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FLIGHT OR RIGHT? CUSTODY & ACCESS IN INTERNATIONAL CHILD ABDUCTION CASES: EMERGING ISSUES IN JAMAICA

INDEX TO JOINT PAPER

FLIGHT OR RIGHT? CUSTODY & ACCESS IN INTERNATIONAL CHILD ABDUCTION CASES: EMERGING ISSUES IN JAMAICA

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I. Introduction

Issues relating to custody and access are ordinarily dealt with by reference to applications made under *The Children (Guardianship and Custody) Act*, under the *Matrimonial Causes Act*, or under *The Affiliation Act.*[1] The latter Act was for the purpose of dealing with questions relating to the former status of illegitimacy[2] which existed prior to the passing of the *Status of Children Act* in 1976. For the purpose of grounding jurisdiction locally the sole question is the parish of residence of the child or a parent of the child if the matter is being commenced in a Resident Magistrate's Court or in the Supreme Court where the parish of residence does not matter. In the Supreme Court, the applications under *The Children (Guardianship and Custody) Act* can be freestanding or the Act becomes a relevant consideration in ancillary proceedings for custody and access in proceedings relating to dissolution of marriage. These statutory instruments which ground the jurisdiction of the Courts for the purpose of hearing the matter does not affect the court's inherent power to deal with take jurisdiction as *parens patriae* over children matters.

Child abduction issues are not new even though it appears to be so in our jurisdiction. For this reason, it is important to appreciate that abduction is not to be

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1 Repealed

2 There are still questions as to whether this status has been completely abolished in Jamaica but those issues will not be resolved in this paper.

understood in the pejorative sense. It simply refers to the retention or removal of a child from one jurisdiction to another in breach of custody rights of the other parent. In some cases a decision to return the child will turn on the question of the parent who has parental responsibility for the child whether as a matter of law or on the basis of a pre-existing court Order. The governing consideration however, is always the welfare of the child. Applications relating to parents attempting to leave with children from or retaining children in the jurisdiction are not new either. Prior to 1993 and for quite sometime thereafter these applications were dealt with by applications for injunction where relevant and substantive applications for custody and access.[3] 1993 could easily have been a watershed year for a change in the jurisprudence and approach to the question for many reasons. By that time the *Hague Convention on Civil Aspects of International Child Abduction and Custody, 1980* was in effect and signed by several countries.[4] In addition to that quite apart from the convention the jurisprudence in the area of child abduction and custody was well advanced in relation to non-convention countries such as Jamaica. The opportunity arose in the case of **Thompson v. Thompson**[5] where the issue of *forum conveniens* in the context of a foreign custody order first arose. The matter was adjudicated to the Court of Appeal but the question was never raised again for over 11 years until the case of **Grant v. Robinson**[6] in 2004. An independent but interlinked form of application is that for a summary or peremptory return Order. This type of application was first made in the Court of Appeal case of **D. v. K. (Re: A Peremptory**

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3 Krainz v. Krainz (Unreported Supreme Court Judgment SCCA No. 107 of 2001 delivered March 13, 2003) Morrison v Seow (SCCA No. 81/2003 unreported Judgment delivered 29 July 2003, and in the Colin Henry case

4 Jamaica is still not a party to it. This fact does not however affect the issues raised herein.

5 (1993) 30 JLR 414

6 Unreported Supreme Court Decision delivered September 16, 2004.

Return Order)[7] in 2003 where an *illegitimate* extra-jurisdictional child was brought to the jurisdiction. Summary is indicative of the application and the conduct of the proceedings as the review of the authorities herein will indicate.

The principles all came together and were finally comprehensively dealt with in the landmark decision of **Lisa Hanna-Panton v David Panton.**[8] The decision is being described as landmark to the extent that all the principles relative to forum, summary proceedings, consent orders and welfare separately raised in each of **Thompson v. Thompson**,[9] **D v. K**[10] and **Grant v. Robinson**[11] were all pulled together in this one case and comprehensively argued and *resolved,* at least until someone distinguishes it or argues successfully that it is not good law. It is important to note that the issue in the forum state does not necessarily have to commence as an application for custody and/or access as will be seen. In fact this is where Counsel for the Applicant will have to exercise caution in making the application especially if there is an intention to raise the question of *forum* as distinct from an application for *summary return.*

II. Parental Rights and Responsibility

The starting point for all issues in relation to child abduction and custody cases is the breach of custody rights in a foreign jurisdiction. Parental rights and responsibility refer loosely to that bundle of rights to determine where the child lives, goes to school, to determine the child's child religion and a child's property. It has been more forensically

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7 Supreme Court Civil Appeal No. 81 of 2003 heard November 3, 4, 5, 6, 7 & 12 2003 and Written Reasons delivered on July 29, 2005

8 (unreported judgment handed down 29th November, 2006 at page 4)

9 *Supra*

10 *Supra*

11 *Supra*

defined in child statutes in other jurisdictions such as England as "all the rights, duties, powers, responsibilities and authority which a by law a parent has in relation to that child and his property."[12] In the case of parents who are married both parents exercise parental responsibility for the child. However, where the child resides with one parent it is that parent who prima facie exercises parental responsibility for that child.

If the child is an illegitimate child, different considerations apply because: in jurisdictions that recognise the status of illegitimacy it is the mother who has the prima facie right to exercise parental responsibility irrespective of whether the parents are living together. In these cases parental responsibility may very well be the deciding factor.[13] In fact even if the forum state has abolished the status of legitimacy, it cannot for the purpose of the hearing[14] treat that child as if it were a legitimate child. This is because the status of legitimacy is determined not by the law of one's residence but by the law of one's domicile. This was the issue in, and the effect of **D. v. K.**, *supra*, In this case the parties and the child were Montserratian nationals. Montserrat is a British dependent territory. It recognises the status of illegitimacy. D and K had a visiting common law relationship which ended in 1999. Due to the volcanic conditions in Montserrat during the relevant period D. was offered an opportunity to relocate to the motherland but declined in favour of an option to reside with K in Barbados. This was in 1998 prior to the break up of the relationship. After the break-up D returned to Montserrat to live but

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12 Dicey, Morris & Collins, Conflict of Laws Volume 2 14th edn at 969 para 19 – 003 (Sweet & Maxwell:2006)

13 Although see local case of Clarke v. Carey decided prior to the passage of the Status of Children Act, 1976, where de facto custody was granted to the father even though he had no right to apply for custody or de jure custody because it was in the best interests of the child to do so. This can be used to guide a court in an international child abduction case since welfare is the paramount consideration.

14 The application for summary return.

enrolled in the Faculty of Law. During the period that she was in law the child A resided with her and sometimes with the father K. Custody was therefore shared between mother and father. [A] lived in two homes and it seems dual residence will be the clue to solving the vital issue of whether the learned judge exercised her discretion correctly in ordering the return of A to Barbados.[15] At the completion of her studies, D asked K to return the child to her in Montserrat whereupon she took the child with her took England to visit a relative who was ill. She then left England and came to Jamaica with the child. K's Attorneys took out proceedings for custody in Jamaica which was later amended to add relief for summary return to Barbados being they contend the ordinary residence of the child A. D's Attorneys opposed the application on the basis that A being an illegitimate child, that status is determined by the law of her domicile and that the person in those circumstances who can determine the child's ordinary residence is D, her mother. It could not be said in those circumstances that she abducted A, because she did not need his consent to remove the child from Montserrat, the place from which the child was taken. The learned judge dismissed the application and D's attorneys appealed from the Order. It appears from a close reading of the Judgment that the decision only went the way it did because the child was removed from Montserrat and not Barbados.[16] That this is so, is underscored by the learned justices of appeal reserving the right to the father K the right to continue his proceedings for custody in the Supreme Court if he so desires under *The Children (Guardianship and Custody) Act*.[17]

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15 This was a finding of fact and an issue – see page 6 of the Judgment [emphasis added]

16 Barbados has abolished the status of illegitimacy

17 Counsel for the parties D and K have diverging views on this issue both of whom are presenting this paper. Counsel for D is of the view that parents in the Children Guardianship and Custody Act means parents of legitimate children whether by marriage or by statute as in the case jurisdictions where there is Status of Children legislation. She suggests that it is inconceivable

Parental rights and responsibility can also arise from Custody orders in a foreign jurisdiction. It is in these cases that there is room for argument because even if the status of illegitimacy exists the Order would already have decided the *rights* of the parties in terms of the entitlement to exercise those prima facie rights. The attitude of Courts in this jurisdiction is consistent and in keeping with the principles of the interests and welfare of the child as the paramount consideration. This was first demonstrated in **Thompson v. Thompson**, *supra* and affirmed in **Hanna-Panton v. Panton**, *supra*. In **Thompson** Carey J. A. citing the headnote of **McKee v. Mckee**[18] opined *"[t]he value of this case, in my view, is the importance it places on the consideration for the interests or welfare of the child over the order of the foreign court."*[19] He then went on to cite the relevant principles impacting welfare which were used in the balancing of the interests of the welfare of the child. The **Hanna-Panton v. Panton** case (*supra*) also concerned parental rights and responsibilities a foreign custody order. That order was a consent order.

III. The Hanna-Panton v. Panton Case – The Issues Come Together

The parties in this case will hereinafter be referred to as the mother and the father. The facts of the case are that the parties were married in New York, United States of

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that the status of illegitimacy which continues to be 'tacked' onto a child by the law of the domicile should suddenly be usurped by the *lex fori* and enable the father of an illegitimate child to come under the Children Guardianship and Custody Act notwithstanding the rules of Conflict of Laws and Clarke v. Carey which has not been overruled. Although it is conceded that it might be decided differently in light of the subsequent passage of the Status of Children Act in Jamaica **but** only, Mrs. Gibson-Henlin insists, to children on whom the status of legitimacy has been conferred by the law of their domicile. This is the reason for having a difficulty with the position in D. v. K because that the child A by virtue of her domicile of origin is an illegitimate child and it does not matter than the local law has abolished the status of legitimacy. However, it is an issue that the Court of Appeal may be persuaded to revisit and settle.

18 [1951] 1 All E.R. 942

19 At page 418 G

America ("USA") and returned to Jamaica where there son "A" was born. The parties along with "A" migrated to Atlanta, Georgia, USA in February, 2004. They separated in May 2004 and obtained a divorce in June, 2004. On 9th June, 2004, the parties entered a consensual agreement with respect to the custody of, and access to "A" which granted primary physical custody of "A" to the father with generous access to the mother. This agreement was incorporated in the terms of a final judgment and decree pronounced in the Superior Court of Fulton County, Atlanta, Georgia, USA on 10th June, 2004.

The mother thereafter sought to set aside the decree, final judgment and settlement agreement on the grounds of duress and her Motion in that regard was dismissed by the said court in August, 2004, on the basis that the court found that the mother had acquiesced and consented to the agreement. The mother returned to Jamaica in June, 2005 and in December, 2005 the father brought "A" to Jamaica to visit his mother on the express understanding that the father would return to Jamaica to collect "A" and return to the USA. On 17th January, 2006, the mother obtained an interim order granting her custody, care and control of "A" and an injunction restraining the removal of "A" from the jurisdiction. The father applied for an order to discharge the injunction and an order for the peremptory return to "A" to Atlanta, on the basis that that was where the child had been ordinarily resident and that was where the child was settled (attending school and Church and training to be an acolyte and interacting with his extended family) prior to the wrongful retention. The application made by the father which came up before the Honourable Miss Justice Gloria Smith ("Smith J.) at first instance was in the nature of summary proceedings or an application for a peremptory order directing a return of the child to Georgia. Smith J. granted the Order in favour of the father on 20th

March, 2006 and the mother's appeal to the Court of Appeal was dismissed by the Court which handed down a written decision which will be discussed in this paper.

IV. Nature of Summary Return/Peremptory Return Order Proceedings

The phrases "*summary return proceedings*" or "*peremptory return order application*" are used interchangeably to mean applications made and dealt with in the context of urgency based on a limited inquiry. A peremptory return order has been defined as follows:

> *"A peremptory return order . . . is . . . an order made without investigating in depth the general merits of the parents' dispute over the future care of the child, but after making sufficient inquiries to establish that they have been wrongfully removed from the jurisdiction of the custody of their habitual residence and should be returned there so that the dispute can be determined in the courts of that country."*[20]

This application may be properly heard on the affidavit evidence only and without cross-examination and this was confirmed in the court of appeal. This was also applied in cases within the region as in the Trinidadian case of **Campbell v. Campbell** where it was held in part that "[t]here *are cases or kidnapping cases where a court taking all circumstances into consideration can hear the matter as a summary one on the affidavits before the court and exhibits thereto and even in the absence of the party."*[21]

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20 Re M (Abduction: Peremptory Return Order) [1996] 1 F.L.R 478 at page 479, see also W & W v. H (Child Abduction: Surrogacy) [2002] 2 F.L.R. 252 at 253 (emphasis added).

21 Campbell v Campbell [1993] 3 T.T.L.R. 209 (Headnote); see also Re T [1968] 3 W.L.R 430 at page 436; In re Z (Abduction: Non-Convention Country) 1999 1 F. L. R. 1270 at 1284 and 1293; In the marriage of P and B (formerly P) (1978) F.L.C. 90-455 at 77,315 at page 90-455

The Court of Appeal decision in **Hanna-Panton v. Panton**, *supra*, also affirmed the principle in the that a judge may conduct a limited inquiry in coming to a determination as to whether the child should be returned to a foreign jurisdiction so that the matters of custody and related issues may be dealt with in that forum. The principle was stated in several cases before such as **In Re M (Jurisdiction: Forum Conveniens)**[22], where the mother appealed a summary return order of the children back to Malta after she had applied for custody in England on the grounds, *inter alia*, that the Judge acted precipitously and without sufficient knowledge and failed to consider various issues in detail. The Court of Appeal concluded:

> *"No doubt in an ideal world it would be helpful to be furnished with [this] kind of information . . . But an imperative element in all cases of this nature is the need for expedition . . . The judge, in my own view, had every justification for acting with the speed that he did, and for proceeding on the basis of the limited knowledge that he had."*[23]

The English Court of Appeal decision in **Re M (Abduction: Peremptory Return Order)**,[24] was to the same effect. In that case the mother appealed on the grounds, *inter alia*, that the judge was "*too cursory in making a return order*" and that she should have sought something more than the "*one-sided account*" of the father which was placed before the court "*at the last minute.*"[25] The Court of Appeal rejected this argument because the trial judge had the discretion in a summary order context to make his decision on the basis of limited information available, and was "*entirely right to have*

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22 [1995] 2 F.L.R. 224
23 *Supra*, at page 228
24 1996 1 FLR 478
25 *Supra*, at page 481

made the order which she did."[26] The decision in this case and more so the dicta of Waite L. J. at page 479 was affirmed by Downer J. A. in the Court of Appeal in **D. v. K.** *supra*, where counsel for the Appellant as a ground of appeal complained that the learned judge in the Supreme Court erred in refusing to allow an adjournment for further affidavits to be filed. Downer J. A. opined, *"[t]he learned judge rightly refused to grant the adjournments sought by the appellant to produce further affidavits in these summary proceedings."*[27] The court also has discretion in the appropriate case, if the child is of the appropriate age to interview the child. This option was also taken and commended in the Court of Appeal decision in **D. v. K** where Downer J. A. continued *"[i]n the present case the parties declined to give any oral evidence. They also refused the learned judge's invitation to undertake any cross-examination. The learned judge also examined the infant. All this demonstrated the commendable thoroughness with which the issues were inquired into in the Court below there was no proper basis for granting the adjournment"*[28]

Summary return proceedings are not proceedings on the merits. A court is not obliged to make any conclusions about allegations regarding the fitness of either parent:

> *"In particular it is said that [the judge] failed to conduct a proper investigation into the serious allegation made by the mother that the father was not a fit and proper person to have the custody of the boys. I think that complaint is rather wide of the mark, at any rate at the present stage. For the judge was not asked to make (and in fact has not made) any order for continuing custody in favour of the father; all that he has made is a temporary order, limited to sending the children back to New York in the care of the*

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26 *Supra*, at page 480

27 Page 3 of the Judgment; the dicta of Waite L. J. is to be found at pages 3 – 4.

28 Page 5 emphasis added.

> *father, with a view to their custody being determined by the State of New York."* **Re H (Infants)**[29]

The House of Lords in its latest pronouncement in this area of law affirms the right of the judge at first instance to conduct a partial investigation with a view to ordering the return of a child to a foreign jurisdiction to have the matter of custody determined when it declared ". . . *the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits.*" **Re J (a child)**[30] It is against this background that the Court of Appeal in **Hanna-Panton v. Panton** held that in the circumstances, Smith J. was correct when she held that ". . . *the lack of hearing on the merits incorporated the element of speed to facilitate the prompt resolution of these applications which is what is required as there is always an element of urgency in these applications;"* and further:

> *". . . 'summary' could . . . be taken to import an element of speed in the court's determination of the application . . . A number of the authorities cited spoke of 'partial investigations' see Re H*[31] *Buckley J reached his conclusion after only a partial investigation; the evidence which he had before him was contained in conflicting affidavits, there was no cross-examination 'and the mother was not even present at the trial before him.'"*

The Court of Appeal per Harrison P. affirmed this approach to the affidavit evidence, in the circumstances of a summary return order application when, he in the course of his judgment made the following pronouncement:

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29 [1966] 1 All E.R. 381 at page 400; see also In the marriage of Mittelman and Mittelman [1984] FLC 91-578; In the marriage of P and B (formerly P) (1978) F.L.C. 90-455

30 [2005] UKHL 40, at paragraph, 26.

31 *[1966] 1 WLR 381 at page 400*

> *"... a judge is not obliged to allow cross-examination of the witnesses who have given their evidence on affidavit, seeing that, the judge is not at that time required to make primary findings of fact, nor pronounce on the credibility of witnesses. The court may therefore in those circumstances properly base its decision on the undisputed evidence tendered, as Miss Justice Smith did."*[32]

Importantly Smith J.A., in his judgment noted that he had grappled with this very issue of the treatment of the affidavit evidence by Smith J.,[33] as it was a live issue before the Court of Appeal that Smith J., had erred in failing to consider all the affidavit evidence including the vigorously contested allegations of inappropriate conduct. Smith J.A. approved Baroness Hale's statement **In Re J (a child)**, *supra*, to the effect 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 determined there. Those who oppose this proposition must make out a case against its application..."*[34] This formed the basis for Smith's JA, rejection of Counsel for the mother's submission that all the affidavit evidence should be examined, and he held (at pages 47 to 48) that:

> *Is the contention of counsel for the appellant that the learned judge erred in not examining all the affidavit evidence before making an order for summary return of the child, correct? I think not. In this regard, I accept as correct the submissions of counsel for the father/respondent that in summary order proceedings there is no legal requirement for the judge to examine conflicting evidence in all cases. The nature and extent of the enquiry undertaken by the trial judge will vary from case to case. The learned judge may be satisfied that in the circumstances of a case the undisputed evidence comprises all the material she needs to determine the application for summary return. In other words, in the context of the welfare principle it is for the trial judge to decide whether in the particular case an examination of the conflicting*

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32 Page 20 of the Judgment.
33 See page 36 of the Judgment.
34 Paragraphs 44 - 45

affidavit evidence is necessary before granting or refusing a summary return order.[35]

V. The Court's Duty/Approach Regarding a Hearing on the Merits

Every court faced with an application for the hearing of a summary return order is faced with the questions that Smith J. A. grappled with in **Hanna-Panton v. Panton.** Two issues which faced Smith J. were: (a) whether the court has a duty or obligation to hear the general merits of the case and (b) whether on all the circumstances of this case the court should in fact grant the summary order. In answer to the first issue, Smith J. concluded that "*the Court has a discretionary power as to whether or not to hear the merits of the case in an application of this nature*" and in answer to the second question, she determined that the court should "*grant a summary order directing that the relevant child be forthwith returned to the State of Georgia in the U.S.A.*"

VI. The Welfare Test in the Context of Summary Return Orders

In the first instance judgment, Smith J. concluded, by reference to the recent House of Lords decision of **Re J (A Child)**[36], the Supreme Court does have the power in accordance with the welfare principle to order an immediate return of a child to a foreign jurisdiction without conducting a full investigation on the general merits. The learned judge also relied on section 18 of the *Children (Guardianship and Custody) Act* and **Re L (Minors)**,[37] thereby affirming that the Supreme Court is required to consider the welfare of the child as its first and paramount consideration even in a summary return order

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35 Pages 47 – 48.
36 *Supra*
37 [1974] 1 W.L.R. 250

proceeding. The Court of Appeal upheld this conclusion while noting that *"the Act which governs these proceedings does not in any way assist in the procedure governing the request for the summary return order."* [38]

As a matter of law, the judge always has a choice whether to return the child or not in the child's best interests. In the recent case of **Re J (A Child)**[39], the House of Lords confirmed this principle when it held that the "*court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits . . . [T]here is always a choice to be made . . . Summary return may very well be in the best interests of the child.*"[40]

Similarly, the Canadian court in **Burgess v Burgess**[41] has opined that it "*is entirely open to the trial judge to decide, having regard to the best interests of the child, that he should not exercise his jurisdiction to determine the issue of custody but leave that issue for the Court of the other country. In so doing the trial judge is not refusing jurisdiction, or abdicating it, but determining in his exercise of it, what is for the benefit of the infant.*"[42]

What then are the relevant factors which guide the Courts in coming to a conclusion on what the best interest of the child requires? The factors are many and varied none conclusive or determinative.

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38 per Harrison P. at page 4 of the judgment
39 *Supra*
40 *Supra*, at paragraph 26
41 [1977] 75 D.L.R. (3d) 486
42 *Supra*, at page 493

VII. Relevant Factors

In the **Hanna-Panton v. Panton** case, Harrison P., noted that *"the summary return order may only be made after considering several factors"*[43] which are summarized as follows:-

1. the fact that the "kidnapper" is in breach of a foreign custody order is undesirable but not a disqualifying factor;[44]
2. The Privy Council in **McKee v. McKee**, *supra* also confirmed that "*it is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction is invoked and for that reason give effect to the foreign judgment without further inquiry.*" Although the court is not obliged accept a foreign order, "*comity demands, not its enforcement, but is grave consideration.*" (**McKee v. McKee**, *supra*). Harrison P., interpreted that dicta as follows[45]: *"The existence of a valid foreign order is one of the factors to which some weight must be given, but that will not preclude a court in another jurisdiction in some cases from adjudicating on the issue of what was best for the welfare of the child."*
3. His Lordship, Harrison P., cited with approval the High Court of Australia decision in **Z.P. v. PS**[46], which he noted was authority for the principle that *"...the welfare of the child is the first issue in making a summary order but .... That when the child is within the jurisdiction, the doctrine of forum non conveniens is applicable..."* [47];
4. *"... a court considering the summary return order ought to determine which of two fora is more appropriate to evaluate effectively..."* the *varied factors which the welfare principle, and "...logically the forum of the country in which the child is ordinarily resident or "...with which... the child has the closer connection...", as Baroness Hale so described In re J (a child) (FC)*[48] *should be preferred."* Further, *"...the country in which the greater influences can be seen to have brought about the varied factors which constitute the best welfare of the child, for some period of time, will be the country of the child's*

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43 Page 5
44 (McKee v. McKee [1951] 1 All ER 942)
45 At page 6 of the Judgment.
46 [1994] 181 CLR 639
47 At page 7 of the Judgment.
48 *[2005] UKHL,*

ordinary residence or with which the child has the closer connection."[49]

5. Additionally, Harrison P., noted that: *"... along with the other factors, a court considering the summary return order, must, in its balancing exercise, be satisfied that the court of the country to which it is being sought to return the child, recognizes and employs and will apply principles similar to the accepted welfare of the child principles. In that regard, the court considering the application will be assured that the welfare of the child will be preserved, in the event that the child is summarily returned..."*[50]

VIII. Review of the Authorities

The principles distilled from the following authorities are helpful in considering the nature of summary return order proceedings and are as follows:-

1. **In Re Z (Abduction: Non-Convention Country)**,[51] the English court ordered a summary return of the child to Malta because (1) the child was habitually resident in Malta, (2) the courts in Malta were in a better position to resolve disputes relating to the child's future, and (3) it was in the child's best interest to have her future determined without the impact of a unilateral and wrongful removal of the child from her place of residence by one parent. Importantly, the court in Re Z rejected the arguments of the mother that (1) the child was settled well in school in England, (2) the child had been in England for a long time (over six months), (3) the child was an English citizen who had strong connections to England, (4) the mother had been the child's primary caregiver since birth, and (5) there was a real possibility that the court in Malta would ultimately send the child back to the mother in England. The court found that these arguments did not outweigh the overwhelming argument that Malta was the best place to make a determination about the child's best interests and thus it was in her best interests for her to return to Malta. The principles distilled in Re Z have been judicially approved by the English Court of Appeal in **Re E (Abduction: Non-Convention Country)**[52] as *"a full and scholarly review of the modern case law . . . rightly found to be of great assistance."*
2. **In G v. G (Minors) (Abduction)**,[53] even though both parents were English nationals, the English Court of Appeal reversed the order of the lower court declining to make a summary return order of the children to Kenya. The Court

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49 Per Harrison P., at pages 10 to 11 of the Judgment.
50 At page 12 of the Judgment.
51 [1999] 1 FLR 1270
52 [1999] 2 F.L.R. 642
53 [1991] 2 F.L.R. 506

held that the Kenya court would apply the welfare test in a custody hearing and that "*in all the circumstances, the proper court to deal with the disputes between the parties was the Kenya court where the proceedings had been initiated and where most of the witnesses were available.*"[54]

3. In another recent English decision in **Re H (Child Abduction: Mother's Asylum)**,[55] the mother fled Pakistan to London alleging domestic violence by the father. The father brought the child to London two months later on a temporary basis and the mother assumed care of the child contrary to the father's wishes. The father returned to Pakistan and thereafter applied to the High Court in England for the summary return of the child to Pakistan. The mother opposed the application. The child had been with the mother for eighteen months before the father's application was finally heard. The mother was granted asylum based on allegation of violence, which the father denied. The court ordered the return of the child to Pakistan based on the undertakings offered by the father.

4. In the Canadian case of **Burgess v. Burgess**, (*supra*) the appellate court in Canada upheld a summary return order of the children to England because (1) England was the child's ordinary place of residence, (2) there was already an action for his custody in a Court of competent jurisdiction in England, (3) the court in England was already seised of the matter, and (4) the father who had taken the child out of England should not be able to obtain an advantage over the mother by his actions.

5. **In the Canadian case of Re Firestone and Firestone**,[56] the appellate court upheld a summary return order of the child to Australia. Even though (1) there was no custody agreement in place in Australia, (2) both parents had joint legal and physical custody of the child, and (3) the parents and child were all Canadian citizens with significant and meaningful connections to Canada, the Canadian court cited several so-called kidnapping cases with approval in holding that it was in the best interests of a child who has been removed from his place of ordinary residence to be returned forthwith to the country from which he was removed for all disputes about custody to be settled in that country.

6. In the Australian case of In the marriage of **P and B (formerly P)**, *supra*, the Australian court ordered a summary return of the child to New Zealand even though it was clear from the affidavit evidence that (1) the child had been settled in Australia and was doing well at school and (2) the child expressed to several persons including a psychologist and doctor who submitted affidavits that he did not want to return to New Zealand. The court held that (1) in this case the interest of comity required that the Australian court should respect the custody order of the New Zealand court, which was a Court of competent jurisdiction, (2) a full investigation was required to make a reliable resolution and New Zealand was the more appropriate place for that resolution to occur and (3) it was both impractical and inappropriate for the Australian court to make such a determination.

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54 Headnote

55 [2003] 2 FLR 1105

56 [1978] 90 D.L.R. (3d) 742

7. **In the Marriage of Mittelman and Mittelman**, *supra*, the Australian court ordered the children returned to California even though both parents were Australian and the children were Australian citizens. The court held that (1) the most important factor was the desirability for one court to determine the issue of custody, (2) the children should not be subject to conflicting orders, and, as such, (3) it was in the children's interests that the matter be referred back to the court in California which had the best evidence available about the child and where all the factual allegations occurred and which was the most advanced in the hearing of the matter and could resolve the matter with the least possible delay because it was already seised of the matter (whereas in contrast a case in Australia would take months to be heard during which time a new status quo would be created).

8. In the Trinidad and Tobago case of **Campbell v. Campbell**,[57] the court made a summary return order of the child back to Canada even though (1) the child was born and raised in Trinidad and Tobago, (2) both parents were citizens of Trinidad and Tobago, and (3) the child had significant connections to Trinidad and Tobago including several years of schooling because there was already a custody order in place in Canada, the child had been settled in school in Canada, and a trial in Trinidad and Tobago would take several months. Importantly, the court rejected the mother's argument that summary return orders were only made in cases involving "foreign" children and that the child's race, nationality and culture were all of Trinidad and Tobago and thus the court was obliged to hear the case. The judge held that these factors were less relevant in this case because there were several strong similarities between Canada and Trinidad and Tobago such as language and education and cited several cases in which nationals of countries that were similar (such as the United States, England and Canada) were ordered to be returned.

IX. "Habitual or Ordinary Residence" and "Nationality" as a Factor affecting Jurisdiction in Forum and Summary Return Applications

Nationality and "ordinary residence" has played different roles in the child abduction matters. Different roles depending on, on whose behalf the submission is being made. Some parties want it to play a decisive role some want it to play a minimal role but the courts are at one in holding that it is the welfare of the child that is the paramount consideration. This has been evident in this jurisdiction since **Thompson v.**

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57 [1993] 3 TTLR 209

Thompson and again in **Grant v. Robinson**. In the latter case Sykes J. found that counsel for the applicant:

> [U]rged and I accept that this Supreme Court should not lightly decline jurisdiction if two of its nationals wish to litigate before it and if the question of the welfare of a Jamaican child is raised then it should be in my view only in unusual circumstances that this court should not hear a custody application. This does not mean however that the court can wrap itself in the cloak of nationalism and ignore the fact that there may be other fora more appropriate to hear the matter.[58]

It is this extract that formed the basis, it appeared, of the mother's submission in **Hanna-Panton v. Panton** that there were no exceptional circumstances which should warrant a refusal on the part of the court to hear a case brought by a Jamaican national for custody of a Jamaican child and that the child's ordinary residence or closest connections were with Jamaica the land of his birth, and accordingly that the Jamaican court should not defer to a foreign court. However, in keeping with the authorities thereby affirming **Thompson** and in a manner of speaking Sykes J, in **Grant v. Robinson** the court refused to countenance this submission. Before doing so they reviewed the authorities which provide guidance on the meaning of the term ordinary residence or ordinarily resident. The term *"ordinarily resident"* was defined in **Re P. (G.E.) (An Infant)**,[59] in which the Court of Appeal concluded that the English courts had jurisdiction over a six-year old boy who was not an English citizen but who had been taken to Israel by his father without the consent of his mother. The court outlined the test for determining the ordinary residence of children and how it may be changed:

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58 Page 6 of the Judgment

59 [1964] 3 All E.R. 977

> *So long as the father and mother are living together in the matrimonial home, the child's ordinary residence is the home - and it is still his ordinary residence, even while he is away at boarding school. It is his base, from whence he goes out and to which he returns. When father and mother are at variance and living separate and apart and by arrangement the child makes his home with one of them - then that home is his ordinary residence even though the other parent has access and the child goes to see him from time to time. I do not see that a child's ordinary residence, so found, can be changed by kidnapping him and taking him from his home; even if one of the parents is the kidnapper. Quite generally, I do not think that a child's ordinary residence can be changed by one parent without the consent of the other.*[60]

Further support for this proposition is found in **Re Z (Abduction: Non-Convention Country)**[61] "[w]*here both parents have parental responsibility neither of them can unilaterally change the habitual residence of their child by removing the child wrongfully and in breach of the other parent's rights unless circumstances arose which independently pointed to a change in the child's habitual residence."*[62]

This is the context of the thesis of this paper. It is the breach of the custody right by the attempt to change the ordinary residence of a child that in most cases gives rise to these proceedings. This is why the issue was so framed in **D. v. K.** - who had the right to change A's ordinary residence by reference to the jurisdiction **from** which A was taken. Most times the effect is what is manifested to the "naked eye" that is an attempt by one parent to deprive the other of the *custody* of the child. In the ordinary case, it is and the ultimate result is indeed so. It is the *crossing of the borders* that gives rise to the *change of residence,* the breach of custody rights issues in an international context. It is for this reason that the ultimate result, *custody* of the child is never the real issue in these

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60 Supra, at page 982 – paragraphs C-E.

61 *Supra*

62 *Supra*, at page 1275, citing Re M (Abduction: Habitual Residence) 1996 1 F.L.R. 887.

matters.[63] In other words, it is not a custody application, at least not until the court has decided the first question. The issue usually in the case of forum is, which of two courts is best suited to hear the matter and in the case of summary proceedings, to return or not to return? The answer always points in one direction – to the courts or jurisdiction of ordinary residence. It is not the decisive issue but it is usually at the centre of every argument in international child abduction cases. It is for this reason that the courts can decline to hear the merits of an application. In fact in forum applications even welfare is understood in two contexts. The first is concerned with which of two courts and the second is after that issue is decided who is to have the *society* of the child. The second is the custody application and the hearing on the merits as per Lord Donaldson of Lymington M. R. in **Re F (Abduction and Custody Rights)**:-

> *"The welfare of the child is indeed the paramount consideration, but it has to be considered in two contexts. The first is the context of which court will decide what the best interests of the child require. The second context,* ***which only arises*** *if it has first been decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody, care and control and so on should be made."*[64]

The **Hanna-Panton v. Panton** decision was therefore not a decision relative to the question of custody. It was about the breach of custody rights of one parent with whom the child resided. This was a finding of fact, Georgia, Atlanta became the ordinary residence when the mother and father migrated there and lived there for two (2) years, and in answer to the contention that two (2) years was too short a time to amount

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63 Practice point – unless you intend to make an application for custody and to remain in the Jurisdiction, therefore it is not advised that you include an prayer for relief for custody in your application.

64 1991 Fam. 25 at page 31E; see also ZP v. PS [1994] 181 CLR 639; Karides v. Wilson [1998] FamCA 105 (3 August 1998) at 10-12 and Kirsh v. Kirsh, *supra.*

to ordinary residence, the father found support for the view that "A's" ordinary residence was in Atlanta, albeit for a two (2) year period in a recent English case, **M v M (Abduction: England and Scotland)**,[65] in which Butler-Sloss L.J. stated:

> *"In my respectful view those observations in relation to ordinarily resident apply equally to habitual residence on which there appears to me to be absolutely no difference in principle. Consequently, applying those words to this case this couple settled in Scotland voluntarily as part of a regular order of their life for the time being for what the judge himself saw as a medium duration. . . . there is no case to [my] knowledge . . . where a period of 2 years has not been treated by the court as being a period which imported habitual residence. It is possible that another court at another time might find that, but in this case with the family settled in council accommodation, the children at school, the husband with a permanent job and the wife with a part-time job, the fact that they may at some future date decide to move to England, if they had not parted does not prevent them from the period prior to 10 June 1996 being settled in their habitual residence which was Scotland."*[66]

Whether one uses the "*closer connection*" test (formulated by Baroness Hale in **Re J (a child)**, *supra)*, or the "*ordinary residence*" test (formulated by Lord Denning in **Re P. (G.E.) (An Infant)**, *supra*), the Court of Appeal upheld Smith J.'s, finding that "A" was ordinarily resident in Georgia for a period commencing February 2004 and had closer connections there, particularly after the mother returned to Jamaica in June 2005 leaving the father with the child to continue to reside in Georgia.

The Court of Appeal also held that Smith J.'s holding that *"the fact that the parties are Jamaican nationals is not an overriding consideration, it is just one element in the determination of what is in the best interests of the child"*[67] was correct. It is our

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65 [1997] 2 F.L.R 263

66 *Supra*, at pages 267 to 268

67 Per Harrison P., at page 32 of the Judgment

view that both Smith J., and the Court of Appeal were correct and that both decisions can be supported by the following principles:

1. The trial judge must conduct a balancing exercise and there are no presumptions about any factor; as such nationality can be outweighed based on the particular circumstances of the case: *"How then is the trial judge to set about making that choice? His focus has to be on the individual child in the particular circumstances of the case . . . Our law does not start from any a priori assumptions about what is best for any individual child."* **Re J (A Child)**,[68]
2. *"Nationality is one of the factors which the judge should take into consideration. It must form one element in the balancing operation to be performed to determine where the child's welfare lies. It is, however, no more than one of the balancing factors."* [69]
3. In **G v. G (Minors) Abduction)**,[70] both the father and mother were English citizens who lived in Kenya and the mother took the children home to England on holiday and applied for custody in England. The English Court of Appeal overturned the lower court ruling that the English court should hear the merits and after canvassing various authorities including **Re L**, **J v. C**, **McKee v. McKee** and **Re T**, reasoned, *inter alia*, that:

> *"In **J v. C [1970] AC 668 at p 701**, Lord Guest observed that nationality is one of the factors which the judge should take into consideration. It must form one element in the balancing operation to be performed to determine where the child's welfare lies. It is, however, no more than one of the balancing factors."*[71]

The Courts have in several cases; nationality notwithstanding found that other factors override nationality, even in situations where the parents and children had strong connections to the country of the court. Courts in England, Australia, Canada, Trinidad and Tobago, and Jamaica have all declined to exercise jurisdiction over parents and children who were nationals and ordered their return to a foreign jurisdiction in the best interest of the children and without conducting a hearing on the merits of custody because other factors outweighed nationality. This is because they are applying the test of

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68 *supra*, at paragraphs 29 and 38
69 Re L (Minors) (Wardship: Jurisdiction), *supra*, at page 264B
70 [1991] 2 F.L.R. 506
71 *Supra*, at page 516

welfare as the paramount consideration. The following are a some cases in which the courts applied the welfare principle over nationality as a single factor:

1. In addition to **M v M (Abduction: England and Scotland)**, *supra*, where the English court ordered that custody of the English children should be tried in Scotland where they had lived for two years, there are several other authorities from various jurisdictions that have made similar decisions:
2. **In the marriage of Mittelman and Mittelman**, *supra,* the mother, father and children were all Australian citizens and the children had spent the majority of their lives in Australia, but the Australian Court ordered the children returned to the USA (where the children lived prior to their removal) in their best interests and after applying the welfare test.
3. In **Re Firestone and Firestone**, *supra,* the mother, father and child were all Canadian citizens, and the parents migrated to Australia. The father took the child back to Canada and sought custody claiming that he wanted the child raised as a Canadian, the child's grandparents all lived in Canada, the father wanted the child to enroll in a bilingual school in Quebec to learn French (his maternal grandmother's language) and the child was an heir to the business of a prominent Canadian family (Firestone). Even though there was no custody agreement between the parties in Australia and thus the father had shared physical custody, the Court of Appeal upheld the decision of the trial judge that *"all the events could be more effectively dealt with in Australia, that the welfare of the child as a paramount consideration calls for full and complete determination of all the facts of the case, that that evidence was much more readily and less expensively brought forward in Australia and that he should order a hearing there."*
4. In **Campbell v Campbell**, *supra*, the mother, father and child were all Trinidad and Tobago nationals who got married and divorced in Trinidad and the child was born and raised, went to school, and spent most of her life in Trinidad. The parents moved to Canada where the child started school and a custody order was made in favour of the father. The mother returned to Trinidad and sought custody of the child there and the court ordered a summary return of the child back to Canada in the child's best interests and after applying the welfare test primarily because a custody order was already in place.
5. In **Grant v Robinson**, *supra*, the mother, father and child were all Jamaican citizens, but the Supreme Court held that the child's custody should be determined in the USA where the child had lived before being removed in the best interests of the child.

X. Forum Non Conveniens – Determining the Proper Forum:-

The central point in all forum conveniens cases as aptly adapted by Carey J. A. in **Thompson v. Thompson**[72] is that the "parties to a dispute have chosen to litigate in order to determine where they shall litigate." It is for the party resisting the application to provide proof that some other forum is more appropriate. It is against this background that the learned Justice of Appeal went on to caution himself as did Lord Justice Templeman in the following terms:

> Where the [Claimant] is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate.[73]

The exercise of the discretion is not automatic. The onus of proof is on the person who raises the objection to show that there is a more appropriate forum.[74] The seven propositions which guide the Court were set out in **Thompson v. Thompson**[75] in essentials only and include the following:

1. The forum must be a more appropriate forum of competent jurisdiction.

2. The burden of proof rests on the defendant.

3. The court will not light decline its jurisdiction, therefore the burden resting on the defendant is not just to show that [Jamaica] is not the natural or appropriate forum for the trial **but to establish that there is another available forum which is clearly or distinctly more appropriate than the [Jamaican] forum.**

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72 Page 416 H of the Judgment of Lord Justice Templeman in the *Spiliada Maritime Corporation v. Cansulex Limited (1986) 3 W. L. R. 972 at 975*

73 Page 416 I.

74 *Ibid*

75 *Ibid* at Page 417 A – H.

4. Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action the court will look see what factors there are which point in the direction of another forum…

5. The question of whether the [Claimant] will obtain justice in the other forum.

It is important to note that the forum must be **clearly distinct and more appropriate.** In other words, it is not enough to bring evidence to show that the other forum also apply the same law as that of the forum state. There must be a distinct advantage. From a procedural perspective the relevant provisions of the Civil Procedure Rules 2002 must be observed in order to adduce evidence of foreign law.[76]

Further, the doctrine commenced in commercial litigation. As with all things relating to children the welfare of the child is the paramount consideration. It follows therefore that the doctrine is subject to those considerations as expressed in **Thompson v. Thompson** Carey J. A. opined:

> [b]oth Law Lords agreed to the underlying question, viz whether some other forum exists where the case may be tried more suitably having regard to the interests of all the parties and the ends of justice. The principle which their Lordships articulated, were applied to a commercial law case. The matter which Bingham J., addressed was one involving custody proceedings **where the welfare of the child is the first and paramount consideration. Section 18 of the Children (Guardianship and Custody) Act** provides…[77]

This proposition was affirmed in the Hanna-Panton case where counsel for the mother sought to argue that the doctrine does not apply in child custody cases. Carey J. A. went on to outline the principles that are relevant to a consideration of the applicability

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76 Part 31

77 Page 417 I

of the doctrine.[78] It is reasonable to say that the Court of Appeal in Hanna-Panton refined and settled the principles on forum conveniens that were first argued in **Thompson v. Thompson** so that this case should be considered with the more recent decision in Hanna-Panton.

The Court of Appeal, in **Hanna-Panton v. Panton** found that Atlanta, Georgia, was the proper forum. In doing so, it considered cited the following statements of law cited by Counsel for the father:

1. *"A consideration of what is in the best interests of the children must be gleaned from evidence available in [the foreign jurisdiction] . . . where their little friends are, their teachers are, their neighbours are, and the family doctor and minister [are] living."*[79]
2. *"The optimum programme for a child's future will substantially be identified by reference to past events; to the personality, abilities and needs of the child, and of those around the child, . . . and to the relationships between them, as illumined by past events; and to the physical, emotional, social and cultural milieu in which the family lived; and that all these matters, including in particular any resolution of factual disputes relating to past events, are more satisfactorily addressed in the courts of that state."*[80]
3. *"If any enquiries are to be made about [the father's] suitability as a parent the [foreign] court can make the suitable enquiries. The same can be said for [the mother]. The courts [in Jamaica] would be placed in a difficult position. They would have to rely on affidavit evidence, . . . cross-examination and . . . demeanour. Should the welfare of a child depend on the vagaries of litigation in a context where this court is not able to get current, reliable and accurate information about either of the litigants, to examine for example the physical, spiritual and psychological environment in which the child is expected to grow and flourish? . . . In this context the Jamaican courts would not have any objective independent evidence by which any of the parties' testimony could be weighed. At the very least the courts in Maryland could if they wish cause a visit to be made to [the father's] accommodation [and] . . . visit the school of the child."*[81]

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78 Pages 417 I – 419 D; N. B. the pronouncements of Buckley J. in **Re: L (Minors) [1974 1 W. L. R. 250 at 263** on this issue.

79 Atwal v Atwal [1990] CanLII 2275 at page 5 (citing Walker v. Walker [1974] 3 W.W.R. 48 at page 52)

80 In Re H (Child Abduction: Mother's Asylum), *supra*, at page 1116 at paragraph 30

81 Grant v. Robinson, *supra,* at pages 9-10

Smith J. therefore had strong legal and factual support for holding that the Georgia court was the proper forum to decide the child's best interest because the child had been living in Georgia for the past two years, all the factual allegations related to the child occurred in Georgia, and almost all of the relevant witnesses were located in Georgia, and the child's "*physical, spiritual and psychological environment*" was unquestionably in Georgia.

Before the Court of Appeal, in **Hanna-Panton v. Panton**, the mother sought to challenge that Smith J. failed to first decide the best interests of the child before determining which Court should determine the issue of custody and that she should not have made any determination of which Court was the appropriate court before making a determination of the best interests of the child. Smith J. concluded that (1) she did have the power to make a summary return order of the child in accordance with the welfare principle and without conducting a full investigation, and (2) she was obliged to apply the welfare principle in the summary order context as required by Section 18 of the *Children (Guardianship and Custody) Act*.

Having determined that the welfare principle is to be applied, Smith J. then asked: *"How is the welfare principle to be applied when there are two competing jurisdictions?"* and answered the question as follows: *"(i) First you must determine which Court should decide what the child's best interests require; (ii) What order should be made in respect of the child. This second question only arises for consideration if it is determined that the local Court rather than the foreign Court shall decide what is in the best interest of the child."* Thus affirming the principle cited above in **Re F (A Minor)**

(Abduction: Custody Rights)[82] which the learned Smith J., said was not binding on the court but highly persuasive:

> *"[A]s a general rule an abducted child's best interests required his return to the jurisdiction of his habitual residence and any decision relating to custody was best resolved in that forum; that where a child had been removed in breach of custodial rights from his habitual residence . . . the English Court, considering his welfare as paramount, would first determine the appropriate forum to decide the substantive issues relating to his welfare, that provided that the English Court was satisfied that the foreign Court would adopt appropriate principles in considering such issues and there were no contra-indications requiring the retention of jurisdiction the general rule would prevail."* [83]

The facts in that case were that the mother was an Israeli citizen, the father was a dual English-Israeli citizen, and the father brought the child to England and applied for custody. The lower court held that the child had not been brought to England in violation of a prior custody order in a foreign court and that the child had significant connections to England so the English court would retain jurisdiction. The Court of Appeal overturned this ruling and held that the trial judge had erred in principle because (1) as a general rule an abducted child's best interests required his return to the jurisdiction of his habitual residence, and any decision relating to custody was best resolved in that forum and (2) since the Israeli court would adopt a similar approach to the substantive matters and since there were no indications that the child's return would be harmful, the court applied the general rule and ordered his immediate return to Israel. Importantly in **Re F**, Lord Donaldson of Lymington M.R. stated the following:

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82 *Supra,* Headnote
83 *Supra*, Headnote

> *"So far as ties with England are concerned, this is one of the matters which falls to be considered by the court charged with resolving the dispute between the parents. It does not point to the English courts as the court appropriate for that purpose . . . There is no evidence that the Israeli court would adopt an approach to the problem of [the child's] future which differs significantly from that of the English courts . . . In a word, there is nothing to take it out of the normal rule that abducted children should be returned to their country of habitual residence. The welfare of the child is indeed the paramount consideration, but it has to be considered in two different contexts. The first is the context of which court shall decide what the child's best interests require. The second context, which only arises if it has been first decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody, care and control and so on should be made."*[84]

The Court in deciding the more appropriate Court will be guided by several factors that impact the question of welfare. In the **Hanna-Panton v. Panton** case, Smith J., following the approach in **Re G (A Minor)**:[85] where it was recognised that *"[t]he question to be resolved is which court would be better equipped and fitted to take this very difficult decision – the Canadian court or the English court."* Similarly, the House of Lords has opined that in so-called kidnapping cases, the English court can properly decide that a foreign court is the "*proper forum*" to decide the merits "[w]*here there has been something in the nature of kidnapping, as it is usually called, a court in this country after investigating the facts may decide that a foreign court which is already seised of the matter is the proper forum to decide all questions relating to the infants welfare."* **J v. C**.[86]

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84 Re: F (A Minor) (Abduction: Custody Rights), *supra*, at pages 30-31 (emphasis added).
85 [1984] F.L.R 268 at page 275
86 [1970] A.C. 668 at page 829 paragraph A

The second question of significance in this inquiry, also applied by Smith J. in the **Hanna-Panton v. Panton** decision, is to which country does the child have a closer connection? The second question was approved by the House of Lords in **Re J (A Child)** *"[o]ne important variable . . . is the degree of connection of the child with each country. This is not to apply . . . [a] technical concept . . . but to ask in a common sense way with which country the child has the closer connection."*[87]

This therefore takes one back to one of the propositions of this paper and which in effect was the basis for affirming the decision of Smith J. that is that the starting position as a general principle that it is in the best interests of the child to return to its place of ordinary residence:

> *"It will, in general, be in the best interests of children to have their future decided in the courts of the country where they habitually reside. That is a principle which has particular force in a case, like the present, where the competing jurisdictions are represented by two countries with close historical ties and closely corresponding legal systems, applying a similar approach to the difficult problems to which cases of this kind inevitably give rise."*

It is a starting point however and no more as expressed in **Re J (A Child)**:

> *"It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorized taking or keeping of a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child . . . How then is the trial judge to set about making that choice? His focus has to be on the individual child in the particular circumstances of the case . . . the Judge may find it convenient to start from 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*

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87 *Supra*, at paragraph 33

> *there. A case against his doing so has to be made."* (emphasis added)

The rationale for this principle which was accepted and adopted in the **Panton-Hanna** case basis for this starting point or principle is usefully extrapolated in the judgment of Wilson, J. in **Re H (Child Abduction: Mother's Asylum)** *supra*:

> *"What is the basis for the proposition that in normal circumstances it better serves the welfare of a child for his future to be determined by the courts of the state of his habitual residence? Unless the question is squarely answered, the proposition is empty mantra. The primary answer . . . is that the optimum programme for a child's future will substantially be identified by reference to past events; to the personality, abilities and needs of the child, and of those around the child, whether parents, siblings or others, and to the relationships between them, as illumined by past events; and to the physical, emotional social and cultural milieu in which the family lived; and that all these matters, including in particular any resolution of factual disputes relating to past events, are more satisfactorily addressed in the courts of that state. A second answer . . . is that it is preferable for a child that his future should be determined in the absence of unilateral relocation achieved by one parent. Charles J. described it as 'in some ways . . . an intangible benefit' but considered it to be an advantage for the child in later life to know that his future had not been determined in such a context. I wonder whether the benefit becomes slightly less intangible by mounting an argument that the decision upon his long-term future is more likely to be in his interests if it has not been distorted by the attempted – and unreversed – imposition by one parent of a fait accompli. My personal view is, however, that there is a third answer which buttressed the validity of the proposition or, to be specific, of a slightly wider proposition. It relates not the preferable exercise of jurisdiction in one particular state rather than in another but to the general advantage to the child that, where two states might exercise jurisdiction over a child, one of them should, as early as possible, cede jurisdiction to the other. In my experience the advantage to the child of early, definitive recognition by one state that the other state should make the substantive decisions and that the former state will in principle enforce them can hardly be over-stressed. An even rule of law across both jurisdictions is*

> *thereby achieved for him; and in particular he can travel between his families in the two states without the risk that each state will use his arrival in order to impose contrary arrangements upon him."*[88]

The decision to return the child does not mean the child must be raised in the foreign country, just that the foreign court should decide the merits of the case:

> *"Accepting that the welfare of the children is paramount, it is necessary also to accept that that welfare is normally best served by children returning to be dealt with by the court of the jurisdiction of their habitual residence, whether that court returns them from whence they have been sent or keeps them in that country or elsewhere. It is not a decision that they should go and live in that country. It is a decision that the country of habitual residence should assume the jurisdiction to decide on the future of the children. Those are the general principles upon which the English courts look at the removal of children who should not have been removed without the consent of both parents."* **M v. M (Abduction and Scotland)**[89]

In the **Hanna-Panton v. Panton** case the learned judge Smith J. answered these questions in favour of the father.

XI. Does the Court Ever Decline Jurisdiction?

The Court declined jurisdiction in **Williamson v. Williamson unreported Supreme Decision 2007 M. P. 00024.** This decision was handed down on May 10, 2007 Roy Jones J. (on appeal) but the written reasons are still outstanding. In that case the parties and the children and American citizens. The father is also a Jamaican national. The parties and the children resided in the State of Florida, United States America prior to their arrival in Jamaica. The facts in relation to how they came to be in Jamaica are in dispute. It is however, clear on the facts that they had put up their house for sale and

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88 *Supra*, at pages 1115 to 1116 – paragraphs 30-32

89 *Supra*, at page 268 – paragraph D-F

decided to move to the State of North Carolina. While in Jamaica the father filed for divorce, included a prayer for custody and thereafter he obtained an ex parte order for *interim* custody. The mother filed an acknowledgment of service, and answer including a prayer for custody. She also filed an application for custody. After filing this answer she also went to Florida and took out divorce proceedings in Florida. Sometime later her application was amended to seek a summary return Order of the children to Florida. This is after the mother had obtained Orders reversing the *interim* custody order granted to the father and granting *interim custody* to herself.

Counsel for the father argued that this case was distinguishable from **Hanna-Panton v. Panton** and the line of cases which it followed in the following terms:

1. It is accepted that in matters concerning children welfare is the paramount consideration and that all other factors are issues to be taken into the balance including questions of the appropriate forum. However, when a court is being asked to decline jurisdiction on the ground of forum conveniens it must be of some significance to the Court's exercise of its jurisdiction and discretion and in the context of the welfare principles there must, be distinction between:

    a. A Respondent, who previously submitted to a foreign jurisdiction, possibly has a foreign custody order for or against him subsequently seeks to obtain a custody Order of a Court in a jurisdiction in which she now resides [bearing in mind that custody orders are never final]; and
    b. A Respondent who immediately on being served with an Order or proceedings asks the Court to decline jurisdiction; and
    c. A Respondent who is within a jurisdiction, invokes that court's jurisdiction **and** submits to that court's jurisdiction, gets a custody Order from the Court based on the jurisdiction so invoked and then seeks to have that Court decline jurisdiction **before the matter is heard** *without offering to give up the benefit so derived having invoked the jurisdiction*; and

jurisdiction **before the matter is heard** *without offering to give up the benefit so derived having invoked the jurisdiction*; and

d. A case where there is no breach of custody rights in another jurisdiction coupled as well with a combination of the facts in (c).

2. A court being asked to consider which of two Courts is better suited to hear a matter should take into consideration as set out in Re F that welfare is considered in two contexts:

   a. First, which of two Courts is best suited to hear a matter; and

   b. Second, once the first is decided what the welfare of the child requires is what orders as to custody care and control and so on should be made.

3. However, this Court must be mindful of the fact that the questions raised in relation to the first context are only relevant where:

   a. The Court was not seised of the **custody** matter and issue at the instance of the very party who is asking it to decline jurisdiction.

   b. **More importantly, it [the 1st context] is only relevant when the case is one that is pejoratively called an International child abduction case as clearly Re F was.**[90] Contrast the position with **RE J** in order to appreciate the distinction[91] - where the situation was described as being far removed from the popular picture of kidnapping or even abduction. This even though the mother retained the child R. in breach of an Agreement between her and the father that she would return to Saudi Arabia with the child F at the end of her studies in England. **BUT** the father at paragraph 6 as we are submitting in this case applied for "*a specific issue order under s. 8 of the Children Act of 1989 tat the child be summarily returned to Saudi Arabia. He also applied for a Stay of the English Divorce proceedings so that the matters could be dealt with in the Shariah Courts there.*" This same option was open to the Respondent in the instant case under Part 9 of the CPR but it was not taken instead she opted to submit to the jurisdiction to this Court and herself applied for custody.

   c. **This was the option taken in Thompson v. Thompson, Panton v. Panton, Grant v. Robinson and in D v. K.** [In latter case the father had initially applied for custody but on realising error immediately amended application to apply for summary return. However, he could not do so because of conflict of law issues relating to his ordinary residence].

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90 Page 28 F.

91 Para. - 5

4. Also contrast the approach ***in the Marriage of Mittleman***, *supra,* where the father continued the proceedings in California, and then armed with that Order proceeded to Australia and used that Custody order as the basis for getting an Order solely for the purpose of *giving effect to* the foreign order so that on arrival in California the Australia the Australian order was of no effect.

5. In sum, there was a jurisdictional issue in those cases. Where the jurisdictional issue is in this case when quite apart from the Court's inherent *parens patriae* jurisdiction the Court is fully seised of the matter. **ZP v. PS**, *supra.* It is submitted that in such a case the doctrine of *forum conveniens* has no application.

In addition to the foregoing it was argued that there is no challenge to jurisdiction in keeping with Part 9 of the CPR – **RE J.**[92] The Court accepted jurisdiction on the basis that it was already seised of the matter.[93] It seems that the better approach is that the jurisdictional point must be taken at the first opportunity. The "filing of a counterclaim,"[94] an answer claiming custody in the Williamson case, may amount to an acceptance of the court's jurisdiction.

XII. Conclusion

The emerging issues are at once interesting and exciting. The central point though is to always remember that these are not applications for custody orders, at least not as the primary relief. The starting point in all cases is the breach of custody rights in *another jurisdiction.* It is this fact that, that informs the approach of the courts in all the

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92 See also Insurco International Limited (Formerly Agrichem Insurance Co. Limited) v. Voluntary Purchasing Group Incorporated Limited & Fertilone Distributors Incoporated (1999) C.I.L.R. 532.

93 This paper cannot take the matter further in terms of reasons in so far as the Judge's written reasons are not yet available.

94 *Supra*, note 84

cases that is that issues relating to children are best determined in the courts in their jurisdiction of ordinary residence. It has been seen that even this is not a decisive factor because the overriding consideration is the welfare of the child. Its importance to the balancing exercise cannot however be understated to the extent that the courts always use it as the starting point for both an analysis of forum and summary return question in these applications. The factors are many and varied but have been summarised with reference to questions asked by Smith J. in the **Hanna-Panton v. Panton** case. Which of two courts is best suited to decide the questions relative to the welfare and custody of the child and to which jurisdiction does the child have a closer connection. No one factor will be decisive on the issue.

Summary return and forum applications are preliminary points. They are mutually exclusive applications in that one can be made without the other. It depends on the circumstances of the case:

1. Summary return can be commenced as a "freestanding" application even if no application for custody is made in the forum state once the child is within the jurisdiction of its courts but has been removed in breach of custody rights in another jurisdiction. This can be resisted on the ground of forum conveniens if an application for custody is pending in the foreign state.

2. Forum conveniens and summary return can be made in an application to resist an *application for custody* in the forum state.

3. Forum conveniens is always in the nature of an objection or response to summary return or to proceedings continuing in the forum state. An

application should be made for the matter to be considered summarily, that is without an investigation of the facts.

4. If there are no proceedings in the foreign state, then it is in order to make an application for summary return of the child in an effort to resist an application for custody by the "kidnapping parent." It is difficult to see how forum conveniens is relevant in a situation such as this since there are no competing courts.

5. If there are proceedings in the forum state and the "kidnapping parent" files an application for custody an application is the appropriate application to be resisted on the basis of *forum conveniens* even if the party making the application was party to and possibly might have initiated the proceedings in the foreign jurisdiction.

These above are some of circumstances in which the two forms of applications can be utilised. The outcome will depend what favours the welfare of the child of the child, it being the paramount consideration. There are no final answers and none are offered here.

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