JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 101/2007

BEFORE: **THE HON. MR. JUSTICE SMITH. J. A.**
THE HON. MRS. JUSTICE HARRIS, J. A.
THE HON. MISS JUSTICE G. SMITH, J. A. (Ag.)

BETWEEN: KEVIN LEIGHTON FORRESTER APPELLANT

AND MICHELE ANN STRONG-FORRESTER RESPONDENT

Gavin Goffe and Mrs. Alexis Robinson instructed by Myers Fletcher & Gordon for the Appellant

Ransford Braham and Suzanne Risden-Foster instructed by Livingston Alexander & Levy for the Respondent

25th, 26th, 27th, 28th, 29th February and 2nd May, 2008

SMITH, J.A.

The subjects of this appeal are two (2) children, Q F and K F, born on the 18th of October, 2002 and 3rd of March, 2005 respectively. Their parents were born in Jamaica. In 1970 the appellant, their father, migrated to the United States of America and has lived in California since then. Their parents met in Jamaica and were married in Jamaica in June 2001. In September 2001 the respondent, their mother, migrated to the United States of America to join their father who is a Clinical Pharmacist and Lecturer at the University of Southern California. Q F and K F were born in California.

The respondent, who is a Management Consultant, spent most of her time in California as a housewife. She was unhappy with that situation. She periodically visited Jamaica with her children to spend time with their extended family and friends. These visits were made with her husband's consent and assistance.

In January 2007 the respondent mother and her children came to Jamaica on one such visit. The respondent suggested to the appellant husband that the children remain in Jamaica until July 2007. It is in issue as to whether the parties had agreed on this. By this time the children were enrolled in a preparatory and a nursery school respectively, in Jamaica.

The appellant came to Jamaica and stayed for three (3) weeks, March – April, 2007. The children were left in Jamaica for one (1) week while their parents returned to California. During the week when the respondent was in California, Q F was enrolled at Pantera Elementary School in California.

According to the respondent while she was in California for the week, her husband accused her of infidelity and claimed that she had a hidden agenda in going to Jamaica in January. The marriage was beset with "irreconcilable and fundamental differences" between the parties. She took the decision, on her return to Jamaica, not to go back to her husband.

On the 29th of May, 2007 the respondent filed a Fixed Date Claim Form by which she sought the following orders under Section 7 of the Children (Guardianship and Custody) Act:

(a) An Order that she may have sole custody of the relevant children Q F and K F.

(b) An Order that the Defendant be restrained from removing the relevant children from the jurisdiction of this Honourable Court without a Court Order or without the claimant's consent.

(c) An Order that the relevant immigration authorities be served with this Order.

(d) That the defendant be given access to the relevant children on such terms and for such periods as this Honourable Court deems fit.

(e) Liberty to apply.

On the same day Campbell, J. granted an interim order until the 10th of July, 2007 in terms of paras. (a), (b), (c) & (e). The 10th of July, 2007 was set for the Case Management Conference.

On the 6th of July, 2007 the appellant filed a Notice of Application for Court Orders in the Supreme Court. By this application the appellant sought:

(1) The discharge of the Order made by Campbell, J. on the 29th of May, 2007.

(2) The return of the children Q F and K F to California, U.S.A., their habitual residence.

(3) That the travel documents of the children be delivered to him, the appellant.

This application was served on the respondent's attorneys-at-law on the 9th of July, 2007.

On the 27th of July, 2007 the appellant's attorneys-at-law filed another application which repeated the request for the above orders and added a fourth for a ruling as to the appropriate forum for the determination of the issue of custody of the relevant children.

It might be helpful to state the grounds on which the appellant based his application.

Grounds (a), (b) (c) and (d) concern the status and residence of the parties and the place and date of birth and status of the relevant children. The other grounds are:

(e) The said children Q F and K F have lived continuously and habitually in California in the United States of America.

(f) Pursuant to their habitual residency in California in the United States of America, the said children Q F and K F have closer connections to California in the United States of America.

(g) The claimant/respondent has wrongfully and unilaterally kept the said children Q F and K F away from California in the United States of America, the jurisdiction of their habitual residence.

(h) It is in the best interest of the said children Q F and K F that they be returned to California ... the jurisdiction of their habitual residence.

(i) The best interest of the child is the paramount consideration in issues of child custody in the State of California.

(j) The appropriate forum for the ventilation and determination of the issues relating to the custody, care and control of the said children... is the United States of America, the state of their habitual residence.

I should mention that on or about the 30th of July, 2007 the appellant instituted custody proceedings in the Supreme Court of California, United States of America. In those proceedings the appellant sought sole custody of the children, professionally supervised access, child and spousal maintenance and legal fees. Those proceedings were stayed because of the earlier proceedings in this jurisdiction.

The appellant's application of the 27th July was heard by Mangatal, J. who, on the 14th of September, 2007 dismissed it and granted leave to appeal.

In dismissing the application the learned trial judge held (para 81):

> "In my judgment, it is not in the children's best interest for me to make a summary return order and my ruling is that the substantive custody application

> should be heard here in Jamaica. In so deciding I wish to make it clear that in allowing Q and K to remain here while their future is decided here does not mean that they will remain here in Jamaica forever.
>
> Further, or alternatively my ruling is that Jamaica is the forum conveniens for the determination of the matters of custody and access of Q and K".

Grounds of Appeal

Some twelve grounds of appeal were filed. Ground 1, which concerns findings of fact, was not pursued. The other grounds were:

(2) The learned judge failed to apply the welfare of the child test ...

(3) The learned judge erred in concluding that the case does not involve kidnapping since the children were not brought (to) or retained in Jamaica as a result of stealth, deceit or wrongdoing.

(4) The learned judge fell into error by finding that this is not a kidnapping case while at the same time considering the respondent's potential liability for kidnapping under United States Federal Law and the California Penal Code.

(5) The learned judge fell into error in holding that where there is no element of wrongful retention of the relevant children by the wife then the question of summary return does not arise and the court should proceed to a full hearing of the matter on its merits.

(6) The learned judge erred in holding that even though the relevant children have a closer connection to the United States than Jamaica, the United States is not the more appropriate forum.

(7) The learned judge fell into error in holding that the Superior Court of California is not clearly or distinctly the more appropriate forum for the determination of the issue of custody in respect of the relevant children.

(8) The learned judge failed to consider that there was a pre-existing order made in the State of California on the issue of the jurisdiction of the Californian Court to hear the custody issues.

(9) The learned judge, by indicating that her decision was influenced by the fact that there was no pre-existing order as to custody of the relevant children, paid insufficient regard to the comity of nations. The comity was shown by the Californian Court in declining to make a custody order before the Jamaican Court could hear the jurisdiction issue on its merits.

(10) The learned judge failed to consider that it is in the best interest of the cause of justice and the welfare of the relevant children that the Superior Court of California investigates the circumstances surrounding the welfare of the relevant children.

(11) The learned judge failed to appreciate that it is in the best interest of the cause of justice and the welfare of the relevant children that the issue of maintenance of the relevant children, that is directly related to and affected by custody, be determined by the Superior Court of California.

(12) The learned judge did not consider that the respondent failed to prove the existence of any special circumstances that would require the custody hearing to take place in Jamaica instead of the prima facie more appropriate forum for the hearing.

Counsel on both sides agree that these grounds embrace three (3) broad issues, viz:

1. Whether or not the learned judge was correct in her conclusion that the respondent mother's actions in bringing the children to Jamaica and her refusal to return them to the United States of America amount to kidnapping or wrongful retention.

2. Whether or not there should be a summary return order in respect of the relevant children.

3. Whether or not the learned judge erred in holding that Jamaica was the forum conveniens.

Issue No. 1 – Kidnapping or Wrongful Retention

The appellant's application for the return of the children was zealously resisted by the respondent. Both parties filed affidavits in support of their claims. During the hearing of this application Mangatal, J. ordered that there be cross-examination on two (2) issues, one of which was – "whether there was agreement by the husband that the children should stay in Jamaica until July 19, 2007". The main arguments advanced by the appellant in respect of his application for summary return (issue No. 2) were that the children were habitually resident in the United States of America and that the respondent had kidnapped them and retained them in Jamaica.

In response the respondent contended that the children were taken to Jamaica with the appellant's consent and that the appellant consented to their remaining in Jamaica until July 19, 2007.

Mangatal, J. accepted the contention of the respondent and concluded that this was not a "kidnapping" case. In my opinion the learned judge is correct. "Kidnapping" in this context is not the same as the common law offence of kidnapping which was defined by the House of Lords in **R v. D** (1984) A.C. 778. Of course it is also different from the felony of kidnapping with intent contrary to section 70 of the Offences Against the Person Act. It is not child stealing as is contemplated by S.69 of the Offence Against the Person Act – a parent cannot be prosecuted under S. 69.

In **Re A (infants)** (1970) 3 All ER 184 Harman, L J addressed the meaning of 'kidnapping' in this context. In that case, by agreement between the parents, their two (2) children were sent to stay with the father's parents in England until the end of the month. While the children were in England the father changed his mind and decided not to send them back to their mother because he did not trust her. The mother claimed that this was a kidnapping case. Harman, L J, after referring to the usual cases of kidnapping that were often reported in the newspaper, said (p. 186d):

> "But in this court 'kidnapping' has a rather different meaning; there has been a series of at least four cases of what is called the kidnapping variety, which really consist of this:

> <u>that when a child, or children, have a settled home in one jurisdiction... and one of the parents by fraud or stealth, removes them from this jurisdiction</u> and makes them ward of court, the court will not countenance that procedure and will, if it is satisfied that no harm will come to the children if they are returned to the jurisdiction where they belong, send them back there without further investigating this matter".

I accept this is a correct statement of the applicable principle.

The question for the learned judge was – Did the respondent by fraud or stealth remove the children from their settled home?

Mangatal, J. found that the respondent did not. At para. 54 of her judgment she said:

> "I find that the husband did in fact, albeit it may have been reluctantly, agree to the children remaining in Jamaica until July 19, 2007. The evidence demonstrates that the wife took the children to Jamaica with the agreement of the father at all material times and there is no credible evidence that he objected to their extended stay in April when he came to Jamaica. I find that it is after this time that the wife felt that irreconcilable differences had developed in the marriage which led to the wife changing her mind and deciding to reside permanently in Jamaica. It is only after the wife indicated that she intended to stay in Jamaica with the children and would not be returning at all, that the husband sought to not just revoke his consent, but to say he had not agreed to them staying until July 19, 2007, initially, mid-stream, or at

> all... From the 29th May, 2007 to date the children have been kept in Jamaica pursuant to Court Orders and there is therefore no proper basis for saying that the children have been wrongfully brought or retained in Jamaica. It follows that I am not of the view that this is really a 'kidnapping' case".

Mr. Goffe for the appellant submitted that the judge erred in so finding. He referred to the criminal sanctions in the United States of America for kidnapping and the respondent's belief that she may be exposed to criminal sanctions in the United States of America by virtue of the relevant United States legislation. These, he submitted, indicate an admission on the respondent's part that she knew that she did not have the appellant's consent to retain the children outside the United States of America at the time she applied to the Jamaican court for interim custody.

Further, he submitted, the following facts show that the respondent had in fact formed an intention to remain in Jamaica with the relevant children before she left California:

(i) she acquired an interest in real estate property in Jamaica in 2002;

(ii) she sought and secured a job in Jamaica via email dated July 13, 2006 wherein she states that she will be in Jamaica from January, 2007 to May/June 2007 and not April as agreed with the appellant;

(iii) she enrolled both children in school in Jamaica notwithstanding that they were supposed to be on vacation and were scheduled to start school in California in the fall.

In any event, he argued, even if the appellant was taken to have consented to the children remaining in Jamaica until July 19, 2007, there is written evidence that that consent was withdrawn by the appellant by May 26, 2007, before proceedings were commenced by the respondent.

Mr. Braham for the respondent submitted that there was ample evidence on the disputed claims on which the learned judge's findings were based. The following, to which Mr. Braham referred, in my view, support the judge's conclusion:

(i) The affidavit evidence of the respondent that on a number of occasions prior to January, 2007 the respondent travelled to Jamaica for extended vacation periods accompanied by the children with the appellant's consent – Vol. 2 page 88 para. 13.

(ii) In respect of the January, 2007 visit, the initial arrangement was that the respondent would visit Jamaica with the children for the purpose of vacation and would return to California after the appellant came to Jamaica in April, 2007 - see Vol. 2, page 264 para. 56.

(iii) The appellant visited Jamaica in April 2007. Before the respondent and the appellant returned to California for a week, the latter offered to have his mother babysit "K" while the respondent was at work after she got back from California – see para. 57 ibidem.

(iv) In respect of email dated July 13, 2006, the respondent was exploring the possibilities of temporary employment while she was

on vacation in Jamaica. In this email she said she was "planning to be home from January 2007 to May/June". See email and response thereto at p. 383 Vol. 2. It cannot reasonably be said that at the time of the email she had formed the intention to remain permanently in Jamaica.

(v) The fact that the respondent did not intend initially to remain in Jamaica permanently is confirmed by the appellant when he stated in his Notice of Application for Court Orders that "it was the claimant (mother) pursuant to our agreement who went to the school in April 2007 to effect the registration" of Q F at the Pantera Elementary School in Pantera – see page 108 para. 99.

(vi) The appellant, in a Declaration filed in custody proceedings in the State of California, clearly indicated that he consented to the respondent taking the children on vacation to Jamaica. At para. 17 thereof he stated:

> "In or about November/December, 2006, the respondent indicated her desire to take the children to visit her mother in Jamaica on vacation. Respondent and I purchased the tickets. Respondent and the children would leave on January 1, 2007. I was scheduled to leave for Jamaica in mid March 2007. We were all scheduled to return to the United States as a family on April 12, 2007".

(vii) The appellant asserted in the Declaration that when he arrived in Jamaica in March, the respondent informed him that she had unilaterally changed the return date from April to July 19, 2007. He did not agree with the change. However, in April when the

respondent was with him in California for the week, she promised him that she would return with the children on July 19, 2007.

Then at para. 27 the appellant stated:

> "On or about April 26, 2007, the respondent informed me that she did not plan to return to California with the children on July 19, 2007. I told the respondent that I felt deceived by her. I informed the respondent that her actions were to essentially steal the children from me and keep them in Jamaica. I informed the respondent that she did not have my consent to keep the children in Jamaica past July 19, 2007".

This, in my view, clearly supports the learned judge's finding that the appellant "did in fact, albeit it may have been reluctantly, agree to the children remaining in Jamaica until July 19, 2007". There is no credible evidence to suggest that the respondent intended at the very outset to remove the children from California permanently. The evidence clearly shows that such intention was formed after her return from California in April, 2007.

In **Re A (Infants)**, supra, where the facts are not dissimilar to the instant case, Harman L.J., after stating what "kidnapping" consists of, said (p. 186 h-j):

> "For my part, I do not regard this as a kidnapping case at all. There was no removal of the children by stealth; the children were brought here by agreement of both parties. It is true that they were brought on the

> understanding that they should remain here for a fortnight and that, in the normal course of events, they would be returned at the end of that time; but what happened was that the father... changed his mind and decided that he ought not to send them back...
>
> It is not as if the father had, so to speak, by fraud, induced the mother to agree that they should come over here and had then suddenly sprung on her the idea that they would not go back. At the beginning the father certainly intended that they should go back and had made arrangement for that purpose".

The case of **Re B and B (Kidnapping**) (1986) FLC 75, 447 on which Mr. Goffe relied can be distinguished. In that case the judge found that "in removing the children from Malaysia the mother, upon the subterfuge of a short family visit to Australia to which the husband had agreed and funded, intended to remove the children from Malaysia permanently and thereafter reside in Australia" – p 75, 465.

If Jamaica were a party to the Hague Convention the conduct of the mother in the instant case would probably amount to a wrongful retention of the children although, as we have seen, far removed from the popular picture of a kidnapping or even an abduction – See **Re J (a child return to foreign jurisdiction: convention right)** (2005) 3 All ER 291 at 294 j.

In my view, it cannot be said that the judge's findings of fact in so far as they relate to the issue of 'kidnapping' were plainly wrong. In my judgment, her

conclusion that the children were not here as a result of deceit or wrongdoing, is unassailable.

Issues Nos. 2 and 3 – Summary Return Order and Forum Conveniens

The learned judge after, concluding that this case was not really of the kidnapping variety, went on to say (para. 55A):

> "I agree with Mr. Braham that if there is no element of wrongful retention of the children by the wife here in Jamaica, then some of the cases show that the question of summary return does not arise and therefore the court should proceed to a full hearing of the matter on its merits – see Re A, B and B (Kidnapping), Re J."

I agree that where there is no element of wrongful removal of a child from his settled home in one jurisdiction or of his wrongful retention in a "foreign" jurisdiction then the question of summary return does not arise. The next step is for the court to determine which court shall decide what the child's best interests require. It would be wrong, in my view, for the court, after finding that the case was not of the 'kidnapping' variety, without more, to fix a date for the substantive hearing of the Fixed Date Claim Form. The cases referred to by the learned judge in para. 55 (A) (supra), as I understand them, do not say otherwise.

Accordingly, having found that it was not a "kidnapping" case, the proper procedure is for the judge to embark on a full investigation as to the proper venue for hearing the substantive claim for custody, care and control in the context of the welfare of the child. If, on the other hand, the judge had found that it was a "kidnapping" case then, as Gee J, said in **B and B (Kidnapping)** (1986) FLC 75, it was open to the judge to exercise a summary procedure and embark upon a preliminary investigation as to whether it was in the best interests of the child to make a summary order for the child's return. Thus, where there is no evidence of kidnapping, the court should, in applying the welfare principle, go on to determine which court is best suited to hear the substantive issues. It seems to me that in many cases these two (2) aspects have been confused. **In Re F (A minor) (Abduction: Jurisdiction)** (1991) 1 FLR 1 Lord Donaldson, M R said (p 4 E-F):

> "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 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".

The Master of the Rolls referred to a passage in the judge's judgment to illustrate how the judge mixed the two (2) questions - See p. 4 F-H. He then continued (p. 5):

> "This is an error in principle. Possible outcomes have no bearing on which court should decide. Which court should decide depends, as I have said, on whether the other court will apply principles which are acceptable to the English courts as being appropriate, subject always to any contra – indication such as those mentioned in art. 13 of the Hague Convention, or a risk of persecution or discrimination, but prima facie the court to decide is that of the state where the child was habitually resident immediately before its removal".

The decision of the English Court of Appeal in **Re F** (supra) was followed by this court in **Panton v Panton** SCCA 21/06 delivered 29th of November 2006.

Mangatal J, although she found that there was no evidence of "kidnapping", stated that she would nevertheless consider the issue of "summary return", in the event she was wrong in so finding. The learned judge embarked upon a full investigation. One of the issues on which she invited cross-examination of the parties was "whether the wife was the primary caregiver, or whether both the husband and the wife were primary care givers". On this disputed issue she found, on the evidence, that the wife was really the primary caregiver in relation to the two (2) children. It was the wife, she found, "who spent most of the time with the children, cooking for them, caring for them,

taking them on outings with and without the husband, attending school meetings and when the children travelled to Jamaica, it was the mother with whom they spent considerable time..." This finding of fact has not been challenged in this Court and, of course, for good reason.

It was not disputed that the children's habitual residence was in California and she found that they have a closer connection to the United States of America than Jamaica. However, as the learned judge correctly stated, this factor is persuasive but not necessarily determinative. She also found that (p.24):

> "The degree by which the children are closer to the United States than Jamaica, is fairly small - I so find because, although the children were born in the United States of America and are United States citizens, they are also citizens of Jamaica and they possess Jamaican passports".

Following the decisions in **Re J** (supra) and **Panton v Panton** (supra) the learned judge, in making the choice, started from the proposition that it is likely to be better for the children to return to their home in California for disputes about their future to be decided there. She thereafter examined the evidence to determine whether or not the wife had made a case against this proposition. At page 36 of the judgment she said:

> "In my judgment the following are factors which tip the balance in favour of the children remaining in Jamaica and the issue of custody being decided here:

(a) These children are very young and consequently they have not developed deep roots in the United States. In any event, by virtue of their age, a further short stay in Jamaica would not be deleterious to their welfare.

(b) These children have substantial connection to Jamaica; they are Jamaican citizens. They have spent considerable periods of time here in Jamaica and so they are not at all in an unfamiliar environment.

(c) Separation from their primary caregiver, the wife, at this delicate formative stage of their lives may have serious detrimental emotional effects on them.

(d) The children are young and they may suffer emotional harm if separated from their mother. Since they are familiar with Jamaica and have been here for some time, it may be less disruptive for them to remain in Jamaica for a little while longer while their medium to long term future is decided than it would be to order them to return to California and then to have to adjust in the short term to the new arrangements that the husband intends to put in place there to supplement his own caregiver.

(e) It is not unreasonable for the wife to have decided to resume living in Jamaica and in the circumstances refusing to return to the United States".

Mr. Goffe for the appellant complains that none of the above reasons has any bearing on the issue of whether Jamaica or the State of California is the more appropriate forum. Counsel for the appellant submitted that the above factors

are relevant to the issue of summary return and ought not to have tipped the scale on the issue of forum non conveniens.

As stated before, the learned trial judge proceeded to consider the application for summary return in the event that she had erred in concluding that the children's removal to or their retention in Jamaica, was not wrongful. In this case the judge was not required to embark upon an in-depth investigation, but merely to conduct a preliminary assessment as to whether it was in the best interests of the children that they should be returned to their place of habitual residence as speedily as possible. However, there may be circumstances in a so-called kidnapping case which might indicate that a summary return would not be in the best interests of the child. As the learned judge stated, "summary return cannot be the court's automatic response" to the children's wrongful removal from their habitual residence.

The learned judge faithfully followed the principles outlined by the House of Lords in **Re, J. (a child)** supra. I agree with Mr. Braham for the respondent that the learned judge carried out the necessary balancing exercise, having regard to her findings on the disputed evidence and the material that was before her, as well as the legal authorities which she reviewed. This court should be slow to interfere with the exercise of such discretion – see **Re, J. (a child supra and G v G (Minors) (Abduction)** (1991) 1 FCR 12.

Mr. Goffe also complained that the learned judge misapplied the 'welfare of the child principle' by placing too much weight on the wrong aspects of the welfare test. In this regard, he argued, the judge placed undue weight on the potential separation of the mother from the children, on the potential criminal sanctions for kidnapping in California, on the unavailability of witnesses, and too little weight on the residence of the children. He submitted that the learned judge should have considered the question of a stay of proceedings on the basis of forum non conveniens independently of the issue of summary return.

In making her enquiries as to which court is more convenient to hear the substantive claims, the learned judge took into consideration "all the circumstances which go beyond those taken into account when considering the connecting factors with other jurisdictions" – page 38 para. 78.

She reminded herself that the doctrine of forum non conveniens must be considered in the context of the welfare of the children. At para. 78 she said, "As Gee, J. stated in **B and B** (kidnapping) (supras) the welfare of the children remains the paramount consideration at all times. All other matters are only ultimately relevant in so far as they relate to that issue".

At para. 80 the learned judge concluded:

> "... the question of what is in the best interest of these two little boys Q and K, in other words the welfare, permeates all of the court's considerations and balancing exercise, whether

> one is considering either the issue of summary return or forum non conveniens".

Mr. Braham for the respondent, in support of the learned judge's approach submitted that the doctrine of forum non conveniens in the classic "Spiliada" sense is not applicable to matters dealing with children within the jurisdiction of the court. Counsel relied on the decision of the High Court of Australia in **Z P v. P.S.** (1994) 181 C.L.R. 639.

In that case Mason, C. J., Tooley, J and McHugh, J said (p. 647):

> "Moreover proceedings for custody or access are not disputes inter partes in the ordinary sense of that expression because the court is not enforcing a parental right to custody or access. Its duty is to make such order as will "best promote and protect the interests of the child". It follows that when a child is within the jurisdiction of the Family Court, the doctrine of forum non conveniens has no application to a dispute concerning the custody of the child. Injustice to one or other of the parties, expense, inconvenience and legitimate advantage, which are always relevant issues in a forum non conveniens case are not relevant issues in a custody application. In some cases these matters may bear on issues which touch the welfare of the child but they are not themselves relevant issues when the question arises whether the welfare of the child requires the making of an order that the issue of custody be determined in a foreign forum".

As I said in **Panton v. Panton** (supra), I do not think that the analysis of cases with a view to determining the applicability of the doctrine of forum non conveniens generally will serve any good purpose. In each case it is for the trial judge to determine what factors should be taken into account and what importance should be attached thereto in the context of the welfare of the child principle. This court should only intervene if it considers that the judge was plainly wrong.

For my part, I do not think it is helpful to say that the doctrine of forum non conveniens has no application to a dispute concerning the issue of a child.

Indeed, immediately following the passage above the learned judges said:

> "However, in some situations the welfare of a child may require that dispute as to the custody of the child be determined by a foreign court. Consequently, in some cases it may be a proper exercise of the welfare jurisdiction of the Family Court to make a summary order that a child be returned to a foreign jurisdiction so that questions concerning custody and access may be dealt with by the courts of that jurisdiction".

The terms of the order made are to be determined by the trial judge in the light of the material placed before her, having regard to the overriding principle that the welfare of the child is the first and paramount consideration.

To this paramount consideration all others must yield. This is what is required by S. 18 of the Children (Guardianship and Custody) Act.

There may be circumstances which suggest that it is in the best interest of the children that they remain in one jurisdiction while the matter of custody be determined in another. I agree with Mr. Braham that in this case it was not practical and that the learned judge did not err in not making such an order.

The circumstances of a particular case might suggest that it would be in the best interest of the child that the child be returned to his homeland in the custody of the party who removed him therefrom subject to terms of the order - see for example **Central Authority v Bridget Houwert**, the Supreme Court of South Africa Case No. 262/06 (unreported). As I have said before, it is for the trial judge to decide what order, in all the circumstances, would be in the best interest of the children.

Mangatal, J. correctly stated that:

> "the welfare of the child concept encompasses such matters as the child's happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings".

The learned judge was quoting from **Forsythe v. Jones** SCCA No. 49/99 delivered 6th April, 2001, at page 8.

In determining what is normally in the best interest of a child the learned judge examined a number of cases. In **Re B (Minors) (Wardship: Interim Care and Control**) 1983 4 FLR 473 it was held that:

> "When deciding where the true interests of the children lay during the interim period pending the final custody proceedings the court should weigh the likely risk of emotional damage to the children if they were now taken from their mother against the advantage of restoring them to their home and familiar surroundings during the short period; in the circumstances having regard to the tender age of these children, that the mother had always been the person responsible for bringing them up, and that nothing was said against her care of the children, there would be a real risk of emotional harm to the children if they were separated from the mother than if they stayed with her..."

As the learned judge stated, the facts and discussion in that case are quite helpful in the consideration of the instant case.

In my judgment, the learned judge considered and weighed all the relevant factors in deciding where the interests of the children lay. She did not, in my view, give undue weight to the habitual residence of the children.

Her conclusion is one which is fully justified on the material before her. Accordingly, I would dismiss the appeal.

Before leaving this matter I wish to commend counsel on both sides for their industry and skill in advancing their respective submissions.

HARRIS, J.A.:

This is an appeal against an order by Mangatal, J. dismissing an application by the appellant for the discharge of an interim order for the custody of two children and for their summary return to the jurisdiction of the Californian court.

The appellant and the respondent are husband and wife, having been married in Jamaica on June 2, 2001. They are both Jamaican nationals. The appellant is a Clinical Pharmacist and a Lecturer. The respondent is a Management Consultant. In the late 1970's the appellant migrated to California and has lived there since that time. In or about September, 2001 the respondent joined him. There are two children of the marriage, Q born on October 18, 2002 and K on March 3, 2005. Both were born in California.

Between 2001 and 2002 the respondent sought to obtain employment but was unsuccessful. She subsequently gave birth to the children and thereafter became a housewife and caregiver for them. She expressed dissatisfaction with the area in California in which they lived, for the reason that it did not provide much room for her involvement in, or enjoyment of, any acceptable social

interaction. This prompted her to make repeated visits to Jamaica, taking the children with her, with the consent of the appellant.

The respondent and the children last arrived in Jamaica in January, 2007 with the knowledge and consent of the appellant. She enrolled Q in Saint Hugh's Preparatory School and K at Craydon College, a nursery. She was satisfied with their progress and suggested to the appellant that they remain in school here until the summer break. This suggestion did not find favour with him. In April, 2007, he came on a visit to Jamaica for three weeks at the end of which the respondent returned to California with him, while the children remained in Jamaica with the respondent's mother. The respondent remained in California for one week during which time arrangements were made for Q to be transferred to a school in California. She thereafter returned to Jamaica.

It was asserted by the respondent that the appellant displays moods of anger which was frequently vented at her and that after reading her email and contents of her computer folder, he accused her of being unfaithful to him. The marriage became strained and the parties were eventually estranged. The respondent remained in Jamaica with the children, and on May 29, 2007 she filed a Fixed Date Claim Form seeking, among other things, custody of the relevant children.

On May 29, Campbell J, entertained an ex parte hearing and made the following orders:

> "1. The Claimant be granted interim custody, care, and control of the Relevant Children Q... and K... until the 10th July, 2007.
>
> 2. An Order that the Defendant be restrained from removing the relevant children from the jurisdiction of this Honourable Court without a Court Order.
>
> 3. An order that the relevant immigration authorities be served with this Order.
>
> 4. Liberty to Apply.
>
> 5. Case Management Conference fixed for 10th July, 2007 at 9:30 a.m. for one-half hour."

On July 6, 2007 the appellant filed a Notice of Application for Court Orders in which she sought, among other things, custody of the relevant children. This application was superseded by an amended application on July 27, seeking the following orders:

> "1. That this Honourable Court discharges the Interim Ex Parte orders made by the Honourable Mr. Justice Lennox Campbell on the 29th day of May 2007, and extended by the said, the Honourable Mr. Justice Lennox Campbell on the 10th day of July 2007.
>
> 2. Further and/or in the alternative, that the children **Q...** born on the 18th day of October, 2002, and **K...** born on the 3rd day of March 2005, be returned to the jurisdiction of their citizenship and habitual residence, namely the United States of America.

3. Further and/or in the alternative, that the travel documents for the said children **Q...** and **K...** be delivered up to **KEVIN LEIGHTON FORRESTER**.

4. Further and/or in the alternative, that this Honourable Court makes a ruling as to the appropriate forum for the determination of the issue of custody in respect of **Q...** and **K...**

5. Such further and other relief as may be just in the circumstances."

At the hearing of the application the learned judge invited cross examination of the parties on disputed issues relating to the question as to which of the parties is the primary caregiver and whether the appellant had consented to the children remaining in Jamaica up to July 19, 2007. The following orders were made by the learned judge:

"(1) The Notice of Application for Court Orders filed on 27th July, 2007 is dismissed.

(2) Permission to Appeal is granted.

(3) The substantive hearing of the Fixed Date Claim FORM IS fixed for hearing on 16th January 2008 at 11:00 a.m. for the rest of the day.

(4) The interim order made on 30th July, 2007 as extended on 21st August 2007, with effect from 20th August 2007, that the Claimant be granted interim custody care and control of the relevant children Quentin Charles Forrester and Kyle Saint Clair Forrester is further extended until the determination of the substantive hearing.

(5) The interim order made on 30th July, 2007 as extended on 21st August, 2007, with effect from 20th August, 2007, that the Claimant and the Defendant be restrained from removing the relevant children from the jurisdiction of this Honourable Court without a Court Order is further extended until the determination of the substantive hearing.

(6) No order as to Costs."

At the time of the hearing before the learned judge, the appellant had commenced proceedings in the California court for custody of the relevant children.

Mr. Goffe, on behalf of the appellant, sought leave of the court to adduce fresh evidence with regard to certain affidavits filed by the parties. His application was based on the ground that the contents were relevant to the appeal. The court did not accede to the request as an order in this regard would have been unnecessary. The affidavits were ones which had been submitted by the parties in the court below and had in fact been used there to secure an amendment to the claim form.

The following grounds of appeal were filed:

"(1) The findings of fact of the Learned Judge are unreasonable in light of the evidence adduced at the trial that:

(a) the Appellant and the Respondent were both primary caregivers to the Relevant Children.

(b) the Relevant Children are accustomed to being cared for by the Appellant alone.

(c) the Appellant did not consent to the Relevant Children remaining in Jamaica beyond April 2007 or July 2007.

(d) at no material time did the Appellant ever intend for herself or the Relevant Children to return to their home in California.

(e) the Respondent could be gainfully employed in California if she so desired.

(2) The Learned Judge failed to properly apply the welfare of the child test by:

(a) failing to apply the test within the context of an application for summary return as distinct from its application in the context of a substantive custody hearing.

(b) having insufficient regard to the "more real and substantial connection" test as laid down in **Thompson v Thompson**, which qualified the strict commercial *forum non conveniens* test in **Spiliada** in the context of the paramount consideration of the welfare of the children.

(c) placing insufficient weight on the residence of the children as required by **Thompson v Thompson** and **Panton v Panton**.

(d) failing to consider that the Respondent may no longer be the primary caregiver to the Relevant Children because of her local job commitments.

(e) placing excessive weight on the welfare of the Respondent as a very relevant consideration to the issue of the welfare of the Relevant Children.

(f) not properly investigating whether the Parties' marriage had broken down irretrievably, or broken down to the point where resuming cohabitation with

the Appellant would result in any harm to her or the Relevant Children.

(g) giving too much consideration to matters such as convenience, expense, and the availability of witnesses, which have little bearing on the paramount consideration of the children's welfare.

(3) The learned Judge erred in concluding that this case does not involve kidnapping since the children were not brought or retained in Jamaica as a result of stealth, deceit or wrongdoing.

(4) The Learned Judge fell into error by finding that this is not a kidnapping case while at the same time considering the Respondent's potential liability for kidnapping under United States Federal Law and the California Penal Code.

(5) The Learned Judge fell into error in holding that where there is no element of wrongful retention of the Relevant Children by the wife then the question of summary return does not arise and the court should proceed to a full hearing of the matter on its merits.

(6) The Learned Judge erred in holding that even though the Relevant Children have a closer connection to the United States than Jamaica the United States is not the more appropriate forum.

(7) The Learned Judge fell into error in holding that the Superior Court of California is not clearly or distinctly the more appropriate forum for the determination of the issue of custody in respect of the Relevant Children.

(8) The Learned Judge failed to consider that there was a pre-existing order made in the State of California on the issue of the jurisdiction of the Californian Court to hear the custody issues.

(9) The Learned Judge, by indicating that her decision was influenced by the fact that there was no pre-existing order as to custody of the Relevant Children, paid insufficient regard to the comity of nations. This comity was shown by the Californian Court in declining to make custody orders

before the Jamaican Court could hear the jurisdiction issue on its merits.

(10) The Learned Judge failed to consider that it is in the best interest of the cause of justice and the welfare of the Relevant Children that the Superior Court of California investigate the circumstances surrounding the welfare of the Relevant Children.

(11) The learned Judge failed to appreciate that it is in the best interest of the cause of justice and the welfare of the Relevant Children that the issue of maintenance of the Relevant Children, that is directly related to and affected by custody, be determined by the Superior Court of California.

(12) The Learned Judge did not consider that the Respondent failed to prove the existence of any special circumstances that would require the custody hearing to take place in Jamaica instead of the prima facie more appropriate forum for the hearing."

Ground 1 (a) was abandoned.

It was Mr. Goffe's submission that the respondent, by deceit, brought the children to Jamaica ostensibly on vacation but had no intention of returning with them to the United States of America and by her acquisition of an interest in real property in Jamaica in 2002, her securing a job in Jamaica and the enrollment of the children in school here it was evident that she intended to remain here. He further argued that the consent of the appellant was not procured for the children to remain in Jamaica until July 19 but even if he had consented, such consent was obtained by stealth or deception.

Mr. Braham argued that the presence of the children in Jamaica was with the consent of the appellant and he had agreed to their remaining here in

Jamaica until July 19, 2007. He further argued that the evidence clearly shows that there was no intention on the part of the respondent to remain in Jamaica with the children.

There is no dispute that when the children arrived in Jamaica in January 2007 they were here with the knowledge and express approval of the appellant. The question, however, is whether their continued presence here can be interpreted as kidnapping or wrongful retention by the respondent. The first issue which the learned trial judge was called upon to answer was whether the children, had been brought to Jamaica by the respondent by deception, stealth or fraud and her failure to return them was a case of kidnapping.

The learned trial judge concluded that this was not a case of kidnapping and made the following findings at paragraphs 54 and 55A of her judgment when she said:

> "... I find that the husband did in fact, albeit it may have been reluctantly, agree to the children remaining in Jamaica until July 19 2007. The evidence demonstrates that the wife took the children to Jamaica with the agreement of the father at all material times and there is no credible evidence that he objected to their extended stay in April when he came to Jamaica. I find that it is after this time that the wife felt that irreconcilable differences had developed in the marriage which led to the wife changing her mind and deciding to reside permanently in Jamaica. It is only after the wife indicated that she intended to stay in Jamaica with the children and would not be returning at all, that the husband sought to not just revoke his consent, but to say that he had not agreed to them staying

> until July 19 2007 initially, mid-stream, or at all. I agree with Mr. Braham, Counsel for the wife that the children had been brought to Jamaica with the consent of the husband and had been here with the consent the husband's consent to the children remaining until July 19, 2007. From the 29th May 2007 to date the children have been kept in Jamaica pursuant to Court orders and there is therefore no proper basis for saying that the children have been wrongfully brought or retained in Jamaica. It follows that I am not of the view that this is really a "kidnapping" case.
>
> 55A. In coming to my conclusion that this case does not involve kidnapping I rely upon the English Court of Appeal decision in **Re A (infants)** 1970 3 All. E.R. 184 where the Court held that as the children were not brought or retained in England as a result of stealth, deceit or wrongdoing, the case was not really of the kidnapping variety."

In the case of **Re A (infants)** (1970) 3 All ER 184 on which the learned trial judge placed reliance, the English parents of two children agreed to send them to live in England with their paternal grandparents for two weeks. At the end of the period the father decided not to send them back to Jersey where the mother was. On appeal, the question for the court was whether the English Court should assume jurisdiction over them or they should be summarily returned to Jersey. It was held that it was not a kidnapping case and that their presence in England was not as a result of deceit or wrong doing and the court ought not to decline jurisdiction.

In defining the term "kidnapping", in **Re A (infants)** (supra), Lord Harman speaking contextually, at page 186 said:

> "The ground of the appeal has been opened to us that this was in fact what is called a kidnapping case. Kidnapping is much in the air at the moment; one sees stories about it in the newspapers every day and it is sometimes carried out with dreadful results. But in this court 'kidnapping' has rather different meaning; there has been a series of at least four cases of what is called the kidnapping variety, which really consist of this: that when a child, or children, have a settled home in one jurisdiction – anyhow any foreign jurisdiction – and one of the parents, by fraud or stealth, removes them from this jurisdiction and makes them wards of court, the court will not countenance that procedure and will, if it is satisfied that no harm will come to the children if they are returned to the jurisdiction where they belong, send them back there without further investigating the matter."

The respondent is the primary care giver of the children. The evidence discloses that since the birth of the first child and subsequently thereto, the children and herself had periodically vacationed in Jamaica with the consent and assistance of the appellant. Their visit to Jamaica in January 2007 was no different from visits in previous years. It was originally agreed that they would come to Jamaica, the visit would last until April, 2007 when the appellant would join them and thereafter they would all return to California.

An email dated July 13, 2006 shows that the respondent sought and procured a job in Jamaica. In that document, she stated that she would have been in Jamaica from January to May/June 2007. Mr. Braham contended that at the time the email was sent, the respondent averred that she was investigating the feasibility of her securing temporary employment and the response to the

email cannot reasonably be inferred that she had formed an intention to remain in Jamaica. There is merit in this submission. The respondent is a Consultant. She would have been spending an extended period in Jamaica. She has relatives here who assist with the supervision of the children. There would certainly have been nothing unusual in her seeking and securing temporary employment while she was here. Although she stated that she would have been in Jamaica from January to May or June 2007, the e-mail was sent from as far back as July 2006,it could be inferred that at the time the message was sent she was unsure whether her stay in Jamaica would have been up to May or June.

The appellant averred in a Declaration filed by him in support of custody proceedings in the Californian Court shows that he consented to the respondent taking the children to visit her mother in Jamaica. The respondent and himself purchased the airline tickets and they agreed that the children and the respondent would leave for Jamaica on January 1, 2007. He asserted that he was scheduled to join them in mid-March and they all would return to California on April 12, 2007.

It was further declared by him that on his arrival in Jamaica in March, he was informed by the respondent that she had changed the return date for the children and herself from April to July 19. He stated, however, that in April when the respondent went back to California with him, she promised that she would return with the children on July 19, 2007.

He also averred as follows:

> "On or about April 26, 2007, the respondent informed me that she did not plan to return to California with the children on July 19, 2007. I told the respondent that I felt deceived by her. I informed the respondent that her actions were to essentially steal the children from me and keep them in Jamaica. I informed the respondent that she did not have my consent to keep the children in Jamaica past July 19, 2007."

There is nothing to show that he objected to the promise she made. It is clear that he had implicitly consented to her remaining in Jamaica with the children until July.

The respondent does have an interest in real estate in Jamaica. She jointly owns a home with her mother. This does not in itself demonstrate that she had the intention of remaining in Jamaica with the children. Nor does the fact that she had them enrolled in school here is indicative of such an intention. She was the one who played an active role in arranging for Q to be transferred to a school in California and enrolled there. There is no doubt that the appellant had consented to the children being in Jamaica up to July 19, 2007. The learned judge was correct in concluding that this was not "a kidnapping" case.

I now turn to the question of jurisdiction. It was Mr. Goffe's submission that the learned trial judge in considering the application before her, was obliged to have first considered the question of a stay of proceedings before giving consideration to the application for the summary return of the children .

Mr. Braham argued that in considering any matter relating to a child, the court must base its decision on what is the best interest of the child. The learned trial judge, he argued, was correct in considering the matters of forum *non conveniens* and summary return simultaneously.

The main issue before the learned trial judge was whether the children ought to have been returned peremptorily to California. In considering this issue she would be required to pay due regard to the welfare of the children. She would be obliged to take into account such factors as are relevant to their welfare. In the process of deciding whether their custody, care and control should be decided by the local or a foreign court, it was open to her to address all issues in respect of summary return and forum non conveniens together, as, the issues are inextricably interwoven.

At paragraph 56 the learned judge stated:

> "In the event that I am wrong in holding that this is not a case involving wrongful retention of the children, or in the event that nevertheless the issue of summary return or of forum *non conveniens* arises, I have gone on to consider the issues in relation to the application for summary return, and further or alternatively, the application for the court's ruling as the forum *non conveniens.*"

At paragraphs 58, 59 and 60 she said:

"58. The children are citizens of both the United States and Jamaica. Both Q and K were born in the United States.

59. The children have lived most of their lives in the United States, and until the wife decided that they were not returning to California, the children had made their home in the United States. I agree with Counsel for the wife Mr. Braham that the Court ought not to get entangled in the technical concepts of domicile and habitual residence, but as stated in **Re J**, the Court should ask itself with which country the children have a closer connection. Based on the fact that the children were born in California and are citizens of the United States and have spent most of their lives there, it is my view that California is the country of the children's habitual residence and also they have a closer connection to the United States than Jamaica. However, that degree by which the children are closer to the United States than Jamaica, is fairly small. I so find because, although the children were born in the United States and are U.S. citizens, they are also citizens of Jamaica and they possess Jamaican passports. In addition, although the children have spent most of their lives in the U.S., they have upon a number of different occasions spent considerable periods of time here in Jamaica with the mother. Indeed, even in his e-mail to the wife dated May 20 2007, exhibit MASF 18 to the wife's Affidavit sworn to on the 16th August 2007, the husband points out that as at that time, Q would have spent 16 of his 57 months in Jamaica (almost a third of his life), and K would have spent 13 of his 28 months (almost a half of his life). Of course there have now been a further 4 months that Q and K have spent in Jamaica. In addition, the children have started school here in Jamaica and had not yet done so in the United States, although Q was enrolled to begin. Further, because the children are so young,

they have not really developed deeply-embedded roots in the U.S. – See **Re P** page 233. In other words, I find the U.S. to be the country with which these children have the closer connection, but only marginally.

60. The fact that Q and K have spent so much time in Jamaica means that the children are familiar with the environment in Jamaica, they have many relatives and family friends, godparents and extended family here. They have not therefore in this case been uprooted from one environment and brought to an unfamiliar one. Since the two boys are already familiar with Jamaica, and have been here on previous occasions, and up to a certain point, without objection, it may be less disruptive for the children to remain a little while longer, a matter of a few months, while their medium and longer term future is decided than it would be to return them to the United States. There is also the fact that the children, and indeed, their parents, both wife and husband have substantial connections with this country, the wife and husband both having been born in Jamaica."

At paragraph 75 she stated:

"My paramount consideration has to be the welfare of each of these 2 boys. I find it convenient to start from the proposition that it is likely to be better for both boys to return to their home in California for disputes about their future to be decided there. A case against them doing so has to be so made by the wife. However, I have said that I find California to be the place where the children have a closer connection than to Jamaica only marginally. Indeed, the children are Jamaican citizens who started their schooling in Jamaica, not in California. In addition I am aware that what is best for the children in the long run may be different from what is best for them in the short run. The weight to be attached to the

factor that California is their home country is therefore less than it may have been, for example, in a case where the children had less attachment to Jamaica or were older.

Although I have found that the children's habitual residence has been in California, this factor is persuasive, it may be determinative, but in no case is it conclusive. However, summary return cannot be the Court's automatic response.
In my judgment the following are factors which tip the balance in favour of the children remaining in Jamaica and the issue of custody being decided here:-

(a) These children are very young and consequently they have not developed deep roots in the United States. In any event by virtue of their age, a further short stay in Jamaica would not be deleterious to their welfare.

(b) These children have substantial connection to Jamaica; they are Jamaican citizens. They have spent considerable periods of time here in Jamaica and so they are not at all in an unfamiliar environment.

(c) Separation from their primary caregiver the wife at this delicate formative stage of their lives may have serious detrimental emotional effects on them.

(d) The children are young and they may suffer emotional harm if separated from their mother. Since they are familiar with Jamaica and have been here for some time, it may be less disruptive for them to remain in Jamaica for a little while longer while their medium to long term future is decided the (sic) it would be to order them to return to California and to then have to adjust in the short term to the new arrangements that the husband intends to put

in place there to supplement his own caregiving.

(e) It is not unreasonable for the wife to have decided to resume living in Jamaica and in the circumstances refusing to return to the U.S."

The foregoing findings and conclusions of the learned judge require the consideration of two issues. The first is whether she ought to have made an order for the summary return of the children to California. The second is whether the Jamaican court is the proper forum for the determination of questions relating to their custody and upbringing.

Consideration will first be given to the question of the summary return. The making of a summary return order is not automatic. In **re J (a child) FC** [2005] UK HL 40 at paragraph 28 Baroness Hale said:

> "28. It is plain therefore, that there is always a choice to be made. Summary return should not be an automatic reaction to any and every unauthorised taking or keeping a child from his home country."

She continued at paragraph 29 by saying:

> "29. 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."

There have been cases in which children have been kidnapped or wrongfully taken from their settled home yet the court refused to make a summary return order. For example, in **McKee v McKee** [1951] 1 All ER, the

American parents of an infant were divorced. He was taken by his father from the United States of America to Canada in breach of a court order of an American court. Custody was granted to the father in habeas corpus proceedings in Canada. On appeal by the mother to the Supreme Court of Canada, custody was granted to her. An appeal was subsequently filed by the father to the Judicial Committee of the Privy Council. The Privy Council advised that the question of custody ought to be re- heard in Canada notwithstanding that the father had removed the child from the United States in order to avoid obedience to the order of court of that jurisdiction.

The foregoing is demonstrative of the fact that an order for the speedy return of a child may not be apposite even in a case of the taking of the child out of one jurisdiction to another by one party without the approval of the other. The welfare of the child is the paramount consideration. It predominates all other considerations. A court, in determining whether a child should be returned to a jurisdiction other than that in which he/she is found, must pay due regard to the child's best interest.

In the case of **re F (A Minor)** (abduction: Custody Rights) [1991] Fam. LR 25 Lord Donaldson in giving guidance as to the approach to be adopted by the court in assuming jurisdiction, at page 4 said:

> "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 interest requires. 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."

In obedience to the foregoing, the court must first determine which court would best serve the requirements of the child's best interest. If it is decided that the local court as opposed to the foreign court would best serve the welfare of the child, then the local court should decide all matters pertaining to the child's needs and determine questions as to his custody, care control and upbringing. This does not mean that the court must first consider matters relevant to a stay, following which the question of a summary return is to be considered. The dominant issue to be considered is the welfare of the child.

A court, in its inquiry into the requirements of a child, must with utmost care assess which forum best suits the child's best interests. In its application of the welfare test, the court is obliged to employ scrupulous care. In conducting such an exercise. the court must pay due regard to all the circumstances surrounding the child. The best interest of the child supersedes all other considerations. This demands that due consideration be given to matters such as the child's happiness, moral and religious upbringing, his social and educational influences, his psychological and physical well-being and his

material surroundings. See **J (a child) (FC)** (supra) and **Panton v Panton** (supra).

The court therefore, in reaching a decision as to whether to make a summary order for the return of the child or whether to assume jurisdiction, is obliged to weigh up the competing issues by undertaking a balancing exercise. In so doing, the Judge is compelled to take into account all relevant factors. See **Re J (a child)** (supra). In determining which of two competing jurisdictions would best accommodate the requirements of the child, the country in which the child is ordinarily resident is a crucial but not a determinative factor. Although habitual residence is of importance, other factors my militate against the summary return of a child to his settled homeland.

The learned judge had undoubtedly embarked on a balancing exercise in deciding whether the children ought to be summarily returned to California. She directed her mind to matters relevant to their welfare, taking into account the particular circumstances of their case. She explored all the competing issues and correctly concluded that summary return of the children would not be a practical option.

I now turn to the issue of forum non *conveniens*. In dealing with this principle the learned trial judge, at paragraphs 76, 77 and 78 said:

> "76. As regards the question of forum *non conveniens* I have indicated that the children in my view have a marginally closer connection to

California than to Jamaica. The husband has not therefore in my view shown that the Court in California is the clearly or distinctly (my emphasis) more appropriate Court than the Jamaican Court. It must be remembered that the Jamaican Court has by right jurisdiction as a result of the children's physical presence here in Jamaica and the fact that, in addition to being U.S. citizens, the children are also Jamaican citizens. There is therefore a distinction between sayings that the children have a closer or more real and substantial connection to California and saying that the California Court is clearly or distinctly the more appropriate forum. Questions of degree of closeness are involved in this exercise. In contrast to the difficulties which the wife says she would experience if she had to litigate the substantive matter of custody in California, the husband has not given any evidence as to any difficulty or inability he would suffer in litigating the custody issues here in Jamaica. Although his evidence is that he has a full-time lecturing position which he has held for many years, I cannot make assumptions based on that.

77. As to the question of the availability of witnesses, there is nothing pointing to the Californian Court being clearly more convenient. There is no need for the children's doctors in the United States to give evidence here in Jamaica. This is not a situation such as obtained in **Panton** case where serious allegations had been made and investigated by the Social Services Children Services authorities in George, U.S.A. In the instant case, the wife and children are here in Jamaica. Indeed, the husband's sister who is referred to in several of the Affidavits has returned to live in Jamaica. The husband's parents who form part of his caregiving arrangement, are here in Jamaica. It does not seem to me that it would be distinctly more convenient for witnesses that

> the custody hearing take place in California rather than in Jamaica.
>
> 78. In addition, in making its inquiries this Court must consider all of the circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. In accordance with the decisions in **Panton v Panton** and **Thompson v Thompson** the doctrine of forum *non conveniens* has to be considered in the context of the welfare of the child issue. As Gee, J. stated in **B & B [kidnapping]** 'the welfare of the children remains the paramount consideration at all times. All other matters are only ultimately relevant in so far as they relate to that issue.' "

The doctrine of forum *non conveniens* may be relevant in the determination of a choice of venue when applied within the context of the welfare of the child. See **Thompson v Thompson** (1930) 30 JLR 414 and **Panton v Panton** SCCA 21 of 2006, (unreported). This the learned judge correctly found. In citing a dictum of Gee, J in **B & B kidnapping** she also rightly found that only the welfare of the child is of importance and all other matters are only relevant so far as they relate to the welfare of the child. The welfare of the child being the fundamental consideration, all other factors are subordinate to the requirements of the child.

It is undeniable that the Supreme Court is empowered to hear and determine all questions relevant to the custody, care and upbringing of a child. Section 2 of the Children (Guardianship and Custody) Act confers on the court

such powers. The Supreme Court in the exercise of its powers as a court of Chancery, as *parens patriae* to children is obliged to exercise jurisdiction over all children. A court will therefore be loathed to decline jurisdiction where the child is within its jurisdiction.

Section 18 of the Children (Guardianship and Custody) Act provides that the welfare of the child is the primary and paramount consideration in the determination of questions of the custody and upbringing of a child. The section reads:

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

In the Marriage of **B and B [kidnapping]** [1986] FLC 91 – 749, the case on which the learned judge had properly relied, the Australian court, invoking the welfare principle, retained jurisdiction over children notwithstanding that their mother had no intention of returning them to Malaysia. In that case, the parents of the children were husband and wife. Both were Malaysian citizens. The wife was also an Australian citizen. The two children of the marriage who were three years and ten months respectively were Malaysian and

Australian nationals. The parents and the children moved from Australia to Malaysia. The wife returned to Australia with the children without the intention of returning to Malaysia with them. In Australia, she obtained an ex parte order for custody of them from Australia. At the trial of the matter, it was ordered that the children be returned to Malaysia subject to an undertaking by the husband that the matter would be determined by the Malaysian court. On appeal by the wife, the court held that questions of the custody of the children should be heard and determined in Australian Family Court.

It was Mr. Goffe's submission that the learned judge, having stated that California is the children's habitual residence and that they have a closer and substantial connection with the United States, the appellant satisfies the test that California is the appropriate forum. He further argued that she had wrongly placed reliance on the principle enunciated by Lord Templeman in **Spiliada Maritime Corporation v Cansulex Limited** [1987] A.C. 460 by concluding that California is clearly and distinctly the more appropriate forum. The principle, he contended, was introduced in the context of commercial cases where there is no "natural forum".

I will first address the question with respect to the applicability of the **Spiliada** principle to this case. Harrison P, in **Panton v Panton**, not unmindful that **Spiliada** was commercially based, makes it very clear that the **Spiliada** principles as they relate to *forum non conveniens* can be imported into custody

cases. Speaking to the matter of *forum non conveniens*, at page 21 of his Judgment he said:

> "The doctrine of forum non conveniens does apply in the circumstances of the instant case, contrary to the argument of learned Queen's Counsel for the mother.
>
> A court which is asked to consider whether it will make an order for the summary return of a child, ever mindful of the welfare of the child must consider which of two jurisdictions is better suited to determine that issue. Inevitably, the doctrine of forum non conveniens arises and closely aligned thereto is the question of the ordinary residence of the child. This is equally described as the country to which the child enjoys a closer connection, which may be a factor in the determination of the issue of summary return."

In making a choice of venue, the learned judge started with the proposition that it is better for the child to return to his home country where disputes about his future can be settled. This, Mr. Goffe contended, was an inconsistency in that she placed an onus on the appellant to demonstrate that the Californian court is the more appropriate forum.

In circumstances in which a claimant has a right to commence a claim in the Jamaican court, a stay of proceedings will only be granted where the defendant shows that another forum is more appropriate. See **Spiliada** (supra and **Thompson v Thompson** (supra). Speaking to the foregoing proposition, Lord Templeman, in **Spiliada**, at page 846 declared:

> "Where the plaintiff is entitled to commence action in this country, the court, applying the doctrine of forum non conveniens will only stay an action if the defendant satisfies the court that some other forum is more appropriate."

As a matter of law, the respondent has a right to bring custody proceedings in respect to the children in Jamaica. This she had done.

The appellant elected to make an application challenging jurisdiction. It follows that a duty is imposed on him to show that the Californian rather than the Jamaican court offers a more suitable choice of forum. In these circumstances the resolution of disputes between the parties as to the relative merits of the hearing of the custody proceedings in Jamaica, resides within the province of the judge, as observed by Lord Templeman in **Spiliada** when at pages 846 – 847 he said:

> "In the result it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge."

Mr. Goffe further argued that the term " natural forum" should be construed as meaning that where neither one of two fora can be regarded the "natural forum" for the trial of an action then it would be necessary to consider which forum is clearly and distinctly more appropriate and this the learned trial judge failed to do.

I do not find merit in this submission. In **Spiliada**, Lord Goffe expressly stated that the terms *conveniens* and *natural forum* mean that with which the action had the most real and substantial connection. The term clearly means that forum with which the claim has the most ideal connection and to which it is substantially connected. The learned judge would not therefore have been required to embark on any analysis as to interpretation of the words natural forum.

It was also Mr. Goffe's complaint that the learned judge placed undue weight on, or, ought not to have considered any of the following matters: (a) that the respondent runs the risk of being exposed to criminal liability in California for kidnapping, (b) an allegation by the respondent of her inability to afford counsel in California (c) the relative convenience of the parties conducting litigation in California (d) the respondent's wish to remain in Jamaica.

In deciding on a suitable forum, all matters relating to the welfare of the child must be taken into account These do not only include such matters which are directly related to him or her but also such other relevant matters which are indirectly related. The interest, wishes and conduct the of parents of the children may be taken into considered under the umbrella of the welfare of the principle. **In Re L Minors** [1974] 1WLR 250 Lord Justice Buckley at 263 stated:

> "Every matter having relevance to the welfare of the child should be taken into account and placed in the balance. Other matters, which may not directly relate

> to the child's welfare but are relevant to the situation may be proper to be taken into account and given such weight as the court may think fit, subject always to the welfare of the child being treated as paramount. The interests, wishes and conduct of parents and other members of the child's family and, indeed, of other persons, may fall under either of these heads. Race, nationality or religion may very probably and quite properly affect parental wishes about how and where a child should be brought up. These are factors which may well have an important bearing on the child's growth to maturity and his welfare. "

The learned judge had properly taken into account factors (b) (c) and (d) about which Mr. Goffe complained. However, it cannot be denied that she had incorrectly considered the possible exposure of the respondent to criminal liability if she returns to California. There was no evidence before her which would warrant her giving consideration to this as a factor in support of the question as to the forum in which the issue as to the custody care and upbringing of the children should be decided. This error however, would in no way detract from or vitiate her conclusion that Jamaica is the proper forum for the determination of these issues. She applied the correct test, that is, the welfare test. Where a judge in determining the appropriate forum, applies the correct test, an appellate court will not intervene unless he is obviously wrong. See **G v G** (Minor Custody Appeal) [1985] 1 WLR 647.

The learned judge was correct in finding that California was the habitual residence of the children and she also rightly found that this, although persuasive, was not conclusive. Her finding, that the connection of the children

to California as opposed to their connection to Jamaica was marginal, would not have precluded her from concluding that Jamaica is the more suitable forum as she balanced this against other compelling factors in respect of the best interest of the children. She correctly took into consideration that although California is their home country it is unlikely that they would have any greater attachment to California than they would to Jamaica. They have spent a substantial amount of time in Jamaica since their birth and are familiar with the culture. The learned judge had evidence before her to show that both children are very young, are very attached to their mother – the primary care giver and that the mother would not be able to meet the cost of litigation in California. The learned judge cannot be faulted for finding that although the children have a closer or real connection to California, Jamaica is clearly and distinctly a more appropriate forum.

An appellate court, being a court of review, is disinclined to disturb the findings of fact of a judge unless his or her findings of fact and conclusions are palpably wrong. The court will not interfere unless it is shown that in the exercise of his or her discretion he or she has misconstrued the law or misdirected himself or herself on the facts. The learned judge carefully analyzed the evidence. She took relevant factors into consideration. There is absolutely no reason to disturb her judgment. I would dismiss the appeal.

SMITH, J.A. (Ag.):

Having read the judgments of Smith and Harris, JJA I concur with their reasoning and conclusions. There is nothing further I wish to add.

SMITH, J.A.

ORDER:

The appeal is dismissed. No order as to costs.