J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 48 of 1973

BEFORE: The Hon. President
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Watkins, J.A. (Ag.)

BETWEEN	-	STANLEY CLARKE	-	PLAINTIFF/APPELLANT
AND	-	MADGE CAREY	-	DEFENDANT/RESPONDENT

Dr. Lloyd Barnett and Dr. Adolph Edwards for the appellant.

No one appeared for the respondent.

July 19, 20, 21; & October 29, 1976

Robinson, J.A.:

This appeal is concerned with the care, upbringing and welfare of two illegitimate children, viz, Christopher Clarke born on the 10th October, 1961 and Marlene Clarke born on the 14th August, 1965; obviously Christopher is now 15 years old, his sister being a bit over eleven.

These proceedings were initiated by way of originating summons by the plaintiff/appellant seeking to continue the wardship of these two children, the legal consequence of the issue of the summons. The plaintiff, Stanley Clarke and the defendant, Madge Carey are the admitted parents of these children.

Hearing began on the 9th July, 1973 and continued on various days (15 altogether) in August and September. A great deal of evidence, both oral and affidavit was presented by both sides after which the judge interviewed the children in Chambers. Judgment was reserved on the 14th October, 1973 and on 26th October oral judgment was delivered terminating the wardship of the children and effectively placing them in the custody of the defendant; the plaintiff has appealed therefrom.

Dr. Barnett, on opening his case before us, pointed out that he understood that the defendant had left Jamaica apparently for the United States of America, with the children immediately after the oral judgment was delivered, now almost three years. He ultimately requested an adjournment to consult with his client, the plaintiff as to whether or not an application should be made that the appeal be adjourned sine die or otherwise dealt with - the matter was adjourned to the following day when Dr. Barnett elected to go on with the appeal.

Many judgments have been written in what has been a determined 'fight' between the plaintiff and defendant relevant to the future of these children, but in the interest of completeness and good sense, we set out herein such facts as we consider material at this time.

The illicit intimacy between the plaintiff and defendant began in the year 1959 when the plaintiff, a heavy equipment contractor and married man was working in the district of Above Rocks where the defendant then lived; she was 18 years old and he a man of 38 or 39. The two children are the result of this liaison which lasted some 9 or 10 years. Up to 25th January, 1969, for all practical purposes, the children were in the custody, care and control of the defendant; up to that year when Christopher was 8 years old, he resided with his maternal grandparents at Above Rocks while the younger child, the girl, lived with her mother.

Over the period of this intimate relationship, sexual intercourse took place at various addresses including the matrimonial home in Spanish Town where the defendant lived for 3 months in 1962 while the plaintiff's wife was away in England. In this regard he said -

> "After my wife returned from England in 1962-63 I told her I would do better. I did not keep that promise ..... I broke that promise right up to just a little before Madge Carey left the Island." (i.e. January 1969).

In 1964, the defendant was again staying at the plaintiff's home while his wife was away in the United States of America; "Madge Carey was always with me when my wife was away," he admitted in evidence.

The plaintiff said that he told her, for various reasons which he gave her, the relationship should cease and she should find another man. He deponed, however:

> "Up to two nights before she left to go to the United States of America she had sexual intercourse with me in Spanish Town and the following morning I took her to Kingston from where she took a bus to Above Rocks. ..... I was maintaining my relationship with Miss Carey almost up to the time of her departure when she first left Jamaica."

It is in this setting that the plaintiff says:

> "Up to the week before(her leaving Jamaica), I had not taken any step to break relationship. I had told her I wanted to break it up but I was having sex with her from time to time."

On the other hand, the judge accepted the evidence of the defendant that the friendship terminated after it became apparent to the defendant that the plaintiff had no intention of keeping a promise to divorce his wife and marry her; she ultimately decided there was no future for her in going on - "I never had any intention of marrying her at any time."

This is the background, in brief, in which the defendant, unknown to the plaintiff, arranged and did leave the two children with a friend in Montego Bay and left the plaintiff and Jamaica for the U.S.A. in January 1969; she intended to get the children into the U.S.A. as soon as she was able. She did not

even tell the plaintiff where the children would be while she was away.

The plaintiff in the meantime carried out extensive enquiry, found the children a few days later i.e. in February 1969 unilaterally determined to take them from Ruby Faulkner to his home, incidentally at a time when his wife Mrs. Adina Clarke was off the Island. The judge had this to say at page 200 of the record:

> "In all the circumstances of the case, in this aspect, I find on the balance of probabilities that the defendant had not abandoned them on that occasion and further express the strong view that this ground of complaint (referring to the evidence of the plaintiff that he saw the children in a pitiable condition) has been projected by the plaintiff merely in an endeavour to belittle and discredit the defendant.
>
> I therefore find ..... that the plaintiff was not justified in taking the children from Montego Bay. Furthermore it is my considered opinion that he acted thus because the defendant had, by this means, made a first step to effectively determine the affair between them, which I am convinced he wished to continue against her wishes. And he was thereby trying to obtain an advantage over her. .....
>
> I am satisfied that the defendant as a mother was, and is loving to the children and that they returned her love."

The children were in the plaintiff's home up to April 1972. His attitude to the defendant may be described in his own words at page 117 of the record:

> "From I took the children from Montego Bay, I have done everything to prevent her getting the children."

The circumstances prevailing in their relations, latterly, seemed to have engendered hatred in the woman for this man, she did not wish him to have the children nor did he wish her to have them. Though the conduct of the parties and their wishes are matters for consideration, this is subject always to the over-riding interest of the children, what is best for them, not what is best for either mother or father. In the end, the court has to come to a conclusion what is best to be done for the care and control of the children on all the evidence before it.

The defendant spent about ten months in the United States, returning to Jamaica in November 1969. She made three visits to the home of the plaintiff but was not allowed even to see the children, though they were there; on the first two visits she saw the plaintiff's wife and spoke with her and on the third visit, she saw the plaintiff himself. "She asked for the children and I told her I not giving them to her." In December 1969 she applied by originating summons for custody of the children, Suit No. M43 of 1969. The plaintiff opposed the application and himself asked for custody.

In June 1970, the Master granted the mother's application awarding her custody. The plaintiff appealed against this decision on the broad ground that the master had wrongly exercised his discretion. The evidence at this time disclosed, inter alia, that the mother did not have adequate accommodation, she was unemployed and was unsettled; added to this, she had expected to be married on a certain date and this did not materlialise. The Master's decision was reversed by this Court (Supreme Court Civil Appeal No. 21 of 1970, delivered on December 29, 1971). The judgment is summarised in the words of Smith, J.A. (as he then was) thus:

> "The decision of the Master awarding custody to the mother is not justified on the evidence he had to consider. In my opinion, it will not be for the welfare of the children to remove them into the custody of the mother at this time. This is a decision reached with great regret. The father is, however, not being granted custody and it is open to the mother to re-apply whenever she is settled and can offer proper accommodation to her children."

After this decision was announced, the attitude of the plaintiff against the mother seeing the children, is expressed in his own words:

> "Until I had heard that I succeeded on appeal, she (the mother) saw the children, but after that she never saw them."

On the 1st February, 1972, the defendant took out a summons for the issue of a Writ of habeas Corpus ad subjiciendum to secure custody of the children (Suit No.E 22/72). On the 14th March, 1972 Wilkie J. made an Order, inter alia:

(1) granting access to the applicant within the terms therein expressed and

(2) that the children should not be removed from the jurisdiction while the trial was unheard. (The matter was ultimately adjourned).

On the 15th April, 1972 the defendant took the children from the plaintiff; she had to return to the U.S. on that day to preserve her permanent visa and she took the children with her. She applied for but failed to obtain permanent visas for them because the plaintiff had reported to the American Immigration while he also filed two suits in that year seeking custody but they were both adjourned (E.77/72 and E.134/72).

On January 20, 1973 the defendant returned to Jamaica with the children, left them with relatives, returned to the U.S. and on February 24 got married to Arthur Sterling, returning to Jamaica thereafter.

In May 1973, this suit the subject of review, was filed by the plaintiff.

The defendant's position in 1973 was summarised by White J. in his judgment at pages 215 and 216 of the record as follows:

> "In contrast, the particular facts which I have to consider arose after the Court of Appeal decision; what I accept as fact, is that the Defendant is now married, and is also now living with her husband in a house which has not been spectacularly described; none the less, I accept it as providing adequate and comfortable accommodation as proposed for the children. The mother is now employed, and the fact that she is residing in the United States of America by virtue of a permanent visa must in my view redound to the benefit of the children, not only immediately but in the long run. The matter was put succinctly by Mr. Muirhead when he submitted that all

> the physical requirements now exist in the framework of a stable home. All the elements which were absent on the last occasion now exist to make the claim of the mother far superior to that of the desire of the father to be awarded care and control - this is so far as it will affect the welfare of the children . .....
>
> Then again, I reiterate that there is no evidence to support the bare allegation by the plaintiff and his wife that by their removal from, and non-return to, his custody the children were in such distress, need or danger to warrant or ground the application to make the children wards of Court. As stated earlier I reject such allegations and all in all I conclude that the circumstances have changed since the decision of the Court of Appeal to such a material degree as to require a consideration of the wider question on the merits, whether their custody should now be given to the Defendant."

In this regard and at the end of the judgment at pages 219-220 of the record he continued:

> "The question at issue was not what sort of mother the defendant is. There is no evidence against her on this ground which would lead me to deprive her of custody of her children, and as I have already said, the tie of blood with the plaintiff is not by itself overriding, because while the fatherhood of an illegitimate child is a ground to which regard should be had in determining what course was best for the child's welfare, the fatherhood was not an overriding consideration.
> .....
> In all the weighting of the evidence, I have not in any way given undue prominence to the claims either of the plaintiff over the defendant or vice versa. Making allowance for the fact of illegitimate children, I have tried to keep in mind the statutory injunction that I am not to start with and be guided solely by any preliminary assumption that the claims of the plaintiff and those of the defendant are in each case superior to the other. This exclusion of any competitive superiority has not precluded a consideration of the wishes of the plaintiff, as admitted father of the children, nor the wishes of the defendant, their mother. In fine in all the circumstances, I opine that the welfare of the children will be best served by placing them in the custody of the defendant."

A perusal of the evidence vis-a-vis the judgment discloses that the judge dealt with the various material objections and submissions made by the attorneys as well as the legal aspects applicable thereto. He took great pains to deal fully with all the questions involved, in particular, the question of -

(1) custody;

(2) the jurisdiction and approach of the Court in wardship proceedings;

(3) the approach of the Court to

(a) the conduct of the parents and their wishes;

(b) the assessment of the evidence and in particular vis-a-vis the welfare of the children, their past living conditions and the future;

(c) interviewing the children and the principles applicable thereto, and

(d) the defendant's breach of the Court Order (Wilkie J.);

(4) the merits of the case;

(5) the household of the defendant and her husband (Mr. & Mrs. Sterling).

Four grounds of appeals were argued before us; they were argumentatively set out and of some length.

Ground 1 (a) was to the effect that the learned judge misdirected himself in law in refusing the appellant's application by summons to order Arthur Sterling to attend the hearing for cross-examination on his affidavit.

As stated earlier hearing of this case began on the 9th July, continued on the 10th and 11th when it was adjourned to the 19th July. On the 16th July, this summons was taken out directed to the defendant's attorney and returnable on the 19th July. The learned judge heard the relevant submissions and arguments on that day and ruled:

> "No order for Arthur Sterling to attend - not satisfied the affidavit in support of application, supports the summons - take into account time which elapsed between filing of summons and hearing of summons."

On the 12th September, 1973 i.e. on the eleventh day of the hearing, attorney for the plaintiff made further submissions on this matter and continuing, he said:

> "By virtue of the wrong address given, we have not been put in a position to deal with the suitability of the home environment."

Attorney for the defendant rebutted inter alia:

> "I find this extremely amazing in view of what was said by Dr. Barnett last week that applicant and his agents appear to have known of the correct address of the Sterlings."

Defendant's attorney continued in pointing out Sterling's economic position; that the evidence was that Sterling paid the rental for the apartment, supported the children even while they were in Jamaica, that it would be burdensome to ask such a person with such limited means ($140 weekly) to be put to the additional expense of coming to Jamaica, that if he did come his chances of returning might be prejudiced for some time, his job was at stake. (Observe the plaintiff is a businessman with assets totalling $400,000 and an income of $10,000 yearly).

The judge again ruled -

> "No reason has been advanced which, in the opinion of this Court is cogent enough to make the Court order that Arthur Sterling attend this enquiry for cross-examination. The Court will therefore make such use of the affidavit of Arthur Sterling as the Court thinks fit, bearing in mind the other evidence in the case."

In his judgment at page 208, the judge said -

> "It is important to stress that the fact of this marriage cannot and has not been controverted. The certificate of this marriage has been produced and inspected by the attorneys for the plaintiff and put in evidence, exhibit 8 ..... The defendant and her husband had both in their affidavits, I find, mis-stated the address of their matrimonial home, whereas that address is correctly stated in her marriage certificate."

The judge went on to deal with the reason given by the defendant for this discrepancy and continued at page 209 of the record:

> "When all the evidence is considered and the history of the relationship is given due weight, I am satisfied that the defendant did not wish the plaintiff under any circumstances whatever to know her whereabouts."

He continued to deal with other relevant evidence and then said:

> "It is evident that the plaintiff or his legal advisers were in close and constant touch with the enquiry agents in New York."

He passed on to deal with the affidavit of one Moses Henriques (a private detective living in New York and employed to William Lloyd Detective Agency of New York) dealing with investigations made by him in New York on being retained by the plaintiff and commented inter alia:

> "When Moses Henriques swore his affidavit on the 3rd September, 1973, he was in Jamaica."

On enquiry on the 4th September whether he was still in the Island,

> "Dr. Edwards told me that he was not quite sure because Mr. Henriques had to make arrangements for his return to the United States ..... he certainly did not state in his affidavit dated 3rd September, 1973 whether he had checked upon the address stated in the marriage certificate."

Dealing further with the Sterling's household, the judge went on:

> "I rejected the application because in my opinion no cogent reason had been put forward. For one thing there was the impracticability from more than one point of view of enforcing any such order; for another I was of the view that the court could not, and should not embarrass anyone by calling upon him to act to his own detriment. Accordingly I further intimated that the court would make such use of the affidavit of Arthur Sterling as it saw fit bearing in mind the other evidence in the case."

In the circumstances of this case, we can see nothing wrong with the ruling of the judge in the exercise of his discretion.

Ground 1 (b) was again another complaint relating to Arthur Sterling. In substance it was contended that the learned judge misdirected himself in law by refusing an application for adjournment on the 11th September, 1973 to facilitate the plaintiff to get information about Arthur Sterling with particular reference to the U.S. immigration, labour laws and regulations.

The records show at page 126 that on the continuation of the hearing on the morning of 3rd August, the very first matter mentioned (10.12 a.m.) was an application by the plaintiff's attorney that there should be no hearing on that day since certain investigations relating to Mr. Sterling had not been completed

and he desired to have this done before closing the case for the plaintiff. The court granted an adjournment - the record reads at page 127:

> "Court grants adjournment on request of plaintiff's attorney - adjourned to 4th September, 1973 at 10 a.m."

On 4th September, 1973 the affidavit sworn to by Moses Henriques in Jamaica on the day before i.e. 3rd September met with much opposition and cross talk. (On the 23rd and 26th July, 1973 respectively, he had sworn to two affidavits in New York in this matter). Henriques had apparently brought certain facts with him from New York and swore this affidavit here (page 68 of the record); in the main, the affidavit alleged that Arthur Sterling had no visa; there was a short adjournment and after discussion between the attorneys on both sides, the court resumed when it was announced that both sides will endeavour to find out the true facts, and at a later stage Dr. Barnett will have the right to treat with the affidavit of the 3rd September.

In furtherance of this effort to find the true facts, Mr. Muirhead (for the defendant) interviewed Mr. George Berkley, American Consul-General in Jamaica on the 11th September putting the relevant questions to him. Mr. Muirhead filed an affidavit setting out the result of his interview (at pages 69-70 of the record). After the filing of this affidavit, both Mr. Muirhead and Dr. Barnett had a further interview with Mr. George Berkley.

The judge in refusing the application for the adjournment had this to say:

> "Moses Henriques' affidavit dated 3rd September, 1973 first raised question of Arthur Sterling's status as visitor of U.S.A. It will not be of assistance of this Court to be informed how the U.S.A. Authorities exercise their discretion.
>
> Court cannot stop Dr. Barnett from filing an affidavit in reply to Muirhead's, but will not grant adjournment for that purpose."

In our opinion, the application was rightly and properly refused.

The other ground of appeal, part of ground 1 alleges that the judge misdirected himself in law by dismissing the plaintiff's application that the children be confirmed as wards of court. It was submitted,inter alia, that the court should have control over the children in view of the mother's conduct in breaching the court order. But this is begging the question i.e. that the court should have ordered that the care and control of the children be committed to the plaintiff who was seeking to get "care and control" via wardship proceedings. If the court had confirmed the wardship in the exercise of its discretion, the very next question would be, who would have custody and care of the children. In this regard the wishes of either parents must be considered; breach of the court order is a circumstance which must be taken into account in determining what was best for the welfare of the children.

Breach of the Court Order was committed in two respects:

(i) not returning the children to the plaintiff's home, and

(ii) taking them out of Jamaica.

It was argued in the court below that the defendant ought not to be heard unless and until she had complied with the interlocutory orders. Several authorities were cites on either side. In his judgment, the judge paid due regard to the submissions of the attorneys when dealing with this aspect of the matter and at page 184 of the record said this:

> "However, whatever may be the procedural niceties that affect this aspect of the case, the fact is that the defendant was prima facie in contempt when she, by the advantage of the Order of the Court took the children from the plaintiff and did not return them to him; and moreso when she took them out of the jurisdiction. Of course at the time of the hearing the children had been returned to the jurisdiction, although they had not been returned to the Plaintiff and he did not then know of their whereabouts. Was the last-mentioned continued act of disobedience to the Order of the

> Court enough to justify my not hearing the Defendant or at any rate would justify my adjourning the matter to a specific date so as to allow the Defendant the opportunity to comply with the Order of the Court and so regularise her position?
>
> I ruled, that since the children were again within the jurisdiction, no purpose would be served in making such an Order; therefore I would hear the Defendant. I made no Order regarding the return of the children, because I was concerned at the way in which they had been shuttled back and forth, between the parties, which itself was certainly not helpful to their paramount welfare which overrides all other considerations."

Towards the end of his judgment, he again adverted to this question and at page 201 of the record continued:

> "On the other hand, of course, I had to consider also the Defendant's action in breaching the terms of subsisting orders of the Court relating to custody and the non-removal of the children from the jurisdiction, as well as the fact that she did not re-apply to the Court, as the judgment of the Court of Appeal envisaged. The fact that she thus acted in defiance of the orders of the Court is only one circumstance which I had to take into account and weigh in determining what was best for the welfare of the children."

In our view the relevant principle was properly applied.

Ground 2 is comprehensive and detailed and relevant to the merits of the case, the complaint being that the judgment was unreasonable and/or against the weight of the evidence.

A court of appeal will not interfere with the decision of the judge in the court below in the exercise of his discretion unless a strong case is made out or it is shown that he had acted on wrong principles or otherwise wrongly exercised his discretion.

The judge heard and saw the witnesses in what was a comparatively long case; indeed his written judgment is detailed, comprehensive and full. He came to his decision on the evidence which he accepted (clearly preferring the testimony of the defendant in substance). There was also complaint about certain inferences which he drew as being non-sequiturs.

We have perused the record and considered the substance of this ground with great care and without setting out the factual details, the material ones of which are all dealt with in the judgment, we unhesitatingly conclude that in all the circumstances, there is no merit in this ground. As to non-sequiturs, we do not find that such was of any material importance in these proceedings.

The plaintiff puts himself in a position which may be regarded as "wealthy" but this is not a case of weighing economic means, one against the other. The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded (In re McGrath (Infants) [1893] 1 Ch. 143 at page 148).

In Ground 3, it was argued that the learned judge improperly and contrary to law exercised his discretion to interview the children. The court was directed to the submissions as set out in this ground and those made in the court below. This issue was hotly contested in that court (pages 146 - 152 of the record) where various authorities were cited; in the judgment, the relevant pages of the records are 204, 216 to 220. We quote hereunder certain portions of the judgment in point vis-a-vis the arguments:

> "Removal from that household (of the children) might have caused the plaintiff and his wife great distress, sorrow and suffering. But it has not been substantiated that as alleged, the children also were occasioned great distress, sorrow and suffering. In fact when I did interview the children against the strong and closely reasoned objections of Dr. Barnett, my impression was of children, who (despite what had happened) were intelligent, were fresh in countenance and appeared to be in good health, and well aware of all the surrounding circumstances. I have no outside and independent evidence regarding the sojourn of the children in the Clarke household ....."

"During the taking of the evidence, Mr. Muirhead suggested that I should interview the children with the intention, he said, of ascertaining their wishes and indeed their very lives. After hearing the views of Dr. Barnett at that time I thought it prudent to postpone any decision on this matter until after the cross-examination on all the affidavits. Subsequently I heard fuller arguments, Mr. Muirhead urging the Court to see and interview the children, bearing in mind that they are not of the age of 1, 2, or 3 years but in the instant case, are children of reason. Dr. Barnett's opposition to this course was based on the circumstances of this case. He admitted that in a proper situation there are reported cases in which the interview with the children, the subject of the application, had been conducted for the sole purpose of ascertaining whether the children have any choice in relation to their future residence and if so, what is that choice.

The gravamen of Dr. Barnett's submissions was that in this case it would be unfair and unjust considering that, among other things, the children had spent the immediately previous 18 months with the defendant and therefore, it would be reasonable to assume that they might very well have been influenced to adopt an unfavourable view against the plaintiff. .....

In the result, I interviewed both children, guided in my approach by the principle that I am under no obligation to disclose anything said to me by the wards at such an interview, which is to be conducted not with a view to eliciting further facts, but in order to discover, so far as is possible in one interview, their personalities and outlook, and to assist me in the final determination of the matter. Even if the court obtains the view of the infant in any particular case, as to what course the judge should take, it does not mean that the judge must necessarily follow the infant's view."

It is clear that the judge is here indicating that he conducted the interview within the ambit of the principle stated above - see In Re K (infants) [1962] 3 A.E.R. page 1000 at page 1009 at D. The judge continued:

"The interview did not disclose to me any basis for the fears projected by Dr. Barnett. Specifically, I could find no support for his pessimism that, there is no way of ascertaining by a judicial interview whether or not they have at some time previous to the interview been influenced into the adoption of a selection in favour of the defendant rather than the plaintiff. I could find no basis for assuming that what I was told by these children was the reflections of the wishes of either the plaintiff or the defendant. As far as I am concerned, it was an independent exercise of each child's own will. Suffice it to say that it confirmed certain aspects of the evidence while discounting others, and in the final analysis disclosed the preference of the children to be with the defendant. But even without such expressed preference the conclusion of the matter would have been that all the factors

> " which would lead to what is best in the interest of the children were subsumed under the paramount consideration."

In view of all the evidence before the court and in the particular circumstances of this case the judge came to the conclusion as to what was best to be done for the children and accordingly interviewed them in chambers in the exercise of his discretion; he guided himself by the proper principles in this struggle between the parents.

We have considered the arguments and relevant authorities and can find no room which could be said to accommodate the complaints made on behalf of the plaintiff. We find no fault with the ruling and approach of the judge and the interview. In our opinion this ground is without substance.

We wish to emphasize here as White J. did in his judgment, the jurisdiction regarding wards of court is not based on the rights of parents, the primary concern is not to ensure their rights but to ensure the welfare of the children. However strong the rights of parents, those rights are only the counterpart of duties and it is generally only the very failure of the parents to carry out those duties that occasions any wardship proceedings at all; the Guardinaship and Custody of Children Law, Law 59 of 1956 Section 18 has expressly enacted that where, in any proceedings before any court, the custody or the upbringing of an infant is in question, the court in deciding that question shall regard the welfare of the infant as the first and paramount consideration. The Court will, of course, have regard to the rights of parents and to their views on the interests of the infant. In the cases of wards of court, the Court is really sitting primarily to guard the interests of the ward. This is the very "touchstone" of wardship proceedings.

In the result, we cannot say that the judge's decision is wrong. In the circumstances of this case, we agree with it.

For the purposes of completeness, we record that the question of the jurisdiction of this court was argued, the defendant and the children being at this time, said to be out of Jamaica. In the light of the conclusion to which we have come, it is no longer necessary to deal with this. However, we think it certainly would not be in the best interest of the children at this time to remove them out of the custody of the defendant. In this regard Dr. Barnett had this to say:

> "A fair amount of time has passed in the instant case and that is what I fear, three years have passed and judge ordered no interin situation; I find this a difficult question; if six months there would be no doubt but it is three years."

Certain submissions were made as to the order for costs made in the court below. In the particular circumstances of this case, we see no good reason or justification to reverse that order.

The appeal is dismissed with no order as to costs.