[2022] JMSC Civ 250

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV03811

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

IN CHAMBERS

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

2nd Defendant absent and unrepresented

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

Family Law - Application for the summary return of a child - The inherent jurisdiction of the court - Welfare of the child - Factors to be considered.

M. JACKSON, J (AG.)

Introduction

[1] This is an undefended action. The claimant, Desmond William McKenzie, seeks to make final the interim order granted in his favour on 29 November 2019 by Henry McKenzie J (Ag), against the 2nd defendant, Lacey-Ann Sherene Raymond, for the immediate summary return and full custody, care, and control of their son, MM, through these proceedings.

[2] The proceedings stemmed from the wrongful conduct of the 2nd defendant, who unilaterally retained their son in breach of a consent to travel agreement signed by both parties.

[3] The orders sought are made pursuant to the inherent jurisdiction of the court.

The Factual Background

[4] The claimant and the 2nd defendant are both Jamaican. MM, a minor, is also Jamaican; he was born on 14 December 2011. In 2016, the 2nd defendant left Jamaica for the United States on a visitor's visa and has not returned. When the 2nd defendant departed in 2016, apart from a consent agreement entered into in 2013 for the joint custody of MM by the parents, which will be discussed later in this judgment, no other arrangements or discussions were made between them when the 2nd defendant left in 2016.

[5] MM automatically became the claimant's sole responsibility. The claimant, therefore, had direct control over MM's emotional, physical, academic, religious, and social needs.

[6] In December 2017, through a mutual agreement, MM visited the 2nd defendant in the United States. He returned in January 2018, just before the start of the school term. On 1 August 2018, approximately seven months later, MM travelled again to the United States on a visitor's visa, accompanied by the 1st defendant, Daisy Elizabeth Raymond*,* his maternal grandmother. At that time, the 1st defendant held a written authorisation in the form of a Parental Consent to Travel Agreement signed by the claimant and the 2nd defendant. The main terms of the agreement, signed both in the United States and Jamaica for clear reasons, were as follows:

> *To whom it may concern*
>
> ***Re: Parental Consent for International Travel with MM***

> *We, Lacy Sherene Raymond and Desmond William McKenzie, are the lawful parents of MM, born on December 14, 2011, in Saint Andrew, Jamaica…*
> *MM has our consent to Travel with Daisy Elizabeth Raymond …to visit Newark, New Jersey, during the period of August 1, 2018, to August 31, 2018.*
> *During that period, MM will be residing with CL at…., New Jersey*
> *Any enquiries regarding this document may be addressed to us at…*
> *Email address: … Signed on this 13th day of July 2018.*
> *Signature: Lacy Sherene Raymond Desmond William McKenzie*

[7] It is important to note at this juncture that although the agreement listed the name and address of a third party, CL, where MM would be staying, it was understood by both the parents that MM would be spending time with the 2nd defendant.

[8] On 3rd September 2018, the 1st defendant returned to Jamaica. MM, however, did not return with her. The claimant immediately made several requests to both defendants for the return of MM; these requests were not met. The 1st defendant informed the claimant that the 2nd defendant had decided to keep MM and that she, as his grandmother, did not have the authority over MM to take him from his mother.

[9] Without delay, on 2 October 2018, the Claimant initiated proceedings in the Supreme Court. He filed both a fixed date claim form and a notice of application for court orders with supporting affidavits. The orders sought in the fixed date claim form and the notice of application for court orders were identical. They were formulated as follows:

a. That DM be granted sole custody of MM, a minor.
b. The 1st Defendant, DM, is required to return the minor, MM, to Jamaica forthwith.

c. The 2nd Defendant, LR, is required to return the minor, MM, to Jamaica forthwith.

d. That upon the return of the minor MM to Jamaica, the defendants, whether by themselves or their servants and or agents, be restrained from further removing the said minor MM from this jurisdiction.

[10] On 10 December 2018, about two months after the proceedings began, Henry McKenzie J (Ag) granted the orders requested in the notice of application for court orders. Although the defendants were properly served, they never complied.

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

[12] The pertinent terms of the orders, as varied by Henry McKenzie J (Ag), were as follows:

> "1. The interim formal order made on December 10, 2018, by the Honourable Mrs. Justice Henry-McKenzie is varied in the following terms:
>
> a. The Claimant, Desmond William McKenzie, is granted sole custody, care and control of the relevant child, [MM], until the determination of the Fixed Date Claim Form.

b. The first Defendant, Daisy Elizabeth Raymond, is required to return the minor child [M D M] to Jamaica within fourteen (14) days of the date of the Order into the custody, care and control of the Claimant.

c. The Second Defendant, Lacy-Ann Sherene Raymond, is required to return the minor child, [M D M], to Jamaica within fourteen (14) days of the date of this Order into the custody, care and control of the Claimant.

…"

[13] The 2nd Defendant entered no appearance nor filed an acknowledgement of service. The 1st defendant, however, filed an acknowledgement of service, entered an appearance, and filed an affidavit. This was done after Henry McKenzie's formal order was issued on December 10, 2018.

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

[15] In those circumstances, the only issue I am concerned with is whether to make the orders final as prayed.

[16] After a thorough examination of the facts, rooted firmly in my role as *parens patriae* and in the best interests and welfare of MM, I grant the following orders in the final resolution of the matter:

1. The Claimant, DM, the father of the child MM, is granted sole custody, care and control of the said MM.
2. MM is to be returned to DM, his father, for him to reside with him.

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

The discontinuation of proceedings against the 1st Defendant

[17] Before proceeding further, it would be useful to briefly discuss why the claimant has decided not to pursue action against the 1st defendant.

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

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

[20] In the Supreme Court, the 1st defendant applied to have the order for her imprisonment discharged or stayed pending appeal, but her applications were

unsuccessful. She then applied to the Court of Appeal for a stay of execution pending the determination of the appeal. The Court of Appeal granted her the stay. See **Daisy Elizabeth Raymond v Desmond William McKenzie** [2021] JMCA App 10.

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

[22] Considering the Court of Appeal's ruling and the fact that the substantive appeal against the 1st defendant is still pending, the claimant decided to proceed only against the 2nd defendant.

[23] I propose to outline the evidence presented to me, which has informed my determination of this matter.

The Evidence

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

[25] The claimant also requested that the court rely on the affidavits filed by the 1st defendant. I considered this request carefully. I, however, found no merit in doing so. Indeed, some parts of her evidence may be relevant in providing background evidence. After careful consideration, I concluded it was unnecessary.

[26] Additionally, her evidence matches that of the claimant. Both are unaware of the whereabouts of MM and the 2nd defendant. Moreover, the affidavits do not offer any up-to-date information about MM and the 2nd defendant that could assist this court and ultimately help decide whether a summary return is necessary and in MM's best interests, or whether a summary return would not be feasible, considering that more than three years have passed since MM left Jamaica.

[27] Finally, both the claimant's and 1st defendant's affidavits contain allegations against each other. These are not relevant to this hearing. The paramount consideration is what is in MM's best interests. Furthermore, those allegations should be examined more thoroughly through cross-examination. They are more likely to carry greater evidential weight in another tribunal where a full hearing on the merits can take place. This court did not have that opportunity because the action was undefended. The information provided by the claimant was sufficient.

[28] The claimant has requested that this court grant him sole custody, along with an order for the summary return of MM. Concerning the matter of custody, as mentioned earlier, the claimant's evidence was that in 2013, during a custody hearing he initiated, a consent agreement was reached in the Family Court in the Parish of Portland, following mediation between the 2nd defendant and himself. He stated that both parties agreed to have joint custody of MM. He explained that the hearing was prompted because the 2nd defendant had moved with MM from the parish. At that time, both of them resided in Portland. He said she took MM away for three months, during which he had no contact with her or MM.

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

[30] He further stated that in July 2018, MM was attending the Liberty Learning Centre and was an "A" student. He presented a letter from the school with MM's

grades. The letter stated, among other things, that MM would have been entering Year 2 in September of that year. It also noted that MM had been at the institution since 2014, starting in kindergarten. His school report showed an average grade between 89% and 90.3%. The claimant also explained that MM was attending church, was very active in vocational Bible study, and had formed close bonds with families on both sides.

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

[32] He further informed the court that after MM arrived in the USA in August 2018, his contact with him was limited. He stated that the 2nd defendant initiated and managed the calls. He described her as acting according to her "whims and fancies." He said that MM had told him he was given strict instructions not to disclose his location, including where he was living, the school he was attending, or the name of the school. He mentioned that while speaking with MM, he often cried and repeatedly asked to be returned to Jamaica. He noted that the only contact and address he had for them was for the third party, CL, who was mentioned in the agreement that allowed MM to travel.

[33] He stated that MM has not been in contact with his paternal grandparents or any of his other siblings, all of whom have nurtured and cared for him since birth.

[34] He stated that MM travelled to the United States on a visitor's visa, and his immigration status remains unknown. As of this hearing, MM has been absent for three years and six months. He also mentioned that he is unaware of the 2nd defendant's immigration status, as she also had left the island on a visitor's visa.

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

[36] He stated that he had also applied to the Superior Court of New Jersey, Chancery Division, Family Part. He noted that, with the order of Henry McKenzie, J. (Ag), he was given a hearing, and a subsequent order was issued requiring the 2nd defendant to attend court with MM. He stated that she did not comply with the court's order, and a Bench Warrant was issued for her. The warrant, he noted, was issued under the hand of Judge Christopher Romanysyn on 25 January 2019 and remains unexecuted.

[37] The warrant states as follows:

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

[38] He reiterated that the interim order for summary return should be made final because MM was removed from Jamaica, his country of ordinary residence. He stated that he was settled in school, participating in vocational Bible studies at church, and had a close connection with his family members. He pointed out that the United States was not MM's ordinary residence. He emphasised that he is without immigrant status, as his visitor's status has expired.

[39] He further stated that the 2nd defendant's unilateral conduct had implicitly alienated him and the rest of MM's paternal family, who had nurtured him and

had also jeopardised MM's immigration status. Finally, he reiterated that he last had contact with MM in December 2018.

The Law

[40] On November 24, 2017, Jamaica formally ratified the 1980 **Hague Convention on the Civil Aspects of International Child Abduction** (The Convention**)**. The United States is also a contracting Party. Article 12 of the Convention stipulates that:

> *"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings* ***before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention****,* ***the authority concerned shall order the return of the child forthwith.*** *The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph,* ***shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment****. (My emphasis)*

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

[42] It is widely recognised and well established in all jurisdictions that the law requires courts to prioritise the child's welfare as the paramount consideration when making decisions about the child's upbringing. Consequently, this fundamental principle has been adopted by all judges, whether exercising their role under the inherent jurisdiction of the court or through the Convention.

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

[44] There are numerous cases, both within and outside this jurisdiction, that have addressed the issue of the summary return of a child. These include **B v C [2016]** JMCA Civ 48, **Lisa Hanna Panton v David Panton (Panton v Panton) (unreported),** Supreme Court Civil Appeal No: 21/06 (delivered 29 November 2006), **Suzeanna Sylvia Williamson v Gregory Winston Williams (unreported),** Supreme Court Civil Appeal No. 51/2007, **Judith Thompson v Ranald Thompson** [1993] 30 JLR 414, and **R v M and Another** [2019] JMSC Civ 156, **J v J** [2021] EWHC 2412 (Fam), **Re L (Minors) (Warship: Jurisdiction)** 1974 1 WLR 250, and **Re J (a child)** (FC) 2005 UKHL 40.

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

> *"[19] The Supreme Court does have an inherent jurisdiction ... The jurisdiction of that court, in this context, has a rich history. That history includes the history of the Court of Chancery, which had exclusive jurisdiction in equity, providing relief where the common law offered no remedy. It is a history that is not without some uncertainty, but the more accepted view, in this context, is that the jurisdiction of the Court of Chancery, over children, was founded on the prerogative of the Crown as parens patriae.*
>
> *[20] The term parens patriae is defined in the ninth edition of Black"s Law Dictionary as meaning:*
>
>> *"...parent of his or her country"…The state is regarded as a sovereign; the state in its capacity as provider of protection of those unable to care for themselves…"*
>
> *[21] The Crown's prerogative was delegated to the Lord Chancellor in England, who, at that time, was the King's Chief Minister. The prerogative eventually came to be*

*exercised by the Court of Chancery. In this jurisdiction, there was also a Court of Chancery. Its status and powers in relation to children were very similar to its English counterpart. Its operation was concisely set out in **Mackintosh v Mackintosh** (1871) Eq J B Vol 2 p 113 (reported in Vol 1 of Stephens' compilation of Supreme Court decisions of Jamaica and Privy Council decisions 1774-1923, at page 1068). In that case, Lucie Smith VC said, at page 1069 of Stephens' compilation:*

> *"...In this Island, the judicial business of the Court of Chancery is, by virtue of local enactment, transacted by the Vice-Chancellor, and the records show repeated instances of the jurisdiction in cases of infants having been exercised by my predecessors. When letters of guardianship come to be granted they will be issued by the Chancellor under the broad seal, which is in his custody, but the question of the individual to be chosen as guardian is a judicial question, to be determined by the Vice-Chancellor in due course of law and practice."*

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

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

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

> *The Supreme Court of Judicature,*
>
> *The High Court of Chancery,*
>
> *The Incumbered Estates' Court,*
>
> *The Court of Ordinary,*
>
> *The Court for Divorce and Matrimonial Causes,*

The Chief Court of Bankruptcy, and

The Circuit Courts,

shall be consolidated together, and shall constitute one Supreme Court of Judicature in Jamaica, under the name of the Supreme Court of Judicature of Jamaica, hereinafter called the Supreme Court.

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

"Subject to subsection (2) of section 3 the Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island, that is to say–

The Supreme Court of Judicature,

The High Court of Chancery,

The Incumbered Estates Court,

The Court of Ordinary,

The Court for Divorce and Matrimonial Causes,

The Chief Court of Bankruptcy, and

The Circuit Courts, or

Any of the Judges of the above Courts, or

The Governor as Chancellor or Ordinary acting in any judicial capacity, and all ministerial powers, duties, and authorities, incident to any part of such jurisdiction, power and authority."

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

"With respect to the law to be administered by the Supreme Court, the following provisions shall apply, that is to say–

(a) …

(I) In questions relating to the custody and education of infants, the rules of equity shall prevail.

> *(j) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail."*

> *[30] Against the background of that jurisdiction, inherited from the Court of Chancery, Parliament introduced, in 1957, legislation which specifically treated with the guardianship and custody of children. That legislation, the Children (Guardianship and Custody) Act."*

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

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

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

> *"The Supreme Court has jurisdiction in respect of the custody of children (section 2) …… because of its all-encompassing interest in the welfare of the child. This power is exercisable by the Court, despite the wishes of the respective parents.*
>
> *The true welfare of the child, which is paramount, has been described as:*
>
> *" .. the child happiness, its moral and moral religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings" (**Forsythe v Jones SCCA** No. 49/99 del. 6th April 2001, at page 8)*

[50] In **Re J (A Child)** [2005] UKHL 40, Baroness Hale of Richmond, in overturning the decision of the Court of Appeal to order the summary return of a child to Saudi Arabia, states that the summary return should not be an automatic

response to every unauthorised taking or keeping of a child from their home country. She, however, went on to add that “summary return may very well be in the interest of the individual child.” She further stated that the decision to do so is always a choice, and a judge who sets about making that choice must focus on the individual child in the particular circumstances of the case. She further suggested that, as a convenient starting point, “the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there.” At paragraphs 18, 25, 28, 29, and 32 of the judgment, Baroness Hale, as a reminder to judges, helpfully reiterated that an application under the court's inherent jurisdiction is to be determined solely in the child's best interest.

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

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

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

> *“ [31]That approach is open to a number of objections. It would come so close to applying the Hague Convention principles by analogy that it would be indistinguishable from it in practice. It relies upon the Hague Convention concepts of 'habitual residence', 'unauthorised removal', and 'retention'; it then gives no indication of the sort of circumstances in which this 'strong presumption' might be rebutted; but at times Mr Setright appeared to be arguing for the same sort of serious risk to the child which might qualify as a defence under article 13(b) of the Convention. All of these concepts have their difficulties, even in Convention cases. For example, different approaches have been taken in different countries to the interpretation of the*

> *vital concept of habitual residence. By no means everyone share our view, which is based on the exercise of parental authority: see R Schuz, "Habitual residence of children under the Hague Child Abduction Convention - theory and practice" [2001] 13 CFLQ 1. There is no warrant for introducing similar technicalities into the 'swift, realistic and unsentimental assessment of the best interests of the child' in non-Convention cases. Nor is such a presumption capable of taking into account the huge variety of circumstances in which these cases can arise, many of them very far removed from the public perception of kidnapping or abduction.*
>
> *[41] These considerations should not stand in the way of a swift and unsentimental decision to return the child to his home country, even if that home country is very different from our own. But they may result in a decision that immediate return would not be appropriate, because the child's interests will be better served by allowing the dispute to be fought and decided here. Our concept of child welfare is quite capable of taking cultural and religious factors into account in deciding how a child should be brought up. It also gives great weight to the child's need for a meaningful relationship with both his parents. It does not follow, therefore, that a Saudi Muslim boy who is mainly cared for by nannies and nursery schools will be better off living with his mother and maternal grandparents in multi-cultural London than with his father or some other female relative in his home country."*

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

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

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

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

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

> *"The fact that the father had broken an agreement solemnly entered into was, therefore, a circumstance which the learned judge had to take into account and weigh in determining what was the welfare of the child. That he expressly did, and their Lordships see no ground for saying that he gave too little weight to what was only one of many elements in the case."*
>
> *Although the conduct of the parent is a relevant factor in determining the grant of custody of a child in its best interests (section 7 of the Act), it was held that despite the prima facie unlawful behaviour of a parent who kidnapped its child, that will not disentitle such parent from custody…"*

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

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

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

The Analysis

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

[57] These proceedings, as I have previously stated, are undefended despite the orders for service and the various satellite applications. Unlike other cases involving the application of summary return, where evidence has been provided by both parents, the evidence before this court comes from only one parent. In the meantime, the unfortunate consequence is that the welfare and best interests of MM hang in the balance.

[58] The court lacked information on MM's welfare, status, and other relevant details. The evidence, when pared down to the core issues, reveals these significant facts: MM's immigration status is currently unknown; his time as a visitor in the United States has long expired; the claimant has had no contact with him for over three years; and his current circumstances and connections to the United States are unknown. The court is without evidence regarding his stability, security, and certainty.

[59] In deciding whether to grant the order as requested, I must consider evidence to determine what is in the best interest and welfare of MM. The current position is that MM is not presently in Jamaica. Likewise, there can be no genuine dispute that he is in the United States of America and has been there for over three years.

[60] This case differs from those previously cited, as, in those cases, the application was for the summary return of the minor(s) involved in countries which may not be parties to the Convention, or where one or both of the countries may not have been parties when the application was made, for example, **Panton v Panton**. Despite this difference, however, the principles and laws established in those cases remain relevant to this case. The welfare of MM is, therefore, of the utmost importance. Both Jamaica and the United States are now signatories to the Convention. However, considering the spirit and tone of the Convention and the issues in this matter, it is clear why the application is made under the court's inherent jurisdiction.

[61] Regarding the factual circumstances of this case, the 2nd defendant left Jamaica in 2016; there was no formal agreement concerning the custody, care, or control of MM after her departure. Although her leaving the island does not automatically change the joint custody arrangement, it is clear that the day-to-day custody, care, and control would fall on the claimant. The clear and uncontradicted evidence shows that MM has visited the 2nd defendant twice. MM travelled with a Jamaican passport that included a visitor's visa. His legal status as a visitor expired in February 2019, as indicated on the Bench Warrant issued by Judge Romanysyn of the Superior Court of New Jersey, which states that: "*The court notes that the child's visitor visa expires on February 1, 2019.*"

[62] The court highlights that these were relevant factors in deciding what was in MM's best interests and are highly significant. Similarly, the length of MM's absence from Jamaica now exceeds three years; this, too, was a substantial and material fact that they had to take into account when assessing MM's welfare.

[63] The evidence showed that despite prompt and swift efforts by the claimant to secure MM's return, these attempts have been unsuccessful. The clear evidence, as Mr Eccleston submitted, is that MM was not habitually resident in the United States immediately before his retention. The country of ordinary or habitual residence, or with which he had a closer or stronger connection, was Jamaica. Counsel also submitted that MM was well settled in school, excelling academically and was an “A” student. He further stated that, in Jamaica, MM's religious needs were also met as he attended Sunday school.

[64] Mr Eccleston, in his submission, also reminded the court to consider the fact that MM was unilaterally taken from Jamaica, in breach of a mutually agreed arrangement. I bear in mind that submission, but I also consider the authorities that have stated that while the court disapproves of the unilateral retention of a minor by one parent, the court must not be quick to penalise the offending parent. Instead, it must carefully balance whether a summary return is appropriate when examining the case as a whole. Indeed, it remains a factor to consider. The fundamental rule, however, that I have derived from the authorities is that I must prioritise the welfare of MM, which must always come first. See **Re L (Minors) (Wardship): Jurisdiction** paras 265A-B.

[65] Currently, there is no evidence regarding MM’s current circumstances. This includes whether he has adapted to his new environment or encountered any risks. It has been over three years since he left Jamaica, his usual place of residence. Naturally, questions will arise about whether he has established himself in the United States, as such roots can develop quickly, and concerns about potential conflicts may surface, requiring proper consideration by this court. The claimant stated that MM was crying and pleading to return to Jamaica. This serves as evidence suggesting that MM may not have adapted well to his environment.

[66] Equally, and most importantly, the immigration status of the 2nd defendant is also currently unknown. After leaving the jurisdiction, MM visited her twice. The first

visit was a year after her departure in 2017, when MM spent Christmas with her. He returned in January 2018, and she saw him again in August of that year. She unilaterally retained him that year and enrolled him in a school. At that time, the only known status both held in the United States was that of visitors.

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

[68] Although the circumstances of this case before me present unique challenges, based on my review of the decided cases, I have distilled the following as practical guidance to assist in exercising my discretion and resolving this matter.

a. The court can act in its capacity as *parens patriae*.

b. A court has the inherent jurisdiction to issue an order for the summary return of a child who was wrongfully removed or wrongfully retained by one parent.

c. An application under the court’s inherent jurisdiction must conduct a quick, realistic, and unsentimental assessment of the child’s best interests, leading, where appropriate, to the swift return of the child to his or her own country, without sacrificing the child’s welfare for any legal principle.

d. When deciding whether to return a child to their home country, a convenient starting point is the proposition that it is likely to be in the child's best interest.

e. In determining whether an application to return a child under its inherent jurisdiction, the court must have regard to the “*individual child in the particular circumstances of the case” and the* welfare of the child, which is a primary and paramount consideration.

f. An order for summary return should not be the automatic response to every unauthorised removal or retention of a child from their home

country. However, a summary return may nevertheless be in the best interests of the child.

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

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

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

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

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

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

[69] In this case, although the evidence comes solely from one parent, it still establishes some undisputed facts. These include details such as the lack of information about MM and the 2nd defendant's whereabouts, their immigration status, and MM's current emotional state and adaptation to the new environment. In the court's view, these factors tipped the balance in favour of ordering the immediate summary return of the child.

[70] In light of the specific facts and circumstances of the case, my decision was firmly based on the welfare of MM. MM was removed from his country of usual or habitual residence by the unilateral action of one parent, at a time when he had

no immigrant status other than that of a visitor. Regarding the issue of ordinary or habitual residence, it is important to note that I did not apply the technical definition of habitual residence as outlined in the Convention, but rather a common-sense interpretation of the concept. Simply, I looked at the country with which he had a closer connection.

[71] Jamaica is MM's home country; he is a Jamaican national and has lived here his entire life. His religious and vocational education also began in Jamaica, and he attended school until the age of seven. He has spent his whole life here, starting school in 2014 at the age of three in kindergarten and progressing to the preparatory level. He was quickly moved into a new environment, where he enrolled in a local school. Therefore, I have concluded that MM has a stronger connection with Jamaica.

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

[73] As I have stated earlier, this court has no evidence regarding his current wishes and feelings, his physical, educational and emotional needs, or whether there have been effects of any changes concerning his religion, culture, or any harm he has endured.

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

a. The claimant, who is MM's father, has been alienated from his child due to the unilateral act of retention by the 2nd defendant, which breaches an agreement they both consented to and executed in clear terms.

b. The court is devoid of any explanation or evidence for such drastic and immediate action by the 2nd defendant.
c. MM has been uprooted from a stable environment to one where he had little or no established roots and familiarity.
d. MM was not habitually resident in the United States immediately before his retention.
e. He was taken from his home country of ordinary residence
f. MM is still a minor
g. He had expected to return to his school and other familiar environments, but he now finds himself in a place disconnected from those norms.
h. His education was interrupted.
i. The claimant had sole care, custody, and control of MM since at least 2016, when the 2nd defendant left Jamaica.
j. Following the departure of the 2nd defendant in 2016, no formal custody arrangement has been in place since 2013.
k. The move is likely to be psychologically distressing for him. The claimant asserts that he cries, wanting to return home.
l. The immigrant status of MM is unknown.
m. The 2nd defendant's immigrant status is unknown.
n. MM's family life, at least with his father and siblings in Jamaica, has been disrupted.
o. The circumstances of his current stay, education, religious and psychological connections are unknown.

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

[76] Finally, if the 2nd defendant wishes to approach the court as stated in paragraph 3 of my final orders outlined at paragraph 13 of this judgment, she would not be

prevented from doing so. These orders are made in the best interests of MM and primarily aim to restore a stable environment, as previously established, considering the facts of the case. This includes returning him to the care and control of his father, subject to any proceedings in this jurisdiction.

The Execution of the Order

[77] In conclusion, I note that the claimant has made a relentless effort to locate MM and the second defendant. He travelled with the orders of Henry McKenzie J, and a warrant is still outstanding from the New Jersey Superior Court.

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

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

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

"SECTION 77-B

Duty to enforce

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

77-b. Duty to enforce. 1. A court of this state shall recognise and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this article or the determination was made under factual circumstances meeting the jurisdictional standards of this article and the

determination has not been modified in accordance with this article..."

"SECTION 75-D

International application of the article

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

75-d. International application of the article. 1. A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this title and title two of this article. 2. Except as otherwise provided in subdivision three of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this article must be recognised and enforced under title three of this article. 3. A court of this state need not apply this article if the child custody law of a foreign country, as written or as applied, violates fundamental principles of human rights."

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

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

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