[2025] JMSC Civ 58

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2025FD00339

BETWEEN	**LTM**	**CLAIMANT**
AND	**MM**	**DEFENDANT**

IN CHAMBERS VIA ZOOM

Miss Jhana Harris, Attorney-at-Law instructed by The Jamaica Central Authority for the Claimant

Mr. Gordon Steer and Miss Kayann Swaby, Attorney-at-Law instructed by Chambers, Bunny & Steer, Attorneys-at-Law for the Defendant

FAMILY LAW - RETURN OF CHILD - THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980 - ARTICLE 3, 11, 12 & 13 - THE CHILDREN (GUARDIANSHIP AND CUSTODY) (AMENDMENT) ACT – WHETHER THE COURT SHOULD EXERCISE JURISDICTION UNDER THE HAGUE CONVENTION – CLAIMANT INITIATING PROCEEDINGS FOR CUSTODY – ACCEPTANCE OF COURT'S JURISDICTION TO PROVIDE RELIEF – FORUM SHOPPING - HABITUAL RESIDENCE – VERBAL AGREEMENT – CONSENT OR ACQUIESCENCE - WHETHER UNLAWFUL RETENTION - DISCRETION AFTER ONE YEAR.

HEARD ON: FEBRUARY 19, MARCH 7, APRIL 3, AND MAY 7, 2025

REID, ICOLIN J.

THE APPLICATION

[1] The Claimant, LTM, Student and Swimming Instructor, resides in the United States of America. The Defendant, MM, a Businessman resides in Jamaica. The Claimant and the Defendant have 2 children, **LM**, born on August 18, 2019, and **LM1** born on January 3, 2017, in the United States of America (USA). The

Claimant resided with the children in Florida, USA. The parties were married in Jamaica on November 29th, 2014, and thereafter separated in 2020.

[2] In August 2023, the Claimant, the Defendant and their two sons travelled to Jamaica together. The Claimant returned to the USA in November 2023 for a medical appointment for LM1 and thereafter returned to Jamaica in December 2023 with the child. The Claimant returned to the USA on January 9, 2024, with LM1 alone, only after the Defendant refused to allow her to take LM with her.

[3] The Defendant filed a Petition for Dissolution of Marriage on April 18, 2024, and served the Claimant on May 21, 2024. The Claimant in response filed an Answer and Cross Petition on the 19th of June 2024. She later filed a Notice of Application with an Affidavit in Support on July 11, 2024, seeking custody and maintenance for both children in the Supreme Court. On November 1, 2024, the Claimant filed an Application under The Hague Convention on the Civil Aspects of International Child Abduction ("The Hague Convention") for the return of LM to the USA.

[4] The Claimant filed a Fixed Date Claim Form on January 31, 2025, seeking the following orders:

> *1. An Order for the return of [LM], born on August 28, 2019, in Florida, United States of America, to his place of habitual residence at 8407 Shadow Court, Coral Springs, Florida, 33071, U.S.A.*
>
> *2. An Order that the Defendant, within twenty-four (24) hours of being notified of the confirmed date of return to the United State of America, hands over [LM] 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 [LM].*
>
> *4. An Order for travel expenses to be borne by the Claimant;*
>
> *5. Such further and other relief as this Honourable Court deems fit.*

[5] The reasons for the Application included:

> *1. Wrongful retention of [LM] by the Defendant as per section 7C (1) of the Children (Guardianship and Custody) Amendment Act;*
>
> *2. Application for the return of [LM] being made pursuant to section 7E (1) (f) of the Children (Guardianship and Custody) Amendment Act;*

3. The Court may make an Order for the return of [LM] as per section 7M of the Children (Guardianship and Custody) Amendment Act;

SUBMISSIONS

[6] Counsel for both parties filed and exchanged written submissions and were later permitted to make oral rebuttal submissions. I will summarize areas of the submissions which are applicable to the resolution of the issues in the case at bar. The fact that I do not mention a particular area of the submission does not mean that it was not considered.

The Claimant's Submissions

[7] Counsel Miss Jhana Harris argued that the Claimant had joint custodial rights and did not consent to LM's relocation. The Claimant only agreed that she and the children would stay in Jamaica with the Defendant temporarily, with the understanding that they (she and the children) would return to Florida at any time. Counsel submitted that the Defendant agreed to the return of LM and requested that the Claimant provide an acceptance letter for the children's enrolment at Ramblewood Elementary. This exchange took place via WhatsApp communication between the parties.

[8] Counsel also asserted that, despite having knowledge of the scheduled return flight of January 9, 2024, previously communicated and agreed upon, the Defendant nonetheless withheld the child's passport just five days prior to the scheduled departure. Counsel relied on the case of **Re C (Children)** [2018] 3 All ER 1. Counsel submitted that at the material time of the alleged wrongful retention; LM was habitually resident in the USA. The child was born in the USA on August 28, 2019, and had continuously resided there until his visit to Jamaica in August 2023. Counsel further submitted that, but for the Defendant's decision to withhold the child's passport, the child would have returned to the USA on January 9, 2024, in accordance with the parties' mutual understanding.

[9] Counsel relied on the legal framework articulated in **Re B (a Minor) (Habitual Residence)** [2016] EWHC 2174, wherein the court affirmed that a child's habitual residence corresponds to the place which demonstrates a sufficient

degree of integration in a social and family environment. Counsel contended that, at the time of retention, LM had a higher degree of integration in the USA Counsel submitted that he was enrolled in school, actively participated in church, had established friendships, engaged in extracurricular activities, and resided with his sibling in a stable household environment.

[10] Counsel in anticipation that the Defendant may argue that the child was now integrated into Jamaican society through current school attendance and extracurricular involvement, asserted that any such integration was as a result of the Defendant's wrongful retention of the child over the past 15 months, contrary to the parties' agreement. Counsel pointed out that LM was wrongfully retained on January 9, 2024, and the application for his return, filed on January 31, 2025, falls outside the one-year period prescribed by section 7K(b) of the Children (Guardianship and Custody) (Amendment) Act but which gives the Court the discretion to return the child if satisfied that the child is not settled in his new environment.

[11] Counsel asserted that the child was not settled in Jamaica and remains habitually resident in the USA, where he was born and lived continuously until August 2023. Counsel argued that the child's temporary presence in Jamaica was pursuant to an agreement between the parents for educational purposes only, set to conclude in December 2023. She added that the Claimant informed the Defendant of plans to return to Florida in January 2024, and while the Defendant initially agreed, he subsequently withheld the child's passport and wrongfully retained him.

[12] Counsel argued that the arrangement in Jamaica was more of a "place of boarding" scenario, that was because LM had spent a prolonged period attending school in Jamaica. She asserted that this did not meet the legal threshold for a change in habitual residence. Reliance was placed on **B v D (Abduction: Inherent Jurisdiction)** [2009] 1 FLR 1015, which highlighted that a child sent abroad merely for the purposes of education does not lose his habitual residence unless both parents agree to the change or there is clear evidence of integration.

[13] Counsel added that while the Defendant claims that the child is now integrated due to school attendance and routine activities in Jamaica, these activities were insufficient to establish habitual residence. Further, the child's primary caregivers are the paternal grandmother and a nanny, given the father's frequent absences due to his professional obligations. Counsel therefore maintained that the child has not developed sufficient social or familial integration in Jamaica to displace his habitual residence in the USA.

[14] Counsel submitted that there is no rigid procedural formula for determining whether a child is habitually resident or settled in a new environment. Rather, both determinations are fact-specific and must be assessed on the peculiar circumstances of each case. Counsel relied on the case of **Re N (Minors) (Abduction)** [1991] 1 FLR 413, where the court held that "settlement" comprises two essential elements: a physical element, which pertains to the child being established in the community and environment, and an emotional component, which reflects a sense of security and stability. Counsel also relied on the case of **in the matter of DW: ZD v KD** [2008] 4 IR 751.

[15] Counsel also emphasized that, pursuant to section 7M of the Act (which codifies Article 18 of The Hague Convention), the Court retains a discretion to order the return of a wrongfully retained child at any time, even if the child is deemed settled. Counsel rejected the Defendant's Article 13(a) defence, asserting that the Claimant neither consented to, nor acquiesced in the child's retention in Jamaica. Counsel further asserted that the legal burden lies on the Defendant to prove consent or acquiescence on a balance of probabilities, and this requires clear evidence of either a formal act, a written renunciation, or a consistent pattern of inaction or acceptance over time (***Re E*** *[2011] UKSC 27*, ***Friedrich v. Friedrich*****,** ***Roque-Gomez***).

[16] Counsel argued that the evidence, including WhatsApp messages, showed that the Defendant gave the impression that the school enrolment was temporary and conditional upon the Claimant's readiness to return to the USA Counsel refuted the claim that the Claimant accepted living conditions in Jamaica including the house and car; and pointed out that the Claimant's continued role as primary caregiver from September to December 2023 was consistent with

the original agreement that she and the boys would return to the USA in January 2024.

[17] Counsel referred to the case of **Ahumada Cabrera**, 323 F. Supp. 2d 1303 (SD Fla. 2004) where wrongful retention was only established upon revelation of the true intent not to return the child. She asserted that, similarly, the Defendant's intentions became clear on January 4, 2024.

[18] Counsel found support in the case of **in re R (Children) (Children Act Proceedings: Foreign Dimension)** [2018] 1 WLR 350 which confirms that acquiescence under the Hague Convention is a subjective question of fact. The key consideration is the actual state of mind of the wronged parent, with the burden of proof on the abducting parent. The court must assess whether the wronged parent, through words or conduct, clearly and unequivocally indicated that they would not pursue a return order.

[19] Miss Harris asserted that the Claimant's documented and consistent actions of purchasing return tickets, seeking legal recourse in local custody proceedings, and contacting the U.S. State Department and Central Authority were inconsistent with acquiescence. Counsel argued that the Claimant's willingness to allow the child to remain temporarily does not equate to consent or acquiescence to long-term retention. She argued that at no point did the Claimant express, in conduct or writing, an intent to forgo her rights under The Hague Convention. Based on case law and the mother's unambiguous conduct, Counsel asserted that the defence of acquiescence must fail, and that the Defendant has not discharged the burden to prove that the Claimant clearly and unequivocally abandoned her right to secure the child's return.

Defendant's submissions

[20] Counsel for the Defendant Mr. Gordon Steer submitted that a divorce petition was served on the Claimant on May 21, 2024. Thereafter the Claimant filed custody proceedings in the Supreme Court of Judicature of Jamaica seeking custody, care and control and maintenance of the children. Counsel asserted that there was no claim to remove the children from Jamaica and the issue of

The Hague Convention was only made after the Jamaican Courts had been seized with jurisdiction over the children.

[21] Mr. Steer argued that it was clear from the Claimant's evidence that she left Jamaica in 2020 and up to that time they all lived together. He pointed out that the issue of "the family returning to Jamaica" as stated in the application under The Hague had to be contrasted with paragraph (6) of the Claimant's affidavit filed in support of the Application which stated that "*the Defendant our 2 boys and I went to Jamaica.*" Counsel submitted that this clearly could not be construed as a visit; as up to now, the Claimant has not stated when it was that they were to return to the USA. Counsel posited the question - *Is the Claimant saying that the coming to Jamaica was to be of an indefinite nature?* Because if so, then the habitual residence of the children would have been changed to Jamaica.

[22] Counsel submitted that there was no mention of the return being of a temporary nature and it was obvious that the Claimant's reason for wanting to return to the USA was that LM1 was regressing, and his medical needs were not being met in Jamaica. Counsel asserted that the Claimant acknowledged in her Affidavit that while LM was doing well in school and activities, the same would be true if he were to reside in the USA. Counsel contended that bearing in mind that LM has been in Jamaica since August 2023, some 17 months to the filing of the affidavit, it meant that LM was totally integrated in Jamaica; and Jamaica had become his habitual residence. Counsel highlighted that LM1 was also habitually resident in Jamaica.

[23] Counsel asserted that the WhatsApp threads between the parties and the affidavit evidence paints a completely different picture from what the Claimant was alleging. Counsel listed the following instances:

I. The children were brought to Jamaica either by the Claimant herself or the Claimant and the Defendant whichever is correct, there can therefore be no wrongful removal;

II. There was no agreement, consideration or discussion as to when the children were to return if at all, to the United States of America;

III. *A house in Harbour View was purchased in the name of the Claimant by the Defendant for her to have a place to reside;*

IV. *The Claimant did in fact reside in this property after moving out of the Defendant's residence at 3 Hamilton Drive;*

V. *A motor vehicle was purchase (sic) for the exclusive use of the Claimant by the Defendant;*

VI. *By the Claimant's own words, she stated that she took them to and from school;*

VII. *The Claimant took [LM1] to the United States for a medical appointment and returned to Jamaica;*

VIII. *The messages by the mother (Claimant) and the father (Defendant) paint a very different picture.*

[24] Counsel referred to several sections of the Claimant's evidence and submitted, among other things, that if the move back to Jamaica was not to be permanent there would have been no need to give away items and then to consider "*having to repurchase items I had given away.*" Counsel further submitted that the Claimant's statement in the WhatsApp Group could only have the clear meaning that the return to Jamaica was to have been a permanent one, devoid of any thought of a return to the USA.

[25] This WhatsApp Group had been created within one (1) month of the Claimant's return to Jamaica with the children. Counsel asserted that it was obvious that the "husband and wife" situation according to the Claimant had broken down and that then was the way forward. Counsel argued that this WhatsApp message made so soon after the return to Jamaica clearly meant that there was absolutely no question of any thought of a return to the USA. Counsel added that the documentary evidence which clearly was the best evidence, made contemporaneously, was to be preferred as being the truth of the matter between the parties and the decision made at that time.

[26] Counsel argued that, without a doubt, the children and indeed the Claimant had made Jamaica their place of habitual residence and there could not be any wrongful retention by the Defendant. Counsel relied upon the case of: **Re A (A child) (Habitual Residence: 1996 Hague Child Protection Convention)** [2023] EWCA Civ 659**.** Counsel asserted that the Claimant's evidence that while LM was doing well in school and activities, the same would be true if he was to reside in Florida was obviously an admission that the child's life had clearly been integrated in Jamaica.

[27] Counsel contended that although the instant case dealt with the issue of the application under The Hague, the operative date would either be November 1, 2024, the date of the report in the USA or January 31, 2025 (the date of the filing of the Hague Application before the Supreme Court of Judicature). He argued that either date would be more than one year from August 2023.

[28] Counsel further asserted that the case of **Re J (A child) (Finland) (Habitual Residence)** [2017] EWCA Civ 80 is persuasive as it quoted several cases dealing with habitual residence. Counsel asserted that Part 2 of the Judgement was very instructive where it was stated: - "*Para (1) shall not apply if the holder of access rights referred to in paragraph (1) has accepted the jurisdiction of the Courts of the member state of the child's new habitual residence by participating in proceedings before those Courts without contesting their jurisdiction*. Counsel also relied on **AR (Appellant) v RN (Respondent) (Scotland)** [2015] UKSC 35.

ISSUES

[29] The issues for the court's consideration are:

(i) Whether the court ought to exercise jurisdiction in this matter?

(ii) Whether there was an agreement between the Claimant and the Defendant for LM to reside permanently in Jamaica?

(iii) Whether LM is habitually resident in Jamaica?

LAW

[30] The law relating to the return of children is found in section 7 of **the Children (Guardianship and Custody) Act** ("the Act"). The Act was amended to give effect to The Hague Convention, to which Jamaica is a signatory.

[31] Section 7C of the Act which mirrors Article 3 of The Hague Convention states:

> *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"*

[32] Section 7K speaks to timelines that should be considered when considering applications under the Act. It states:

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

[33] Where an application is made more than 1 year after the wrongful removal or retention of the child, the court has a discretion as to whether the child should be returned where it is considered that the child has become settled in his new environment. This is in keeping with the principle relating to the paramountcy of the welfare of the child.

ANALYSIS

Issue i: *Whether the court ought to exercise jurisdiction in this matter?*

[34] The evidence is that the Claimant filed a Notice of Application with Affidavit in Support on July 11, 2024, seeking custody and maintenance for the two children. Counsel for the Defendant is of the view that the reason for the Claimant's Application under The Hague Convention is due to fact that she was unsuccessful with her urgent custody application in the Supreme Court. Counsel submitted that The Hague Application was made in November 2024, after the Claimant had filed an application seeking joint custody with care and control to herself. Mr. Steer pointed out that the Claimant's evidence is that *"I flew to Jamaica for a (sic) court hearing on September 18, 2024 after filing for an urgency application, and the Judge said she did not read the file and denied having [LM] return to his home in Florida until the Court proceedings are final."* It was thereafter that the Claimant filed the Hague application.

[35] At this juncture however, I wish to point out that the case of **Re J (A child) (Finland) (Habitual Residence)** (*supra*) referenced by Counsel Mr. Steer is not helpful to the Defendant on this issue because it concerns legislation which is not common to this jurisdiction.

[36] In the case of **Larbie v Larbie** No. 11-50859 (5th Cir. 2012), Evelyn and Derek, parents of K.L., had a custody dispute following their separation. Derek was in the U.S. military and based in Texas, while Evelyn and the child were temporarily residing in the United Kingdom during Derek's deployment. The parties entered into a Texas court-approved Temporary Order granting them joint managing conservatorship and allowing Evelyn to determine K.L.'s residence. Derek later executed a Consent Affidavit permitting K.L. to reside in the U.K. temporarily. Ultimately, a Texas court entered a Final Decree of Divorce awarding Derek primary custody. Evelyn fully participated in the Texas proceedings, including filing a counter petition for affirmative relief, attending the final hearing, complying with court orders, and even appealing the Final Decree.

[37] Evelyn being dissatisfied with the outcome of the case later filed a Hague Convention petition in the U.K., alleging that K.L. had been wrongfully retained in Texas. She argued that K.L.'s habitual residence had shifted to the U.K., and that his continued presence in Texas violated her custody rights. The District

Court agreed, concluding that the U.K. was K.L.'s habitual residence and that Derek wrongfully retained the child. On appeal, however, the Fifth Circuit disagreed.

[38] The Fifth Circuit Court concluded that Derek's case succeeded because Evelyn consented and acquiesced to the Texas custody decision, effectively waiving her rights under The Hague Convention. Consent under Article 13(a) of The Hague Convention refers to the petitioner's intent before removal or retention, while acquiescence involves subsequent acceptance of the situation. The Court assessed subjective intent based on statements and conduct. Evelyn participated in the Texas custody proceedings voluntarily, including answering the divorce lawsuit, filing a counter petition seeking affirmative relief and exercised custody under the Temporary Order until the final decree was entered. She obeyed Texas Court orders while in the U.K. and recognized its jurisdiction. Evelyn never initiated custody proceedings in the U.K. and her objection to Texas jurisdiction only arose nine months after the final custody decree. The Court said that emotional distress over losing custody did not prove the absence of consent.

[39] Derek proved as a matter of law that Evelyn agreed to the Texas Court's final custody determination, making her Hague Convention claim invalid. This ruling upholds the Convention's goal of preventing international forum shopping in custody disputes. The Court indicated that "although Evelyn - like most parents - was "devastated"' to lose primary custody of her child, that fact cannot serve as evidence of nonconsent without undermining the Convention's ability "***to deter parents from engaging in international forum shopping in custody cases***". (emphasis mine)

[40] In the case at bar, the evidence shows that the Claimant participated in the divorce proceedings filing an answer and cross-petition on the 19th of June 2024. She thereafter filed a Notice of Application for Court Orders and Affidavit in Support on July 11, 2024, seeking joint custody of the children with care and control to herself. Several affidavits were filed on her behalf in the custody matter and the evidence therein revealed that a temporary access order was

made by the court, whereby the Claimant was granted telephone access to LM three days per week.

[41] Miss Harris submitted that the Claimant believed that the custody matter would have facilitated LM's return to the USA. Counsel stated that it was upon the Claimant coming to Jamaica that she realized that the custody application was unrelated to the process of the return of the children. It is noted that this assertion is not supported by any of the Claimant's affidavit evidence.

[42] There is no evidence before this court indicating that the Claimant ever disputed the jurisdiction of the Jamaican Court nor is there any evidence to suggest that the Claimant has at any time, initiated custody proceedings in the USA in respect of LM or both children. On the contrary, the Claimant initiated custody proceedings in Jamaica, obtained interim access orders and sought the Court's intervention when the Defendant failed to comply with those orders. The Claimant failed to challenge the jurisdiction of the Jamaican Court during the custody proceedings. In reliance on **Larbie v Larbie (supra)** I find that the Claimant arguably waived any argument that the Jamaican Court was an inappropriate forum to adjudicate the issue of LM's custody because she affirmatively invoked the protection of this court and its authority to provide relief when she initiated proceedings for custody and maintenance of the children.

[43] Her subsequent decision to make an application under The Hague Convention six months later, suggests an attempt at forum shopping, an approach which was strongly criticized in **Larbie v Larbie** (*supra*).

[44] I am of the view that the facts support the conclusion that the Claimant submitted to the jurisdiction of the Jamaican courts and is thereby precluded from invoking The Hague Convention at this stage. However, in the event that my conclusion is wrong, I will determine whether there was an agreement between the Claimant and the Defendant for LM to permanently reside in Jamaica and to determine where the child was habitually resident at the time of the alleged wrongful retention.

Issue ii: *Whether there was an agreement between the Claimant and the Defendant for LM to reside permanently in Jamaica?*

[45] The Claimant's evidence is that she separated from the Defendant in 2019. She stated that it was mutually agreed that the children would reside with her. She further stated that the Defendant, herself and the children returned to Jamaica in August 2023 and that whilst in Jamaica the Defendant began accusing her of numerous things and demanded to see the children's passports and took them from her. She said that she agreed to move back to Jamaica on the basis that she did not want the children to split up, after several months of the Defendant insisting that LM alone returns to Jamaica as he (the Defendant was of the view that LM1 was delaying his (LM's) development. She added that due to her close bond with her children, she agreed to return to Jamaica temporarily, so that they could see if being in Jamaica was better suited for both the children. She said that the Defendant purchased a house which originally belonged to her mother, for investment purposes.

[46] The Claimant said that in November 2023, she returned to Florida with LM1 for the purposes of a medical appointment and later they both returned to Jamaica. She stated that in December 2023 she began prodding the Defendant about returning to the USA with the children and he agreed. She said that on January 9, 2024, a few days before her departure, the Defendant indicated that LM would not be travelling and withheld his passport. She returned to the USA with LM1 and has since been trying unsuccessfully to have LM returned.

[47] In direct opposition, the Defendant's evidence was that both himself and the Claimant agreed in about March 2023 that LM1 would be better residing in Jamaica where all their family lived. The Defendant indicated that in April 2023, he purchased and renovated a house in Harbour View, in the Claimant's name and she resided there when she returned to Jamaica.

[48] In the case of **JG v ST** [2022] JMSC Civ 64, the court stated at paragraph [25] that:

> *In deciding the agreement or understanding relating to custody and or care of a minor**, the court would take into consideration court orders and/or verbal agreements between the parties. In the absence of any such agreements, the actions of the parties would have to be analysed.** In this case both parties gave evidence that there was a verbal agreement between them. There have been cases that have opined about verbal agreements. In the case of Commonwealth*

> *ex rel. Veihdeffer v. Veihdeffer, 235 Pa. Super. 447, 344 A.2d 613 (Pa. Super. Ct. 1975) Watkins, P.J. in analysing the approach to adopted in cases of verbal agreements stated that –*
>
> > *It is well settled that an agreement between the parties as to custody is not controlling but should be given weight taking into consideration all the circumstances. (*Emphasis mine*)*

[49] The evidence shows that there was firstly an agreement between the parties for the children to reside in the USA with the Claimant while the Defendant visited. The Defendant purchased a house in Florida in 2019 for the Claimant and the children to reside. The Defendant said that the parties agreed to relocate to Jamaica. The Claimant indicated that this agreement was reached because she did not want her children to be split up and the Defendant indicated that they agreed to relocate to Jamaica for the sake of the children. The Defendant said he purchased the house in Harbour View in furtherance of that agreement.

[50] The evidence revealed that the children resided with the Defendant at 3 Hamilton Drive while the Claimant resided at the house in Harbour View after residing at 3 Hamilton Drive for a brief period. The Claimant in her evidence indicated "*It has been costly having to repurchase items that I had given away before going to Jamaica…*" This statement gives credit to the Defendant's assertions that the parties agreed to relocate. It also weighs against the submission of Miss Harris that the visit to Jamaica was temporary. It begs the question that if the Claimant intended to return to Florida, why did she give away her possessions and was shortly thereafter re-purchasing them as against reclaiming them. Her actions give support to the submission that she disposed of the items in furtherance of the family's relocation to Jamaica.

[51] The question now is whether this agreement was for a permanent relocation. The Claimant indicated in her evidence that the move back to Jamaica was a trial run and was based on conditions. She stated that the Defendant enrolling the children in school was a temporary arrangement until she and the children returned to Florida. She stated that she began "prodding" the Defendant about returning with the children to the USA and he agreed, but he changed his mind a few days before she was set to leave.

[52] In her Hague Application, the Claimant indicated that she "visited" Jamaica with the children and their father in August 2023. I find that this statement contradicts her evidence on a whole because in several affidavits in support of her custody application she indicated that they agreed to move to Jamaica. It is worthy to note that the affidavits in the custody matter preceded the Hague application. The evidence points to an arrangement for the children to reside in Jamaica permanently. A deeper analysis of the evidence reveal that in the WhatsApp message sent to the Defendant's family in a WhatsApp group created by the Claimant (in September 2023) she stated "*The house in Harbour View was also purchased by MM in my name….**I will reside there to raise [LM1] and [LM]** if however he wishes for me to leave I will do so*." (Emphasis mine)

[53] The message further stated that "*He has purchased a vehicle and its on its way he says its for my use here….I can drive it to take the boys to school and around… That what he has agreed to contribute towards electricity $20,000 and water $5000 be sent to my Wells Fargo account, along with funds for groceries…. He has agreed to put gas in the car weekly but at the gas station he wants and with his timing."* This to me points to the permanency of the residence in Jamaica.

[54] Counsel Mr. Steer submitted that:

> *"… the WhatsApp statement can only have the clear meaning that the return to Jamaica was to have been a permanent one devoid of any thought to return to the USA*
>
> *23. This WhatsApp had been created within one (1) month of the return of the Claimant's return to Jamaica with the children. It is obvious that the "husband and wife" situation according to the Claimant had broken down and what then was the way forward.*
>
> *This WhatsApp message made so soon after the return to Jamaica clearly meant that there was absolutely no question of any thought of a return to the United States of America.*

[55] The Court finds favour in the reasoning of Counsel for the Defendant. It is patently clear that the Claimant intended for the children to remain and reside in Jamaica and had made plans in accordance with those intentions.

[56] The Claimant, in her Affidavit, sought to explain the text message by asserting that at the time it was sent, she was overcome by the amount of control the Defendant had over her life and finances, whilst taking the necessary steps to start her life fresh. However, this explanation does not negate the fact that that message, underscored the permanency of the agreement between the parties for the children to relocate to Jamaica.

[57] Further evidence highlighting the permanent nature of the agreement is the enrolment of the children in a new school in Jamaica. Additionally, another WhatsApp message sent from the Claimant indicating that she intended to return to the USA without the children further supports my conclusion. Although the Claimant said in a further affidavit that she did not entertain this thought for long because she could not see herself being away from her children for such an extended period, I am of the view that the only reason the Claimant returned to the USA in November 2023 was for the purpose of LM1's medical appointment as shortly thereafter she returned to Jamaica.

[58] There are several other pieces of evidence which supports the conclusion that the parties mutually agreed to permanently relocate the children to Jamaica. The Claimant in her several affidavits has given evidence which contradicts her statement of case which leads me to question her credibility. The evidence points to a shared intention by the parties. The following highlights evidence indicative of an agreement:

> Affidavit of LTM in Support of Notice of Application for Court Orders filed on July 11, 2024.
>
> Paragraph 7- *"…That in August 2023 by way of understanding between myself and the Petitioner I returned to Jamaica with both children, however [LM1] was displaying regressing and his medical needs were not being met so we had to return to our home in the United States in January 2024…"*
>
> Affidavit of MM in Response to Affidavit for LTM
>
> Exhibit MSAM1- Text message sent to the Defendant by the Claimant (Nov. 20, 2023)

"I'm heavily considering moving back to Fl, to get myself on my feet, If I am, I won't be taking them, would be there for a minimum 6 mths straight. I know your house is going to be rented, so not asking to stay there, just letting you know so you have time to plan out things for the boys if needed"

Affidavit of LTM in Response to Affidavit of MM

Paragraph 9- *"…I agreed to moving back to Jamaica on the basis that I did not want the children to be split up. This was after several months of the petitioner insisting that LM alone returns to reside in Jamaica as he was of the view that [LM1] was delaying his development.*

Paragraph 13- *"…. I felt helpless and was of the view that it might be better for me to return to Florida to work enough money and save so that the boys would be able to join me in Florida. However, I did not entertain this thought for long as I could not see myself being away from my boys for such an extensive period and I made it clear to the Petitioner that I would wish to return to Florida with them both."*

Affidavit of MM in Response to Affidavit of LTM

Exhibit MM1- Text message sent by the Claimant to the Defendant on January 4, 2024, in response to message sent to her by the Defendant stating *"…I paid both school fees for half a mil ja."*

"I didn't decide to leave until after you paid…"

Exhibit MM2- Text messages sent by the Claimant to the Defendant
"…I still attempted to try, because I was looking at the bigger picture! Its better for them to have both parent accessible in the same country."
"Yes I was planning to leave them if I needed to leave, but I thought a lot about it. N having them go to you sometimes is hard for me, I don't think I could leave them for that long…."
"N that's also an agreement we made before I came to ja."

Exhibit MM4- Text message sent on September 28, 2023 in WhatsApp Group created by the Claimant to the Defendant's family.
'..The house in harbour (sic) was also purchased by [MM] in my name, I wish to have this be out my name as I made no contributions to this

purchase, I will reside there to raise LM1 and LM if however he wishes for me to leave I will do so. He has purchased a vehicle and its on his way, he says its for me to use here…"

Affidavit of LTM in Response to Affidavit of MM

Paragraph 22- *"It has been costly having to repurchase items that I had given away before going to Jamaica…"*

[59] Miss Harris submitted that the fact that the Defendant by text message stated "*well the boys should go to school until your (sic) ready*" is a clear indication that the Claimant did not consent or acquiesce to LM residing, long term in Jamaica. I am not in agreement with Counsel's submission because the Court's duty is to consider all the evidence presented and not to take one isolated piece and make a determination of the issue. A critical analysis of all the evidence does not support the Claimant's contention that the agreement was temporary.

[60] The case of **B v D (Abduction: Inherent Jurisdiction)** (*supra*) submitted by the Claimant is distinguishable from the case at bar. In that case the evidence showed that the mother had consented temporarily for the children to return to Portugal for educational purposes. In the case at bar, both mother and children relocated to Jamaica and the evidence does not indicate that this was a temporary arrangement.

[61] Counsel for the Claimant submitted that the home at Harbour View belonged to the Claimant's grandmother, and that the Defendant did not purchase a car for her. This, however, is contrary to the Claimant's own evidence as she admitted that the house was purchased by the Defendant in her name and that he also purchased the car for her.

[62] There is an absence of any evidence indicating when the children were to return to the USA or the length of the purported "trial run" as characterized by the Claimant. On the other hand, however, I find that there is a plethora of evidence pointing to an agreement between the parties to permanently relocate to Jamaica and for the children to reside in Jamaica.

Issue iii: *Whether LM was habitually resident in Jamaica as at January 2024?*

[63] In **Halsbury's Laws of England**, Children (Volume 9 (2023), paras 1–722; Volume 10 (2023), paras 723–1311), the author stated the following in relation to habitual residence:

> *The Convention on the Civil Aspects of International Child Abduction (referred to as the 'Hague Convention') applies to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights, and ceases to apply when the child attains the age of 16 years.*
>
> ***The term 'habitual residence' is not defined in the Hague Convention. It is not to be treated as a term of art with some special meaning but should be understood according to the ordinary and natural meaning of the words; it is a question of fact to be decided by reference to all the circumstances of a particular case.*** *An appreciable period of time and a settled intention are necessary for a person to become habitually resident in a country. The test of habitual residence, however, was not where the 'real home' was; there was a distinction to be drawn between being settled in a new place or country and being resident there for a settled purpose which might be fulfilled by meeting a purpose of short duration or one conditional upon future events. Concurrent habitual residence in more than one place at the same time is incompatible with the Hague Convention; however, where a sufficient degree of continuity is established, it is possible for a person to be habitually resident in one country for part of the year and in another for the remainder of the year8. Where a child is in the sole lawful custody of the mother, the child's habitual residence will necessarily be the same as hers. It follows that for a change of the child's habitual residence to take effect, the child must actually be transferred into the care of the parent seeking to establish the new habitual residence.*
>
> *The habitual residence of the child falls to be considered immediately in relation to the period before the wrongful removal or retention*
> *Emphasis mine*

[64] In the case of **Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)** [2021] 2 All ER 1227, Moylan LJ stated at paragraph [45] the approach to be taken to the meaning of "habitual residence":

> *[45] It has been established for some time that the correct approach to the issue of habitual residence is the same as that adopted by the Court of Justice of the European Union ('CJEU'). Accordingly, in A v A, at [48], Lady Hale quoted from the operative part of the CJEU's judgment in Re A (Area of Freedom, Security and Justice) (Case C-523/07) EU:C:2009:225, [2009] 2 FLR 1 at 12–13, sub nom Proceedings brought by A [2010] Fam 42 at 69: '(2) The concept of "habitual residence" under Art 8(1) of regulation No 2201/2003 must be interpreted as meaning that it* ***corresponds to the place which reflects some degree of integration by the child in a social and family environment.*** *To that end, in* ***particular the duration,***

regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration*. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.' (Emphasis mine)*

[65] The Court went on to say at paragraph [46]:

> *[46] It is also relevant to note that the factors listed in para 2 (quoted above) were taken verbatim from the judgment, at para 39. Their purpose or objective appears from the preceding paragraph:*
>
> *'38**. In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.' (**Emphasis mine)*

[66] At paragraph [51], the Court indicated:

> *[51] Lord Reed summarised, at [17], what Lady Hale had said in A v A, at [54], emphasising that: (i) habitual residence is a question of fact which requires an evaluation of all relevant circumstances; (ii) the focus is on the child's situation with the '**purposes and intentions of the parents being merely among the relevant factors'**; (iii) 'it is necessary to assess the degree of integration of the child into a social and family environment in the country in question'; (iv) the younger the child, the more their social and family environment will be shared with those on whom the child is dependent, giving increased significance to the degree of integration of that person or persons. (Emphasis mine)*

[67] It is clear from the above that habitual residence is not defined by The Hague Convention. It is a question of fact to be determined by an examination of all the circumstances of a particular case.

[68] In the case of **Re B (a minor) (habitual residence)** [2016] EWHC 2174, the court outlined principles relating to "habitual residence" at paragraph [17]:

> *(i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).*
> *(ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, In re L).*
> *(iii) In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 ("Brussels IIA") its meaning is "shaped in the light of the*

best interests of the child, in particular on the criterion of proximity". Proximity in this context means "the practical connection between the child and the country concerned": A v A, para 80(ii); In re B, para 42, applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22, para 46.

(iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (In re R).

(v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (In re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

(vi) Parental intention is relevant to the assessment, but not determinative (In re L, In re R and In re B).

(vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (In re B).

(viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B—see in particular the guidance at para 46).

(ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (In re R and earlier in In re L and Mercredi).

(x) ***The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident*** *(In re R) (emphasis added).*

(xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day ***(A v A; In re B)****. In the latter case Lord Wilson JSC referred (para 45) to those "first roots" which represent the requisite degree of integration and which a child will "probably" put down "quite quickly" following a move.*

(xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (In re R).

[69] The evidence of both parties is that the children were registered in school when they returned to Jamaica. LM attends Mona Preparatory School and engages in extra-curricular activities and attends the Bethel Baptist Church in Half-Way Tree, St. Andrew on Sundays. The Defendant's evidence is that LM resides

with him, his paternal grandmother and a full-time nanny. At school LM is part of the Drumming Corp, the Football Club, and Mona Prep Swim Team and also a member of the Ballaz Football Club and Swimmaz Aquatics Swim Club.

[70] The Defendant also stated that LM has several close friends at school, within the Trafalgar Park neighbourhood and is close friends with the children of his (the Defendant's) childhood friends, who are all the same age. He stated that they engage in extra-curricular activities together and spend time together on weekends and holidays. The Defendant stated that he (the Defendant) is a member of the Liguanea Club where LM has regular pool and play dates with children of Club members at various homes under his supervision.

[71] The Claimant stated that even though LM was doing well in school and activities in Jamaica, the same would be true if he was to reside in Florida. She added that she believes the children should live with her as they would receive more parental attention and care and that their spiritual needs would still be met.

[72] Counsel for the Claimant submitted that LM was ordinarily resident in the USA before traveling to Jamaica in August 2023. She argued that the central issue before the court is whether Jamaica has become the child's new habitual residence, displacing the USA, and whether the court should exercise its discretion to return the child to his habitual residence. Counsel contends that the parties had only agreed to a temporary school arrangement in Jamaica from September to December 2023, with the understanding that LM would return to Florida in January 2024. She argued that the child's continued stay in Jamaica, resulted from the father's unilateral decision and wrongful retention rather than a mutual agreement.

[73] Further, Counsel argued that the child has not formed sufficient integration into Jamaican society to establish habitual residence. While the father relies on the child's school attendance, church participation, and extracurricular activities to assert habitual residence, Counsel submitted that these factors do not demonstrate full integration. Counsel pointed out that the father's professional obligations as a businessman and a 2nd Lieutenant in the Jamaica Defence Force frequently required his absence, leaving the child primarily in the care of

his paternal grandmother and a nanny. Accordingly, Counsel maintained that the child's presence in Jamaica does not amount to a change in habitual residence.

[74] It is notable that the evidence presented provides minimal insight into the child's life in the USA. While the child was born in the USA and resided there up until August 2023, the Claimant has not provided any substantial details regarding the child's routine, social environment, and family ties in the USA. The only information gleaned from the Claimant's evidence is that before the move to Jamaica, LM was attending Kiddie Academy and if returned, would be enrolled in Ramblewood Elementary. The absence of any evidence regarding the child's life in the USA significantly undermines the Claimant's assertions that the child remains habitually resident in the USA

[75] The Court considers the evidence presented regarding the day-to-day activities of LM, his family life as well as his school activities. I note also the child's family environment, that he resides with his paternal grandmother and father. Other than a neighbour mentioned by the Claimant, there is an absence of evidence alluding to a familial community in the USA.

[76] I do not agree with Miss Harris' submissions in several respects. I reject the assertion that the children came to Jamaica on vacation, as the evidence does not support this. On the contrary, as discussed earlier in this judgment, there are several pieces of the Claimant's own evidence which strongly emphasize an agreement between the parties to permanently relocate to Jamaica. The court bears in mind the Claimant's actions and communications, all of which are consistent with the conclusion that there was a permanent relocation.

[77] The question is whether the child has achieved a sufficient degree of integration in a social and family environment in Jamaica. The answer to this I find is in the affirmative. LM is habitually resident in Jamaica and has been so since August 2023 when the family relocated to Jamaica. His life here has been qualitatively more stable and secure than in the USA. LM was not unlawfully retained in January 2024.

[78] At this juncture, I want to address two issues concerning an allegation raised by the Claimant in her affidavit but was not pursued in submissions by either Party. The Claimant asserted that the Defendant sent her a video of him physically and verbally disciplining LM. Firstly, I note that what was adduced in evidence was merely a still image from an alleged video and not the video itself. Secondly, the Claimant did not raise the defence of grave risk.

[79] In absence of the actual video, the court is left to speculate as to its actual content. It is also noted that the Defendant did not address or refute this allegation in any of his affidavits. However, in any event, I am not convinced that the material before the Court meets the threshold of being a grave risk. I also note that the alleged incident occurred in December 2022 and despite this, when the parties relocated to Jamaica in 2023, the Claimant left the children with the Defendant on weekdays while they spent the weekend in her care. I note also that the Claimant had intended to leave the children in the father's care for 6 months, although she later changed her mind. I believe that if the Claimant had genuine concerns regarding any abuse on the part of the Defendant, she would not have voluntarily left LM (or his brother) in his care, during those periods and was further contemplating going overseas and leaving him behind with the Defendant.

[80] I therefore do not find that LM will be in any grave danger if he is allowed to remain in the custody of the Defendant.

Application made outside the one-year period

[81] The evidence shows that the Application under The Hague Convention was made on November 1, 2024. The Fixed Date Claim Form was filed on January 31, 2025, The Fixed Date Claim Form was therefore filed approximately 1 year and 3 weeks from the date of retention. The Act states at section 7K (b) that:

> *Notwithstanding sections 7I and 7J*
>
> *(a)…*
>
> *(b) where the Court proceedings are initiated after the expiration of one year from the date of the wrongful removal or retention of the child the*

> *Court shall order the return of the child, unless it is demonstrated that the child is now settled in his new environment.*

[82] Having found that LM has been habitually resident in Jamaica since August 2023 and was not wrongfully retained, I find it unnecessary to address this issue.

CONCLUSION

[83] I conclude that the Claimant having invoked and submitted to the jurisdiction of the Court when she filed a Notice of Application seeking custody and maintenance of the children is precluded from invoking the Hague Convention to gain custody of LM. The Court therefore will not exercise its jurisdiction under the Hague Convention. I further find that there was an oral agreement for LM to travel to and reside in Jamaica permanently. I also find that LM has been habitually resident in Jamaica since August 2023 and was not wrongfully retained by the Defendant.

ORDERS

[84] In the circumstances, I make the following orders:

1. The orders sought in the Fixed Date Claim Form are refused.

2. The Claimant's Attorney-at-Law is to prepare, file and serve the order.