for the trial or substantive hearing. Often the application is made on the basis that the evidence consists of hearsay statements. The judge will in my opinion likely feel obliged to hear the application because he or she does not want to have before the Court impermissible hearsay evidence. I find this practice inappropriate and/or undesirable at this stage for two reasons. Firstly, one would hope that at First Hearings or Case Management Conferences, the estimated length of trial is being proffered and set after proper thought and contemplation of the realistic length of time it will take for the completion of the trial. I doubt that when these trial dates are being fixed, Attorneys in suggesting the appropriate number of days or hours take into consideration, or advise the Case management judge that, at the trial they

contemplate making applications to strike out significant portions of the evidence. These applications are often long, extensive and contested, as in the instant case, and consume precious trial time. Secondly, I frankly don't see what the point is of having pre-trial reviews, or case management conferences or other Chambers hearings which occur, or which can be applied for after the allegedly offending document has been filed or exchanged, if the judge at trial will now have to deal with such applications. Obviously when they are made at trial, they can throw out the time estimated for completion of the trial or substantive hearing. This often causes the matter to be part heard, occasioning delays and necessitating further protracted hearing dates, with all the attendant costs and other consequences. There may be the odd instance when it may reasonably not have been appreciated until near trial that a statement should be struck out. However, by and large it is my view that they should be made at an earlier stage of the proceedings. We must be careful not to whittle away some of the gains made in the trial process since the advent of the C.P.R. I think the practice is particularly undesirable in matters to do with custody and maintenance of children, some of which are urgent, but all of which are delicate and emotionally loaded for the parties.

[7] At the initial stages of this matter, Mr. Steer, Counsel appearing for B, also made an oral without notice application for L to be examined by a Child Psychologist in order to assess what impact going to a new environment would have on L. He submitted that this would ensure that the best evidence concerning the welfare of L is put before the Court and relied upon **B(M) v. B(R)** [1968] 3 All E.R. 170 at page 173 c. The application was opposed by Ms. Thomas, Counsel appearing for F.

[8] I refused the application upon a number of grounds. Firstly, no proper application, indeed no written application at all, was filed and there had been no compliance with Part 38 of the C.P.R. which deals with Expert Evidence. However, even more fundamentally, I considered the fact that the proposals of both parents involve a relocation and consequently a different environment. Thus I did not consider that the Report was likely to be useful to any significant

extent. I took the view that the advantages, if any, to be gained from obtaining a psychologist's report, were outweighed by the disadvantage of the delay that would be occasioned while awaiting the examination and report. I considered further that the Court had already been provided with a Probation Report, and ruled that in this case there was no requirement for a psychologist's report to be produced in order for the Court to determine the relevant issues.

BACKGROUND

[9] F and B met in Jamaica in 2001. F is a medical doctor and B is a businessman. At that time F was engaged in a Clinical Training Programme in the Bahamas and was not yet fully qualified. She was however in Jamaica pursuing a six week elective at the Faculty of Medicine, University of the West Indies, Mona Campus. The parties started a relationship and after the elective was completed and F had returned to the Bahamas, they maintained a long distance relationship and ultimately got married in March 2005. By the time of the marriage, F had become a fully qualified Medical Doctor and was working as a Senior House Officer in internal medicine at the Princess Margaret Hospital in the Bahamas.

[10] The marriage took place in the Bahamas, and shortly thereafter F and B returned together to Jamaica to live as man and wife in Mandeville, in the Parish of Manchester where B resides. L was born on the 28th of December 2005. L is F's only child. B is the father of L and C.B.

[11] It is F's evidence that she had told B of her intention to do post graduate studies in internal medicine prior to the marriage and to L's birth. When L was born F stayed at home with L at the matrimonial home in Mandeville she states until L was nine months old. B states that when L was seven months old F decided to go back to work in Kingston, having previously applied to the University to pursue the Internal Medicine Specialty. B says that when F came to Jamaica she could have opened her practice anywhere in Jamaica and that F became a Jamaican citizen in 2008.

[12] When L and F came to Kingston, they resided primarily in a two bedroom rented townhouse in the Long Mountain Country Club complex. These premises

are in relatively close proximity to the University Hospital of the West Indies (U.H.W.I.) where F commenced working and pursuing a residency programme in internal medicine, and where F was currently engaged at the time of filing her application.

[13] It is F's evidence that she asked B to come to Kingston with her. She states that he agreed to do so, saying that if she could move to a new country because of him, he could move a few miles for her. B did not come to Kingston. However, it is his evidence that because of their different jobs, it was decided that F would live in Kingston and B would continue to live in Mandeville. B claims that he recommended to F that L should stay in Mandeville since she was so young and the demands of F's work would not allow her any time with L. Further, that a helper raising L would not be in the best interest of L. He states that he adamantly insisted that L would be better off growing up under his and his parents' guidance. F did not agree. F on the other hand states that B did raise the question of L staying in Mandeville as an option, but did not adamantly so insist. It is F's evidence that she rejected this option for a number of reasons, including that L was so young and was still breastfeeding and very attached to her. Further, that B worked extensive hours in his businesses and was gone from home for the entire day during the week.

[14] The marriage broke down and F and B started living separate and apart in the latter part of 2009. From the age of nine months up to today, L has resided in Kingston with L and since the date she reached school age, has attended school in Kingston.

[15] On ceasing to reside in Mandeville, F had taken the helper who had been working with the parties in Mandeville, to work with her in Kingston. F had to work some, (B says most) weekends. B would collect L in Kingston on Friday evenings and take her to Mandeville to spend the weekend with him. F would join them sometimes on a Saturday, sometimes on a Sunday and then F would drive back to Kingston with L. Other weekends F would spend with L and B in Kingston, and sometimes there were occasions when B did not come to Kingston.

[16] Twenty-four hour call (being on duty at U.H.W.I.) was a part of F's job requirement. During those times when F was on call, which was usually at least once, sometimes twice per week, B sometimes stayed with L in Kingston. When B was not available, F would arrange with the nanny, Jennifer, to spend the night and take care of L. F advised the Court during the latter part of the hearing, that Jennifer no longer works with her, due to recently discovered alleged misconduct on Jennifer's part. Previously F had in fact indicated that if granted permission by the Court to relocate to the Bahamas with L, she had intended to take Jennifer with her to the Bahamas.

[17] After the separation, B had access to L, on F says, alternative weekends. B states that he only had access to L at the whim and fancy of F.

ISSUE AS TO WHICH PARENT IS THE PRIMARY CARE GIVER

F'S –THE (MOTHER)'S CASE

[18] F states that she has always been L's primary care giver from the moment of her birth. During the period up to nine months, she breastfed her, fed her, changed her diapers, nurtured and pampered L, and stayed home by choice until L was nine months old. The helper mainly performed domestic duties and functioned as a housekeeper around the house during this period. F says she did 95 % of the diaper changes and general care at night.

[19] Since moving to Kingston, F states that she has been actively involved in L's life and that a significant portion of L's everyday care is done by her and not the nanny. She maintains that L has always been her priority and that she has tried at all times to maintain a balance between work, studying and her parental responsibilities. She has been taking L to and from school and picking her up from her extra-curricular activities for some time. She also reviews L's homework, and helps her practice her reading and spelling. She takes L out on many outings and recreational activities, including going to the zoo, cinema, picnics, trips to the country, to museums and also arranging play dates at their home or a friend's home.

[20] In November 2010, F's contract at the University Hospital having expired, she took up a job offer in Montego Bay in the Parish of Saint James at the Cornwall Regional Hospital and was currently working there up to the time of the hearings, as far as I am aware. The fact that she had commenced this employment was brought to the attention of the Court by B in an Affidavit. In an Affidavit in response, F avers that she did not tell B about this job, and maintains that she has no obligation to discuss her job or how she earns a living with B now that their marriage was ended, though she remains happy to discuss with him matters concerning L's welfare. She stated that she took this job because she could only find work in the rural areas in Jamaica, not in Kingston, and that this was the only job that did not stipulate that she would have to relocate. She says that she took the job because the application to relocate to Bahamas was still to be heard and in the meantime she had to earn a living to support L and herself. F decided not to relocate to Montego Bay, but to continue living in Kingston. Thus she commutes to Montego Bay daily and back again, sometimes by motor vehicle sometimes by airplane. Her mother MF came from the Bahamas to stay with F and L and to assist with taking L to and from school and to extra curricular activities. F states that all of the weekends that she has been on call at the Cornwall Regional Hospital, L has been in Montego Bay with her and that the seniority of the position allows her to briefly review patients in the morning and to call from a phone. F states that despite the fact that she has been working in Montego Bay, she is still able to do most of the things she usually does with L because most days, she reaches home before 4 p.m. She does not work on Thursdays, so she is still able to pick L up from school sometimes. She still reviews L's homework and eats dinner with her and other such things. She opines that L's environment has, by reason of these several circumstances and measures, remained stable notwithstanding her commuting.

B'S – (THE FATHER)'S CASE

[21] B states that ever since L's birth, whilst the parties all lived in Mandeville together in Mandeville, they had a helper or nanny for L who worked from 8 – 4

Monday to Friday and every other Saturday. He avers that the nanny is the one who looked after L to a great extent, even though F was at home. B indicates that F always handed L over to him as soon as he came home and that he and F shared evenly the night time feedings and diaper changes.

[22] B states that after F and L began living in Kingston, for the first year and a half he would pick L up every weekend and take her to Mandeville and look after her by himself. He would give up his work duties in order to do so. Amongst the things he would do were to cook breakfast, bathe L and plait her hair, take her to the beach, the playground and to church.

[23] B indicates that in addition to weekends, whenever F was on call, which he says was two to three times a week, F would be at the hospital from 8 a.m. until 6 or 7 p.m. the next day. B would on most of those days come into Kingston and release the helper, and look after L and take her out to play. The next morning he would drop L off to school before heading back to Mandeville. After working on call, F would sleep as soon as she got home until she went to work the following morning.

[24] B states that despite the fact that L resides with F, he has spent more time with L than F has, and that the bond between himself and L is strong. He claims that F is not comfortable caring for L, to the extent that even when she takes L to visit her parents in the Bahamas, she has to carry the helper from Jamaica. He denies that F has been the primary care-giver for L and avers that while in Kingston it is the nanny or helper who cares for L.

[25] B also states that after the marriage was declared over by F, he had access to L only at the whim and fancy of F until the Court made the interim orders in August 2010 granting him access in a more structured manner. B claims that F's commuting to, and working in, Montego Bay has been disturbing for L.

ASSESSMENT OF L

[26] From all accounts, overall, L is a happy, intelligent well cared for and much loved little girl. She is sociable and well-adjusted and the many reports

exhibited in this matter indicate that she is doing very well in school. She is well-rounded and engages in extra curricular activities such as swimming and ballet.

RECOMMENDATION IN PROBATION REPORT

[27] A Probation Report, or Social Enquiry Report, was prepared pursuant to the interim order and is dated October 12, 2010. The Probation officers prepared their report understandably, without being able to assess or examine F's proposed relocation plans. They did not view the proposed home or school or environs in the Bahamas and in preparing their report they were only able to examine L's environment and circumstances, including home and school in Kingston, and the environment, including home and school in Mandeville proposed by B. To that extent therefore, the Probation Report, though useful, is limited. Though the recommendation of the Report is that the status quo remain, the plans proposed by both parties involve relocation, one abroad, one to a different Parish of Jamaica.

[28] The Report closes as follows:

> ***ASSESSMENT AND RECOMMENDATION***
>
> *Although the parties have not been able to concur on a number of issues, they seem to be in accord as it relates to the well being of the child. They have advanced exorbitant expenditure although that of the Respondent far exceeds the amount he said is his income.*
>
> *The home environs of both parents appear conducive to the upbringing of the child even though the child has advanced her preference to reside with the mother.*
>
> *Information from the authorities at the school which the child currently attends suggests that (L) is doing well academically, has been settled, and shares a cordial relationship with both her classmates and the teachers. Officer also observed (L) in the school environment and she appeared quite comfortable. It would be unwise at this time to remove her from such an environment as this is likely to have a negative physical impact on her.*

It is encouraging that both parties have demonstrated a high level of interest in the child's social welfare, even though they have been separated. Based on the aforementioned it is being recommended that the status quo as it relates to custody and control not be altered and that the Honourable Court exercise its wisdom as it relates to the matter of maintenance.

THE LEGISLATIVE PROVISIONS IN RELATION TO CUSTODY

[29] The relevant sections of our law are to be found in **THE CHILDREN (GUARDIANSHIP AND CUSTODY) ACT**, "the Act" notably sections 7 and 18.

[30] Section 7 of the Act provides as follows:

> ***7. The Court may make order as to custody***
>
> *7.(1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent,* ***having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father,*** *and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just.....*
>
> *(3) Where the Court under subsection (1) makes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father* ***the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodic sum as the Court, having regard to the means of the father, may think reasonable.*** (My emphasis)

[31] Section 18 of the Act provides as follows:

> ***18. Principle on which questions relating to custody, upbringing etc. of children are to be decided.***

Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the Court in deciding that question, ***shall regard the welfare of the child as the first and paramount consideration,*** *and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.*

[32] Some of the issues which arise for consideration are therefore the issues of:

(A) The meaning of custody.

(B) What it means to have "regard to the welfare of the child as the first and paramount consideration".

(C) The conduct of the parties.

(D) The considerations that are encompassed in the concept of the welfare of the child.

(E) The guiding principles when the application for custody involves an application to relocate.

I will deal with each of these in turn.

(A) THE MEANING OF CUSTODY

[33] It would appear from the case law that the word "custody" bears two different meanings. On this issue I found instructive the judgment of Sachs L.J. in **Hewer v. Bryant** [1969] 3 All E.R. 578, cited by Ms. Thomas. At page 585 D-G, the learned English Judge of Appeal stated:

In its wider meaning the word "custody" is used as if it were almost the equivalent of "guardianship" in the fullest sense-whether the guardianship is by nature, by nurture, by testamentary disposition, or by order of a court. ....Adapting the phraseology of counsel, such guardianship embraces a "bundle of rights", or to be more exact, a

"bundle of powers", which continues until (age of majority)...These include power to control education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right (originally only if some property was concerned) to apply to the courts to exercise the powers of the Crown as parens patriae. It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, i.e. such personal power of physical control that a parent or guardian may have.

[34] The issue of care and control of L, in respect of which F and B have each filed their respective applications, therefore is encompassed in the determination of "custody" within the meaning of sections 7 and 18 of the Act. This is the aspect of "custody" with which this Court will be most concerned.

(B) WHAT IT MEANS TO HAVE REGARD TO THE WELFARE OF THE CHILD AS THE FIRST AND PARAMOUNT CONSIDERATION

[35] In **J v. C** [1969] 1 All E.R.788, the House of Lords, had for its consideration, section 1 of the then English Guardianship of Infants Act, which is similar to our section 18. Lord McDermott at page 826, in considering the construction of the section, in particular the scope and meaning of the words "shall regard the welfare of the infant (child) as the first and paramount consideration, stated:

Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are

taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as that term has now to be understood.

(C) THE CONSIDERATIONS THAT ARE ENCOMPASSED IN THE CONCEPT OF THE WELFARE OF THE CHILD

[36] In the oft-cited case of **Re McGrath** (1893) 1Ch. 143, Lindley L.J. stated:

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not measured by money only or physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

[37] In **Poutney v. Morris** [1984] FLR 381, at page 384 Dunn L.J. made a statement which I think is entirely accurate as follows:

There is only one rule; that rule is that in a consideration of the future of the child the interests and welfare of the child are the .....paramount consideration. But within that rule, the circumstances are so infinitely varied that it is unwise to rely upon any rule of thumb, or any formula to try to resolve the difficult problem which arises on the facts of each individual case.

I have also found a number of statements and considerations discussed by the learned author of **Bromley's Family Law**, 8th Edition, Chapter 11, pages 385 - 390 helpful. Although the authors there discuss a statutory check list provided in the English **Children Act**, they make the point that most of the considerations set out in the checklist are drawn from, and build upon previous practice and case law which preceded that Act. At page 384 it is stated:

Another key to understanding the decision-making process is to appreciate that essentially the court's function is to determine which of the options set before it best accommodates or, at any rate, is least detrimental to the child's interests.

.....

Among the most agonizing cases are those where the court has to decide which of two capable, loving and caring parents should look after the child. It is in these cases where the check-list that we are about to discuss come most prominently into play. Of course it is in the nature of a finely balanced case that some facts will weigh heavily on the side of one claimant while others will favour the other but it is clear that in reaching its conclusion the court should consider all the circumstances of the case, and in the light of the evidence adduced, make the best decision it can.

[38] Some of the relevant considerations may be the following:

(a) The child's physical, emotional and educational needs.

(b) The child's age, sex and background.

(c) The likely effect on the child of any change in her circumstances.

(d) How capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting her needs.

(D) THE CONDUCT OF THE PARTIES

[39] Section 7 of the Act speaks to the conduct of the parties. Although I accept F's evidence, (which B has not specifically denied), that B did remove F and L's passports from the home in Long Mountain without F's knowledge and consent, I do not in the circumstances consider that this conduct weighs against B in relation to the matters which I have to consider in deciding on a suitable custody order. Ms. Thomas has also referred in her closing submissions to the fact that B did not join F and L in living in Kingston as being part of the conduct that I should have regard to, in contrast to F's actions which she described as self-sacrificing. I have taken these matters into account, but in a more general way, in my consideration of L's welfare, and not under the heading of "Conduct" as such. As my brother Campbell J found in paragraph 12 of his judgment in **DMH v. DH** Claim No. 2000/115 delivered April 3rd 2008, there is nothing before

me in relation to the conduct of the parents that separates them to any considerable extent.

(E) THE GUIDING PRINCIPLES APPLICABLE IN A RELOCATION APPLICATION

[40] One of the critical features of this case is that it is what is referred to as a relocation case, which addresses the situation where one parent wishes to take the child outside of the jurisdiction to live with him or her. In the recent unreported decision of **BP v. RP** Supreme Court Civil Appeal No. 51/08, judgment delivered 30th July 2009, our Court of Appeal examined, and endorsed the principles set out in some of the leading English cases treating with this area of Family Law. Harrison J.A., who delivered the Judgment of the Court, cited with approval the decisions in **Poel v. Poel** [1970] 1 WLR 1469, **Payne v. Payne** [2001] ECA Civ 166, and **A v. A** [1980] 1 FLR 380.

[41] The headnote in **Poel v. Poel** indicates that a mother made an application to the court for leave to remove her son out of the jurisdiction and the trial judge refused the application on the ground that it would cut the boy off from all contact with his father. The mother's appeal as allowed. The Headnote reads in part as follows:

> *Held, allowing the appeal, that on an application for leave to take the child out of the jurisdiction the primary consideration being the welfare of the child and whether it would be in the child's best interests to grant the application, regard had to be had to the welfare of the parent who had custody, since if he or she became unhappy it might adversely affect the child and, therefore, there should be no interference with any reasonable mode of life selected by the parent having custody unless it was absolutely essential ..., and that since the judge had not considered the effect of a refusal of leave on the mother's new life he had come to an erroneous decision and leave would be granted to take the child to New Zealand subject to the usual undertaking to return the child to the*