IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. HCV 1616/03

BETWEEN	"K"	CLAIMANT
A N D	"D"	DEFENDANT

Mr. Ransford Braham and Mrs. Suzanne Risden-Foster instructed by Livingston, Alexander and Levy for the Claimant

Mrs. Georgia Gibson-Henlin and Miss Kerry-Ann Rowe instructed by Nunes, Scholefield, Deleon & Co for the Defendant

Heard: 12th, 15th, 23rd September 6th and 7th October 2003

Mangatal, J (Ag.)

1. This application concerns a father, a mother and a daughter. The overriding objective of the Civil Procedure Rules 2002, which apply to these proceedings, is to deal with cases justly. I have, in an attempt to achieve that objective styled the Claimant "K", the Defendant "D", and the child "A" for the purposes of this Judgment. This is in an effort to protect their privacy.

2. This is an application by ("K") for the following relief in respect of his 9 year old daughter, ("A").

2. This is an application by ("K") for the following relief in respect of his 9 year old daughter, ("A").

"That the Court in the exercise of its summary and/or interlocutory jurisdiction do order and direct that the child ("A") be forthwith returned to Barbados in the care and control of her father, and for any other interim or other orders necessary or expedient in the best interests of the child."

3. To adopt the description used in one of the many cases cited to me, this is "a most delicate jurisdiction" that I am being asked to exercise, and to exercise with expedition. It is a complex case, the resolution of which will involve concepts of private international law, status of children, and family law. I wish to pay tribute to the Attorneys-at-law who represented both sides for the clarity and thoroughness of their presentations.

4. In the course of the hearing, I have been referred to the law of Montserrat, Barbados and Jamaica. Some of the Affidavits are over twenty pages long. There have been both oral and written submissions, with the latter consisting of over 50 pages, with reference being made to many authorities. As a consequence of the foregoing, the Judgment is lengthy and I apologise to anyone who has the burden of reading it. The nature of the application does not permit the luxury of much refinement. In an effort to lighten the burden, I have provided a summary and index at the end of this judgment.

5. "K", "D" and "A" are all nationals who hail from the volcanic island of Montserrat. "D" is the mother of "A", and "K" is the father of "A". "A" was born out of wedlock on January 2nd, 1994 in Montserrat.

6. "K" is an Attorney-at-law employed as Legal Counsel to a Bank in Barbados and "D" is a law student completing her legal studies. "K" is registered as the father of "A" on "A's" birth certificate. "K" is now married to "F" and they have a daughter, "KA", who is approximately ten month's old.

7. "A" resided in Montserrat between 1994 – 1997. On "D's" evidence, "A" resided with her from 1994 to 1997 in Montserrat in various places.

8. On "K's" evidence, "A" resided with both himself and "D" at various places in Montserrat between 1994 and 1997. In 1996 "D" went on a 6-month police training course in Barbados. During "D's" absence, "A" continued to live in Montserrat with "K".

9. On "D's" evidence, she had her best friend assist "K" with the care of "A". On "K's" case, he had sole care of "A" during that 6-month period.

10. In 1998 due to health problems, the chief medical officer advised that "A" be removed from the ashy environment in Montserrat. She was required to change schools and homes more than once before the eventual recommendation that "A" be removed from Montserrat entirely.

11. Residents of Montserrat were being offered a relocation package. "D" who was at the time considering relocation to the United Kingdom (because of the recommendation to move "A"), told "K" of this

consideration, whereupon "K" invited "D" and "A" to live with him in Barbados. After some discussion,, "D" and "A" came to live with "K" in Barbados in 1998. Sometime later in 1998 relations between "K" and "D" broke down and "D" and "A" left Barhados and went to Montserrat. During this time "A" lived with "D" in Montserrat, and "K" would visit whenever he came to Montserrat from Barbados.

12. Somewhere between 1998 and 2000, "D" applied for admission to the Faculty of Law. At first, her application was not successful. In July 2000, "A" accompanied "K" to Barbados. According to "D", "A" was to have gone to Barbados for just for a few weeks in the holidays. "D" subsequently went to Barbados in September 2000 to study law at the Faculty of Law in Barbados. According to "K", "A" did not in July 2000 come to Barbados for a holiday; she came to live with him indefinitely, bringing with her all her possessions.

13. "K" claims in paragraph 14 of his 1st affidavit that Montserrat was then at the height of the volcanic crisis and education for children was a critical issue. Additionally, he and "D" accepted medical advice to remove "A" from the ashy conditions in Montserrat. "D" and "K" discussed and agreed that "A" should live with "K" in Barbados where she would have access to good educational opportunities and be able to continue her education for the foreseeable future. "K" however thought that it would be beneficial to "A" if "D" was admitted to a program of study in Barbados and would

therefore be present in Barbados, at least for the three years of the LLB course of study.

14. "K" claims that he collected application forms for admission to the Faculty of Law for "D" and himself applied for admission on behalf of "D", notwithstanding that "D" he claimed had refused to again apply for admission. "K" says that up to May 2000, there was no response from the University. He claims that he made certain enquiries and asked that consideration be given to granting "D" a place. In June 2000, "D" was notified that she had gained a place. "A" accompanied "K" to Barbados, "K" says with the intention that "D" would take up separate rented accommodation which "K" says he was asked to procure on her behalf.

15. "D" does not say when she received notification that she had been offered a place in the faculty of Law. She simply says in paragraph 34 of her 1st Affidavit that in September of 2000 when she went to Barbados after being informed that she had secured a place at UWI, Cave Hill, she was informed by "K" that when he took "A" to Barbados in July 2000 he had made the conscious decision that "A" was not coming back to Montserrat with "D".

16. Then, says "D", this upset her and she asked "K" how he could have been so deceptive. She told "K" that he took "A" to Barbados through deceit and had she known that was his intention, she would not have agreed to him taking "A" to Barbados. "D" did not deny that she received notification in June 2000 that she was admitted to the faculty.

17. At paragraph 16 of "K's" 1st affidavit, he states that he and "D" agreed that during "D's" period of study in Barbados, "A" would continue to reside with him and would visit "D" on weekends. He states that he procured a place for "A" at the West Terrace Primary School which is situated approximately four hundred metres from the University of the West Indies, Cave Hill campus in Barbados, and secured rented accommodation for "D" immediately outside the perimeter of the school.

18. "D" on the other hand says at paragraph 36 of 1st affidavit that from September 2000 to May 2003, "K" and herself shared care and control of "A".

19. While in Barbados between 2000 and 2003, "A" attended one (1) school, West Terrace Primary School, and has been there for three (3) years. She has been doing quite well at school, and is in the A-stream, although there are areas which her teachers have recommended should be worked upon and which "K", who has some teaching experience, says, he was assisting "A" with improving. Whilst the changes which occurred in her earlier years, in schools in Montserrat, and from Barbados back to Montserrat, occurred in her Kindergarten years, she was in September 2003 about to go into Class 3 at West Terrace Primary School in Barbados where she would begin a two-year preparation for her common entrance examination. In Barbados, children take the common entrance examination after reaching age 11 and not before. In his Affidavit of 19th September 2003, "K" states that West Terrace Primary School is one of

the most highly ranked schools in Barbados based on common entrance results over the last few years.

20. While in Barbados, "A" developed an avid interest in athletics and swimming. She was a leading track and field athlete in her age group at her school in Barbados and she swam competitively in Barbados and is a member of the Alpha Swim Club in Barbados. "A" has represented her Club in national and international competitions over the past two (2) years. She is the anchor swimmer for the Club's relay team in her age group. "A" enjoys swimming and enjoys a close relationship with members of her swim team. She has swam competitively in the presence of cameras and the media and this has helped to develop "A's" self-confidence.

21. In May 2003 "D" went to Montserrat. At paragraph 5 of her 1st Affidavit, she says that she and "A" arrived in Jamaica on 25th August 2003 because she was enrolled at the Norman Manley Law School to pursue a 2-year course in Legal Education. At paragraph 6 she states that her trip to Jamaica with "A" was no surprise to "K" since she had indicated to him from as early as mid 2002 that she intended for "A" to be with her in Jamaica while attending the Norman Manley Law School. "K" says that in or about May 2003, "D" indicated that she intended to take "A" with her to Jamaica for the two-year period of her study.

22. Says he, that he thought in the circumstances she must be making a joke (paragraph 33 of "K's" 1st Affidavit). He says that he received calls from "A's" relatives expressing concern that "D" was planning to take "A" to

Jamaica and also received a call from the Principal of "A's" school seeking his approval for a transfer request that the school had received from "D" in respect of "A". "K" says he tried to get "D" to agree to discuss the matter with "D's" pastor but she refused to attend and said she could make her own decisions in relation to "her child".

23. In paragraph 34 of his 1st Affidavit, "K" states that in late July 2003, "D" called him from Montserrat and said that a relative of hers was sick in England and that she wanted "A" to go to England to see him. "K" says that he asked for an undertaking that "A" would return for school. "D" refused to give the undertaking but later spoke to "K" in terms which suggested that "A" would return. "K" says "D" also spoke to "A" and promised her that she would return on 25th August 2003. "K" says that he felt encouraged and in good faith took "A" to Montserrat to enable "A" to accompany "D" to England. "A" left Barbados with the expectation, says "K" that "K" would be returning to Montserrat for her on or about August 25th to bring her back to Barbados in time for school on September 8, 2003.

24. "K" says that on August 23 however, he received information that the Defendant was taking "A" direct to Jamaica from England and that she was not returning to Montserrat or Barbados.

25. I think that it is important to set out in its entirety the evidence of "D" on the question of the taking of "A" to Jamaica since I will have to make a finding

on the issue of consent or the necessity there for. Paragraphs 7-18 of "D's" 1st Affidavit read as follows:

vii. That this indication (in 2002 that she intended to take "A" with her) was made in response to the Claimant's question of what I intended to do with "A" when the time comes for me to go to Jamaica. He had not indicated then that he was not in agreement with that decision.

viii. That on several occasions during the summer holidays I indicated to the Claimant that I intended to travel to the United Kingdom along with "A" and some of my relatives. At that time "A" was in Barbados.

ix. That I asked the Claimant to have "A" brought to Montserrat in order for her to travel with me and to indicate the date that she will arrive in Montserrat so that I could make the necessary travel arrangements.

x. That the Claimant resorted to questioning me intensely as to why I wanted "A" to travel to the United Kingdom. I was annoyed at his behaviour and told him that I am "A's" mother but he is acting as if I am a stranger.

xi. That it is during one of those discussions that I eventually told him that we would be visiting my sick brother but I did not give him that as the reason for taking "A" with me to the

United Kingdom. In fact even at this time he did not give me an answer as to when "A" would be traveling to Montserrat.

xii. That he was in fact pressing me for an undertaking to return the child to Montserrat but I told him that I would not do that, as I was "A's" mother.

xiii. That the Claimant then decided that there was nothing more to talk about and that "A" will not be coming to Montserrat to travel to the United Kingdom. I called the Claimant again from Montserrat to ask about when "A" will be coming and he started asking again for an undertaking, which I again refused to give. I then told him that if she was not in Montserrat by a certain date that I will just forget about taking her because I cannot afford for him to have me always purchasing tickets for "A" which I cannot be refunded.

xiv. That subsequently "A" called me from Barbados to say that she was coming to Montserrat to travel to the United Kingdom.

xv. That I could hear the Claimant in the background telling her to ask me where she will be going after leaving the United Kingdom. I told her not to ask me that question. She then said that if I did not answer that the Claimant would not allow her to come with me. That I could hear the sadness in her voice.

xvi. That "A" eventually came to Montserrat and went to the United Kingdom with me.

xvii. That there was no understanding between the Claimant and I that "A" would be returned to Montserrat to be collected by the Claimant for the purpose of returning her to Barbados. The Claimant asked when we were leaving the United Kingdom and I told him on the 25th August.

xviii. That I heard him tell "A" to ask me again where she would go when she left the United Kingdom and I gave her the same answer aforesaid.

26. "D" and "A" arrived in Jamaica on or about 25th August 2003. "D" has indicated that she has come to Jamaica to complete her legal studies. There is no other tie to Jamaica. It appears to be the first time that a visit to Jamaica has occurred in relation to "D" or "A".

27. In Barbados the Claimant says that he occupies along with his wife, "A" and "A's"half- sister 'KA", rented premises where "A" used to reside and where "A" has her own room and adequate space inside and outside for recreation.

28. In Jamaica, "D" says that "A" has been living with "D" in a house with one bedroom with two beds and all the usual, modern amenities. These premises are in close proximity to the Norman Manley Law School.

29. "D" says "A" is doing well at school here in Jamaica at Mona Primary School. When she first came she was placed in Grade 3 initially to see

how "A" responded to the curriculum and a few weeks later she was moved to Grade 4 where age nine, which is "A's" age, is the average age in Jamaica. "A" is enrolled at the YMCA Club and swims on Saturday mornings here in Jamaica, says "D".

30. "K" has indicated that "A" in Barbados goes to church at the Western Light Church of the Nazarene with himself and his wife, mainly with his wife. "D" has indicated that she and "A" have started to go to church here in Jamaica at Providence Methodist Church.

31. "D's" evidence is that when she went to Barbados in September 2000, it was for the purpose of attending the Faculty of Law. She went for that purpose only, with no intention of remaining there. At the end of the 3-year course, she left Barbados with no intention of returning except possibly for occasional visits. She returned to Montserrat, her usual place of residence after leaving Barbados in May 2003. She says that she intends to return to Montserrat on the completion of her studies in Jamaica. She owes a moral responsibility to the government of Montserrat to return to Montserrat on completion of her studies since she received scholarship and funding to pursue the LLB degree and now the Certificate of Legal Education. She intends to take "A" with her. She states that after the chief medical officer's advice, she and "A" returned to reside in Montserrat from 1999 to 2000. At the time of the recommendation, the volcanic crisis was at its height. She claims that the crisis has since subsided and the ashy conditions have substantially

diminished and were no longer a threat to "A's" health in 1999 and are not so now.

32. "K" has indicated that "D" has never denied that "A" was born out of a common law union between them. He says (in paragraph 7 of the Affidavit of 19th September 2003):-

> "I lately became aware of her intention to make such an allegation while seated in court on September 15, 2003 and hearing learned Counsel for the Respondent intimate that I had no right of parental control of "A". He then exhibits a letter dated May 15, 2001 from Attorneys-at-Law in Barbados written to him on behalf of "D".

33. The letter makes for very interesting reading:

> "Ms D. has instructed us to write this letter to you to discuss maintenance for herself and your child "A".
>
> Our client hails from the island of Montserrat where you developed a **union other than marriage** and from that union, a child was born on the 2nd day of January 1994.
>
> You relocated to Barbados in the year 1997 and were reunited with our client and your child in 1998 and lived and cohabited with our client, firstly at Grazettes in the parish of Saint Michael and secondly at #23 Lower Estate Heights in the parish of Saint George.

We are in no doubt that under the Laws of Barbados, the union still exists although you have since got married to someone else (refer to the case of Hutson & Poleon 1982).

Our client is at present a student at the Faculty of Law at the University of the West Indies, **having been invited by you to settle in Barbados**." (my emphasis).

34. "K" says that contrary to what "D" has said, there is no scientific indication or announcement that the volcano in Montserrat is no longer active. In paragraph 10 of his Affidavit of 19th September 2003, "K" states:-

"The volcano is the type that slowly grows a dome over a period of time. The dome collapses periodically giving rise to pyroclastic flows and ash deposits. The last eruption was in June 2003, which was the worst in the eight-year history of the eruption. A state of emergency had to be declared. Following a large collapse, the volcano remains quiet for several months, the dome material having been extruded. The dome grows again and the cycle continues. The volcano is now quiet following the June collapse but there has been no announcement or declaration that volcanic activity is at an end. To the contrary, the weekly volcanic reports still announce that residents should be cautious. Visits to the unsafe zone are still carefully controlled and regulated by the police under the watchful eye of the Montserrat Volcano Observatory".

35. On the 1st September 2003, "K" filed suit in Jamaica by way of fixed date claim form, claiming amongst other relief:-

i. That "K" be granted sole custody, care and control of "A", a girl born on the 2nd day of January 1994 with reasonable access to "D" on such terms as this Honourable Court considers in the best interest of the child.

ii. That "K" be given permission to take the child, "A" out of the jurisdiction to return home to reside with "K" at 23 Lower Estate Heights, St. Michael, Barbados subject to the usual undertaking that the Claimant will return the said child to this jurisdiction if called on by this Honourable Court so to do.

iii. An interim injunction restraining "D" from placing the child "A" in any school in Jamaica and from allowing the child to attend any school in Jamaica pending hearing of this application.

36. On the 5th September 2003, an inter partes application for the grant of an interim injunction restraining "D" from placing the child "A" in any school in Jamaica and from allowing the child to attend any school in Jamaica pending the Claimant's application for custody care and control came on for hearing before me during the Court's vacation period.

37. On the 5th September 2003, Counsel for "K" indicated that he had discovered that "A" had in fact already started school here in Jamaica at the Mona Primary School and quite rightly, in my view, indicated that he

would not be pursuing the initial application for injunctive relief, but would instead wish to proceed on the substantive application for custody. The matter was adjourned for Wednesday 10th September 2003.

38. Due to some confusion with the dates and time set for the matter to be heard, the matter did not come back up for hearing until the 12th September 2003.

39. By that date, "K's" claim had been amended to add the further or alternative claim that the court exercise its summary or interlocutory jurisdiction to order the return of "A" to Barbados. This was an application that the child be returned to Barbados for the Court in Barbados to deal with the substantive matter of custody.

40. Counsel for "D" applied for an adjournment to file a response to two Affidavits just received from "K's" attorneys, which adjournment I refused given the nature of the application.

41. Counsel for "K", in the interest of expedition agreed to proceed with the matter without relying on the further two Affidavits. I also invited Counsel for the Defendant to lead oral evidence if she saw fit so to do in order to deal with the application for summary relief. The Defendant ultimately did not choose to lead any oral evidence.

42. In the course of the hearing, it appeared to me that there was need to have further evidence regarding questions of ordinary residence and in relation to "A's" accommodation and surroundings and so permission was given to both parties to file Affidavits.

The hearing proceeded before me with the following Affidavit evidence:

1. Affidavit of "K" sworn to on 1st September 2003
2. Affidavit of "D" sworn to on 5th September 2003
3. Affidavit of "D" sworn to on 17th September 2003
4. Affidavit of "K" sworn to on 19th September 2003

43. I also had for my consideration the opinion of an attorney-at-law practicing in Barbados, Ms. Kim Small, exhibited to the Affidavit of Suzanne Risden-Foster sworn to on the 15th September 2003, and an expert opinion of Ms. Tracey Robinson, lecturer in the Faculty of Law at the University of the West Indies on the law relating to parental responsibility or custody in Montserrat and Barbados, exhibited to "D's" Affidavit sworn to on 17th September 2003.

44. The claimant's Attorneys argue that the Court has the power and jurisdiction to deal with the application in a summary manner dictated by the principle of the welfare of the child in the particular circumstances. Where a child has been removed from another jurisdiction, in this case Barbados, the Jamaican Court is not required to embark on a detailed examination of the facts and issues to determine whether the parent residing in Jamaica ought to have custody of the child or whether custody ought to be given to the parent overseas. Instead, they submit, the Court is entitled in a summary manner to consider whether an order ought to be made for the child to be forthwith returned to its country of habitual

residence so that the Court in that country may determine which of the two parents ought to be given custody.

45. "K's" case is that he did not consent to the removal of "A" in order to come to Jamaica or the retention of "A" by "D" in order to come to Jamaica. K 's Attorneys have relied on a number of authorities, some of which are commonly referred to as "the abduction cases".

46. "D's" Attorneys-at-law have on the other hand argued that "K's" claim is misconceived; there was no abduction and at the time of the alleged retention of "A", Montserrat and not Barbados was her habitual or ordinary residence. "D's" Attorneys argued that all the parties are nationals of Montserrat. The child was born on January 2nd 1994 in Montserrat. The parents were not married at the time and still are not married. "A" is therefore an illegitimate child.

47. The argument runs that Montserrat is a British Dependency. The old United Kingdom provisions govern the laws relating to custody and maintenance.

The unmarried mother of a child has responsibility for the child under the laws of Montserrat, and not the father. The father does not even have a right to apply for custody. "D" had therefore a prima facie right to custody of "A".

48. The removal of "A" could only be held to be wrongful if it was in breach of custody rights acquired by "K" prior to the departure of "D" and "A" from Barbados. "K" is not alleging that he acquired any custody rights or

parental responsibility. In fact, says "D", that is what "K" is now asking this Court to do, that is, return the child to Barbados so that he can acquire custody rights. It was submitted by Counsel for "D" that that is not in the contemplation or spirit of the authorities on abduction and the relief claimed should be refused.

49. The Defendant's Attorneys also argued that the child "A" is not habitually resident in Barbados. They say that the answer to this issue is also dependent on the parental responsibility or prima facie rights of custody issue. Since "D" has the parental responsibility for the child, the child takes on her habitual residence. The habitual residence of "A" changed from at best the date when "D" left Barbados with no intention of returning to Barbados or at worst from the date when she arrived in Jamaica with no intention of returning to Barbados. Her time there was for a limited purpose. That purpose ended in May 2003 and she left. As "D" is no longer ordinarily resident in Barbados, neither is the child.

50. "D's" Attorneys-at-law further submitted that the Barbados Courts do not have jurisdiction to hear the matter as neither the child nor her mother are ordinarily resident there. The Jamaican Courts have jurisdiction because the child is here.

51. In the course of her submissions, Counsel for the Defendant also submitted that legitimacy is a question of status, and that status is conferred by one's domicile of origin. She states that Status of Children Legislation passed in Jamaica or Barbados would not be relevant because

the child's status is fixed by the law of the child's domicile of origin, which is Montserrat. She argued that custody rights must therefore also be determined by the law of the domicile of origin.

52. The Attorneys-at-law for "K" have responded to the submissions and said that the answer to "D's" contention lies firstly, in the area of private international law and that both the child and the mother, though born and domiciled outside of this jurisdiction, are now within this jurisdiction and before this Court and the question which this Court must determine, is what is the Law which this Court must apply in resolving the dispute between the parties. The Claimant's Attorneys-at-law submit that the applicable law is the law of Jamaica. They submit that in Jamaica, as well as in Barbados, the effect of Status of Children legislation is to put both father and mother on an equal footing in relation to the child. They argue that in the instant matter, "K" as father has conducted himself in a way that points to his acceptance of paternity of the child. They submit that in accordance with Jamaican law, the position of "K" is that by virtue of the Status of Children Act, he has an equal right to custody and joint parental responsibility in relation to "A". Alternatively, the applicable law would be that of the law of Barbados because that was the country from which the child was removed and that is the country where the child was ordinarily resident.

53. Alternatively, the Claimant's Attorneys-at-law have submitted that even if the applicable law is Montserrat, the law and "K's" rights thereunder may

well be the same in that under the law of Montserrat, the father of an illegitimate child is required to maintain his child.

54. The first question that I must resolve is what is the applicable law to be applied.

55. Dicey & Morris, The Conflict of Laws, (11th Edition) Volume 2, at pages 786 to 787:

    i. "the rights and duties of a parent as regards the person and upbringing of his minor child are not affected by the domicile or nationality of the parties, but are governed wholly by the law of England"

    ii. The learned authors further noted that:

    "According to the English rules of conflict of laws, the parental rights of a father or mother domiciled abroad over his or her minor child, whether born of a monogamous or polygamous marriage, are governed by English law, whenever an English court has jurisdiction to determine these questions between such parties. This is so even if the minor is residing outside of England and is a foreign national. More specifically, section 1 of the Guardianship of Minors Act 1971 re-enacting a provision dating from 1925 provides that in any proceedings before any court the custody or upbringing of a minor ....is in question, the court must regard the welfare of the minor as the first and

paramount consideration. This principle must be applied by an English court as part of the ***lex fori*** in all cases. It applies whatever the nature of the dispute before the court.....It applies not only in domestic English cases but also to cases where one or both of the parties is of a foreign domicile or nationality; and it may take precedence even over a guardianship or custody order made by a foreign court."

iii. Cheshire and North's Private International Law (12th Ed.); pages 728 –729, makes the point that the English court has jurisdiction even in respect of an alien child,

> "who, at the time of proceedings, is either (i) physically present though not domiciled in England, or (ii) is ordinarily resident, though not in fact present in England. In the case of a person too young to decide for himself where to live, his ordinary residence is the matrimonial home if his parents live together, but the home where he normally lives if they are separated....In a case of "kidnapping", the court would no doubt bear the same factors in mind, giving predominance to the welfare of the child, as in considering an application for an order as to the care of a child."

56. In disputes concerning the wrongful removal of a child from a foreign jurisdiction, the Learned Authors Cheshire and North, supra (at pages 742 – 743) give express recognition to the common law principles involving the unilateral removal of a child from a foreign jurisdiction and note that the cases are concerned with whether the English court should examine the merits of the case or make a summary order and send back the child to the jurisdiction from which he or she was removed.

57. These were authorities cited by "K's" Attorneys. Counsel for "D" says that K's attorneys are confusing two different principles. One is the question of status, that is, legitimacy or illegitimacy as an incidence of domicile, and the other is the question of the care and upbringing of children. She says that Dicey & Morris' statement about the "law of England" relates to the question of the care and upbringing of children.

She referred to the Halsbury's Laws of England, 4th Edition, Paragraph 138. Under a sub-heading "Persons entitled to exercise Parental Responsibility". Persons exercising parental responsibilities, that paragraph commences:

> "Where a child's mother and father were married to each other at the time of his birth they each have parental responsibility for the child. Where the child's father and mother were not married to each other at the time of his birth, the mother has parental responsibility for the child, and the father does not have parental responsibility...."

58. In making her submission in relation to the question of status, Counsel for "D" relied on the case of **Re Bischoffsheim** [1947] 2 ALL E R.830. In that case, Justice Romer laid down the following proposition where succession to personal property depends on the legitimacy of the Claimant, the status of legitimacy conferred on him by his domicile of origin (i.e. the domicile of his parents at his birth) will be recognized by our courts, and that, if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation.

59. **Re Bischoffsheim** was a case concerned with succession to personal property under a will. Essentially, it was decided that the status of legitimacy conferred on the child in question by the laws of New York would be recognized by the English Courts, and the child was entitled to share as a child of or in the share of the residency trust fund settled on her by the testator's will.

60. In the course of his judgement Romer J. quotes from the Judgment of Lord Wensleydale in **Fenton v. Livingstone** (1859) 3 Macq. 497548 where he expressed himself thus:

> "The laws of the state affecting the personal status of the subjects travel with them wherever they go, and attach to them in whatever country they are resident".

At page 833 of the Judgment, reference is made to **In re Goodman's Trusts** (1881), 17 Ch.D.266, 296, 297 where Lord Justice James

propounded the question "What is the rule which the English Law adopts and applies to a non-English child?" He answered the question thus:

> "This is a question of international comity and international law. According to that law as recognized, and that comity as practiced, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin – the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilized world. On principle, it appears to me that every consideration goes strongly to show, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations."

Lord Justice James says at page 299:

> "Heirship is an incident of land, depending on local law, the law of the country, the county, the manor, and even of particular property itself, the forma doni. Kinship is an incident of the person, and universal."

60. At page 828 of Dicey & Morris' work, under the sub-heading "Recognition of the Status of Legitimacy", the English Conflict of Law Rules in relation to children born within and outside of wedlock is stated as follows:

1. A child born anywhere in lawful wedlock is (or may be presumed to be) legitimate in England.
2. "A child not born in lawful wedlock is (semble) legitimate if, and only if, he is legitimate by the law of the domicile of each of his parents at the date of his birth".

61. **Re Bischoffsheim** is cited in support of that formulation. The authors then set out a fairly lengthy and complicated criticism of the case (page 832-835), partially because it appears to be difficult to reconcile with earlier authorities, partially because Romer J. seems to have equated the test for legitimacy with the test for legitimation and then having equated them, to have applied a test which was not in fact the test for legitimation. The authors also say:

> "... it may be questioned whether the court should have concerned itself exclusively (as it did) with the status of Richard. The question before the court was whether the claimant was Nesta's child **within the meaning of an English will**."(my emphasis)

62. At page 834 Dicey & Morris say that Re Bischoffsheim affords no solution in cases where the parents are at the time of the child's birth domiciled in different countries.

63. Dicey & Morris (page 835) indicate that **Re Bischoffsheim** "can perhaps be reconciled with the previous decisions by saying that a child not born in lawful wedlock is legitimate in England if, and only if, he is legitimate by the law of the domicile of each of his parents at the time of his birth. This formula has accordingly been adopted in ... (their) Rule", cited by me previously.

64. In this case, both "K" and "D" are nationals of Montserrat. Just to indicate how tortuous matters can become when one is dealing with the subject of private international law, I comment that at first blush one could be forgiven for assuming that since "K" and "D" are nationals of Montserrat, they are automatically to be taken to be domiciled in Montserrat. This is not the case.

65. Dicey & Morris, set out the following in relation to Domicile and Residence:

> "Rule 4 - A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home.
>
> (2) A person may sometimes be domiciled in a country although he does not have a permanent home in it (p. 116).
>
> Rule 5 – No person can be without a domicile (p. 120).
>
> Rule 6 – No person can at the same time for the same purpose have more than one domicile (p. 120).
>
> Rule 7 – An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (p. 122).

Then at page 125 – 126, under the sub-heading "Ascertainment of Domicile":

A. Domicile of Origin

Rule 9 – (1) Every person receives at birth a domicile of origin:

(a) A legitimate child born during the lifetime of his father has his domicile of origin in the country in which his father was domiciled at the time of his birth;

(b) A legitimate child not born during the lifetime of his father, or an illegitimate child, has his domicile of origin in the country in which his mother was domiciled at the time of his birth;

(c) A foundling has his domicile of origin in the country in which he was found.

(2) A domicile of origin may be changed as a result of adoption, but not otherwise.

66. **Comment**

A domicile of origin is attributed to every person at birth by operation of law. This domicile does not depend on the place where the child is born, nor on the place where his mother or father reside, but on the domicile of the appropriate parent at the time of birth. As a result of this rule, a domicile of origin may be transmitted through several generations no

member of which has ever resided for any length of time in the country of the domicile of origin".

67. I find this last rule and/or the rule in **Re Bischoffsheim** very puzzling. I whole-heartedly agree with the comment by Westlake criticizing Re Bishcoffsheim quoted at page 835 of Dicey & Morris that "it is thinking in a circle to refer the child's legitimacy to the law of his domicile of origin, since that domicile cannot be determined before it is decided whether or not the child is legitimate".

68. At pages 167 – 170 Dicey & Morris discuss the fact that nationality, domicile, and residence are quite separate things and that whilst in Europe, there has been a change from using domicile to nationality as the personal law for purposes of the conflict of law, the reform of the law of England is taking the concept closer to that of habitual residence.

69. There is no evidence before me as to whether "K" or "D" are themselves legitimate or illegitimate, or as to the domicile of the parents relevant to the determination of their own domicile of origin and I am not sure what exactly Rule 9 would entail if I were to use it to determine what was the domicile of "K" or "D" at the time of "A's" birth. However, on the evidence before me, I am of the view that at the time of "A's" birth, both of her parents demonstrated that they intended to reside permanently in Montserrat and that Montserrat was their permanent home. Applying Dicey's 4th Rule, I therefore find that "K" and "D" were both domiciled in Montserrat at the time of "A's" birth.

70. Applying that finding to "A's" case, and applying Dicey's Rules as to Legitimacy quoted above, the question of "A's" status, that is whether she is or is not legitimate falls to be determined by the law of Montserrat.

71. Dicey & Morris have said (I have not been able to find at what page in time for delivery of this Judgment, but will endeavour to find it later):

> "The term 'law of England' may thus, on the one hand, mean every rule enforced or recognized by the English courts, including the rules followed by English Judges as to limits of jurisdiction and as to the choice of law."

This is the sense in which the expression is used in the statement that "every case which comes before an English court must be decided in accordance with the law of England".

72. It is further stated:

> "The English Courts.....consider laws not from the point of view of the sovereign authority from which they emanate, but rather in relation to the people to whom and the matters to which they apply, and, so far as any definite theory can be said to guide their action, it is based on the desire to apply to any given set of circumstances that legal system which will afford results most in agreement with their views of convenience, equity and public policy."

73. I am, as a Judge exercising jurisdiction in Jamaica where "A" is physically present, required to decide the matter in accordance with the law of

Jamaica, but this includes our rules as to conflict of law/choice of law or private international law.

74. In my view therefore, in the statement in Dicey & Morris that the rights and duties of a parent as regards the person and upbringing of his minor child are not affected by the domicile or nationality of the parties, but are governed wholly by the Law of England, the words "the Law of England" include the rules followed by English Law as to the choice of law to apply in relation to the status, legitimacy or illegitimacy of a child.

75. It is not in dispute between the parties that by the law of Montserrat, it being a British dependency, a child born out of wedlock, "A" in the instant case, is considered as being an illegitimate child.

76. What is in dispute, it seems to me, is whether the concept of status includes the bundle of rights, so to speak, that are involved in rights of parental responsibility and/or rights to custody. I am of the view that Counsel for the Defendant has wrongly assumed that the fact that the choice of law for determining status is Montserrat, means that the choice of law for determining the **rights and duties** that **flows** from such status is the Law of Montserrat.

77. In Re Bischoffsheim it is to be noted that although the law of New York was applied in order to determine the status of Richard (since New York was the domicile of origin), it was English law which Romer J. applied in order to see what the consequence of and rights arising on Richard's status were.

78. In other words, the rules of private international law or choice of law, which form part of the law of Jamaica, require that one looks at the law in the country of the domicile of origin in relation to status. However, the law to be applied in determining what rights, duties or obligations apply to that status in terms of parental rights or prima facie custody rights is the law of Jamaica vis-à-vis those rights, duties or obligations. Alternatively, when considering the question of whether there has been a wrongful removal of "A" from Barbados by "D", it is the law of Barbados that would determine those rights. In the same way that James L. J. is quoted in **Re Bischoffsheim** as stating that heirship is an incident of land, depending on local law, parental rights and responsibility depend on local law, and kinship or status is an incident of the person and universal.

79. There is a passage in Dicey & Morris, on page 835 which I found most instructive. Under a sub-heading "Abolition of Illegitimacy in foreign system of law", Dicey & Morris put the matter thus:

> "A number of countries have passed legislation to abolish the categorization of children as "legitimate" and "illegitimate" (The footnote reads Scotland, Australia, and New Zealand). The effect of this on cases falling within our Rule has yet to be considered by an English Court. It might be necessary for such a court to decide for the purposes of a rule of English law, for example as to custody rights, whether a child was legitimate or illegitimate, the child might not be born in lawful wedlock (and so would not be legitimate under

clause (1) of the Rule) but both his parents might be domiciled in a country which no longer distinguished for the purposes of its law between legitimate and illegitimate children. It would be open to the court to hold that in the circumstances clause (2) of the Rule was of no assistance to the child (I assume because under that law the child is not legitimate as such as opposed to no longer being illegitimate). An alternative, and it is thought preferable, approach gives greater weight to the policy of the foreign legislation. If the effect of that legislation is to place the child in the same position as that of a legitimate child, he should be treated as legitimate **for the purposes of English law** (my emphasis) despite the absence of a designation of legitimacy in the foreign law. A Canadian court has adopted this approach, which accords with that adopted in a different context in English law: the nature and incidents of a particular status may be ascertained according to a foreign governing law, the English court then determining how categories used in English rules maybe applied."

80. This last quotation from Dicey in my view makes it clear that what the court is to do is to ascertain the status by virtue of the law of the domicile of origin, but then to that status is applied not what the law of the domicile of origin dictates are the rights of the parties, but what the law of the local country is in relation to the rights arising on the status as ascertained. In England, there is still a distinction between how persons born within and

outside of wedlock are treated. Therefore, what the English Court does is to ascertain what the status is based on domicile, and then, if the effect of the foreign law is to place the child born out of wedlock in the same position as a legitimate child, then the courts in England will afford to that child all the rights attendant on a legitimate status. In the converse situation, where the local country does not distinguish between how it treats persons born within or outside of wedlock, and has certain Status of Children legislation, one still ascertains status according to the law of domicile, but then that status really ceases to be relevant for all intents and purposes because the country exercising jurisdiction treats all persons the same, whether born within or outside of wedlock.

81. I wish to refer to a passage on page 980F-981A in the case of **Re: P.(G.E.)**1964 3 All E.R. 977, a case which I return to later, dealing with the law of ordinary residence, which in my view disposes of the point advanced on behalf of "D" that the custody rights of "K" and "D" in relation to "A" are included in the concept of her status, which status is determined by the domicile of origin, i.e. Montserrat.

After delivering himself of the following enchanting declaration:

> "We are not to be deterred by the absence of authority in the books. Our forefathers always held that the law was locked in the breasts of the judges, ready to be unlocked when the need arose."

Lord Denning had this to say:

"Counsel for the mother invited us to hold that the Court of Chancery has jurisdiction over any child *domiciled* here. He asked us to follow the Scottish law, supported by Dicey on the Conflict of Law, 7th Edition at p.390. It appears that the Scottish courts hold that they have jurisdiction over any child under 16 who is domiciled in Scotland even though the child is not resident in Scotland nor physically present there. **The custody of a child, say the Scotsmen, is a matter of status, and is governed by the law of the domicil.** An order for custody, they say, made by the court of the domicile, is a judgment in rem and should be recognized everywhere."

I do not think that we should follow the Scottish courts in this matter. The tests of domicil are far too unsatisfactory. In order to find out a person's domicil, you have to apply a lot of archaic rules. They ought to have been done away with long ago. But they still survive....if you were to ask what was the domicil of the child in this case, you would have a pretty problem. The child would take the domicil of the father. But what was the father's domicil? His domicile of origin was Palestine. His domicile of choice was England. But in November, 1962, he left England for Israel, taking the child with him. What was the father's domicil then? **It all depends on his intention. Goodness knows how you are going to find that out!** His intention may at first have been to go to Israel

for a short time. Later, when he found work there, he may have intended to make his home there permanently. When did his domicile change? **Are you to take his word for it? If so, he could always defeat the jurisdiction of the court by saying that from the very outset, he intended never to return to England, and abandoned his English domicil**

....ordinary residence is the right test". See also Pearson L.J.PAGE 984E-G.

Although domicil was here being rejected as the law for determining jurisdiction in relation to custody, it appears to me that domicil would also be the wrong basis for determining prima facie custody rights.

81a. In addition, there may well be scope for an argument that even if the law of status and domicile determine prima facie custody rights, "K's" and "D's" domicile of choice may have changed from Montserrat to Barbados, and that even in that case, the law to be applied in relation to "A" is the law of Barbados. This is because in the case of "K", he now has his home in Barbados, and in the case of "D", the letter written by her Attorneys referred to at paragraph 33 above and the circumstances surrounding Montserrat, may indicate that Barbados is now her domicile of choice.

82. I therefore hold that whilst the status of "A" is to be determined by the law of Montserrat, the proper next step for me is to apply to that status what the laws of Jamaica dictates are the rights arising therefrom. I should point out that in coming to this view, there is a consequence that has given

me pause. That is, that if I am correct, it would mean that by the mere movement of a child from one country to the next there may be a state of flux in the parental rights of the father, one day he has rights, and the next he has not, and that this may not seem logical or right. However, it seems to me that that is just a consequence and corollary of the private international law based upon movement in time and space.

I move on. Which law should properly be applied at this juncture, is it the law of Jamaica or the law of Barbados?

83. In the case of **Re M** reported in the 1995 2 F.L.R224 (Jurisdiction:Forum Conveniens) a case to which I will return later, the Court exercised its jurisdiction to send back to the country of habitual residence in a case that was not an abduction case. In so far as this type of jurisdiction is exercised, then the applicable law is the law of Jamaica.

84. However, in my view, in so far as I am being asked to exercise my jurisdiction to send "A" back to Barbados on the basis of wrongful abduction, then the choice of law that I should apply in deciding that question seems to me to be the law of Barbados. I find some support for that in the case of **McM v. C** [1980] 1N.S.W.R. 1, a case which I shall also have to return to later in this judgment. In that case the Supreme Court of New South Wales was considering a case of wrongful removal having to do with the wrongful removal of a child from Victoria to New South Wales. Powell J., although applying the law under the New South Wales Children (Equality of Status) Act, (the country where the application was taking

place and to which the child had been removed), had this to say with regard to the Victoria Status of Children Legislation (the country from which the child had been removed): (p. 12) –

> " – it may be that, in the circumstances of this case, the relevant legislation is not the Children (Equality of Status) Act, but the Status of Children Act 1974 (Vic), but it seems to me that the result would be unlikely to be different, for the provisions of S. 3 (1) of the latter Act, although differing in language, are at least as extensive in their operation as the provisions of S.6 of the former Act, if not more so".

85. It also seems to me to be a matter of common sense that if I am to determine whether there has been a wrongful removal of "A" from Barbados, then I must by the law of Barbados see whether it was wrongful. I find support for my views in Chapter 4 of the Dicey & Morris headed "The Time Factor".

86. At page 59 it is stated:

> "The conflict of laws deals primarily with the application of laws in space. Yet as in other branches of law, so in the conflict of laws, problems of time cannot be altogether ignored...
>
> Three different types of problems have been primarily identified by writers. The time factor may become significant if there is a change in the content of the conflict rule of the forum, or in the content of the connecting factor..., or in the content of the lex causac, that is the foreign law to which the connecting factor refers."

87. On page 62, under a sub-heading "changes in the connecting factor" the authors state:

> "From the temporal point of view the connecting factor in a rule of the conflict of laws may be either constant or variable. It may be of such a character that it necessarily refers to a particular moment of time and no other, or it may be liable to change so that further definition is required...
>
> Examples of constant connecting factors in the English conflict of laws include the situs of an immovable, the place where a marriage is celebrated, a will executed, or a tort committed. Examples of varying connecting factors include the situs of a movable, the flag of a ship, and the nationality, domicile or residence of an individual.
>
> ... if chattels are taken from one country to another by someone not the owner and disposed of there to a third party, does the first or the second situs determine whether the owner looses his title?"

88. Reasoning by analogy, a determination of whether "A" was wrongfully removed is a determination under the law where the wrong was committed i,e, in Barbados.

89. It is useful to see how the matter is treated under the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25th October 1980. At page 9 of Miss Tracey Robinson's opinion she indicates that Montserrat, a British dependency, has enacted local legislation to

implement the provisions of the Convention. Jamaica and Barbados are not signatories to that Convention.

Article 3 of the Convention provides:

The removal or retention of a child is to be considered wrongful where:

(a) "The removal or the retention is a breach of rights of custody attributed to a person...either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

90. I must now therefore see how status and parental rights are treated under the laws of Barbados, and in the event that I am wrong and the relevant law with the abduction cases is Jamaica, under the laws of Jamaica.

91. Section 3 of the Barbados Status of Children Reform Act, 1979 reads as follows:

"For the purposes of the laws of Barbados the distinction at common law between the status of children born within or outside of marriage is abolished, and all children shall, after the commencement of the Act, be of equal status; and a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside of marriage."

92. In his Treatise, "The Law Relating to Children in Jamaica" Part II, Leighton Jackson, then lecturer at the Faculty of Law, Cave Hill Campus, had this to say of the section:

"The Barbados section clearly and systematically does four things. It abolishes the old common law dichotomy; declares the equal status of children, establishes the new status; and lays to rest the criterion of marriage as a determinant of status."

93. The Barbados Family Law Act, Cap. 214, governs the law relating to custody and the welfare of children of a 'union other than marriage' or a marriage. This is the union which "D's" Attorney's declared existed between "K" and "D" in the letter set out at paragraph 33 above. It is interesting to note that by virtue of the existence of this union, "D" was attempting in 2001 to seek maintenance from "K" not only in relation to "A" but also in relation to herself. The Act defines 'union other than marriage' in section 39 as a "relationship that is established when a man and a woman who, not being married to each other, have cohabited continuously

for a period of five years or more and have so cohabited within the year immediately preceding the institution of proceedings".

- Proceedings between parties to a union other than marriage in respect of custody, guardianship or maintenance of or access to a child of such a union is defined by section 2 of the Family Law Act as a 'matrimonial cause'. Section 19(3) provides that the High Court of Barbados has jurisdiction to hear such matters if:
  - (a) either party to the proceedings is a citizen of Barbados at the time on which the proceedings are instituted in the court;
  - (b) either party to the proceedings is present in Barbados at that date; or
  - (c) the proceedings relate to a child of the parties and the child is present in Barbados at that date.
- At first blush, "K" and "D" do not appear to qualify as members of a union other than marriage since they were not so cohabiting within the year immediately preceding the institution of proceedings. However, it may well be that there is case law which qualifies or interprets this law in some other way. It is interesting to note that in 2001 "D's" Attorneys-at-law considered that "K" and "D" developed a union other than marriage. They referred to a case which they say demonstrates that the union still exists, even though "K" had gotten married to someone else. It would have been interesting to

see how such a case was reasoned, since it may well be a strange concept for the parties to have certain rights in relation to the children and then to no longer have them if they separate, and proceedings are not brought within a year.

94. Under the law of Barbados, parents of a child of a union have joint custody of the child. Section 40(1) provides as follows:

> "Each of the parties to a marriage or a union is a guardian of every child of the marriage or union who has not attained the age of eighteen (18) years; and the parties of the marriage or union have the joint custody of each child."

95. S. 43(1) of the Family Law Act provides that:

> "In proceedings in respect of the guardianship or custody of, or access to, children of a marriage or union,
>
> (a) the court shall regard the welfare of the children as the first and paramount consideraton;"

96. The Minors Act, Cap. 215, L.R.O., 1985, applies to children born outside of marriage who are not children of a 'union'. This in my view would be the custody Act most relevant to the instant case. Section 7 of the Minors Act as amended by the Status of Children Reform Act, Cap. 220, L.R.O., 1985 makes it clear that unmarried fathers who are not part of a 'union' have a right to make an application for custody. It provides:

> "The Court may, upon the application of any parent of a minor, make such order as it may think proper regarding the custody of

such minor and the right of access thereto of either parent, having regard to the welfare of the minor and to the conduct of the parents and to the wishes as well of the mother as of the father".

97. The Maintenance Act, Cap 216 – grants the Court jurisdiction to address custody on the application of the mother where a custody order has been made, but does not give a similar right to the father. Section 8 provides:

> "Where, in any proceeding before the Court, the custody or upbringing of a minor ... is in question, the Court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration and shall not take into consideration whether from any point of view the claim of the father or any right at common law possessed by the father, in respect of such custody, upbringing ... is superior to that of the mother or the claim of the mother is superior to that of the father".

98. The Minors Act is a version of United Kingdom legislation that also exists in Jamaica. Dr. Leighton Jackson at page 21 of The Law Relating to Children Part 1 (1984) has commented on the Jamaican Act as follows:

> "[It] did not generally reverse this exclusive position of the fathers. The legislation only provided that **in any proceeding** the Court 'shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing administration or application is superior to that of the mother, or that the claim of

the mother is superior to that of the father'. The Act clearly does not purport to abolish the common law position".

99. It would seem clear that on the face of it, the Barbados Minors Act left intact the superior rights of the father of the child born within marriage and the mother of the child born outside of marriage. The importance of this point is because the question in the present case is what are the parental rights **prior** to an application being made for custody since there has been no application or court order in this case.

100. The question therefore crystallizes itself into what is the effect of the Status of Children Reform Act of Barbados.

101. On page 13 of Ms. Robinson's opinion, she sets out her views on the effect of the Act, and she states that there is no Barbadian case law in support of her contention as to the effect, but that it is consistent with a line of Australian cases interpreting their status of children legislation.

102. I think that it would be appropriate at this juncture to examine some of these Australian Authorities, which are also referred to in Mr. Leighton Jackson's Report.

In **Youngman v. Lawson** [1981] 1 NSWR 439, the Court of Appeal of New South Wales had occasion to consider the The Children (Equality of Status) Act, 1976.

Section 6 of that Act provides:

"Subject to sections 7 and 8, whenever the relationship of a child with his father and mother, or with either of them falls to

be determined under the law of New South Wales, whether in proceedings before a Court or otherwise, that relationship shall be determined irrespective of whether the father and mother of the child are now or have ever been married to each other, and all other relationships of or to that child, whether of consanguinity or affinity, shall be determined accordingly."

At page 443 – 444 of that Judgment, Chief Justice Street stated:

"A cognate provision in the equivalent Victorian legislation was considered by the High Court in **Douglas v. Langano** [1981] 55ACJR352. The Court in a single joint judgment took the view that the equivalent Victorian provision had the effect of 'equating the relationship between an ex-nuptial child and its parents to that of a nuptial child and its parents...

... The Victorian Statute is not in precisely the same terms as the New South Wales Statute. The policy that each seeks to implement is the same and certainly for present purposes, that is to say for the determination of the guardianship of an illegitimate child, the foregoing statements can be directly applied.

It is clear that the effect of Section 6 is to cut across the long established common law situation".

103. Under the Family Law Act of New South Wales, parties to a marriage are guardians and have joint custody of the child.

In **Gorey v. Griffin** N.S.W.R.739, the Court rejected an argument that Section 6 of the New South Wales Act, whilst making an ex-nuptial child, in law, the child of its father, does not make the father, in law, the father of the child. Upon its true interpretation, it was held, Section 6 alters the status of fathers in the same way as it alters the status of the child. At page 744 Mahoney J.A.stated:

> "It was submitted in argument that, though this makes the child the child of his father, it does not make the father the father of the child; that it is a provision which alters the status of the child, but not the status of the father....Section 6 is concerned with the legal relationship between father and mother and their child. The alteration of that relationship is what the section is concerned with, not purely that of the status of the child."

In my view, this case supports the view which I have taken that status is determined by the law of domicile, but does not include parental rights. It is the triangular status of the child, mother and father that are fixed by the law of the domicile, not the parental rights.

104. In G v. P [1977] V.R.44, Justice Kaye, Judge of the Supreme Court of Victoria, held that both at common law as parens patriae and pursuant to Section 147 of the Marriage Act 1958 as amended by Section 12 of the Status of Children Act 1974, the Court has jurisdiction to direct that the

mother of an illegitimate child cause her infant to be known by his putative father's surname.

Section 3(1) of the Status of Children Act of Victoria reads as follows:

> "For all the purposes of the law of Victoria, the relationship between every person and his father and mother shall be determined irrespective of whether he was born in wedlock or out of it".

Kaye J. then said:

> "In my view, the effect of this section is to declare that, as between him and his father and mother, a child's rights and duties are the same irrespective of whether he was born in wedlock or out of it".

105. In **Gorey v. Griffin** – [1973] 1 N.S.W.R 739, at page 753 Mahoney J. J. A. expressed himself thus:

> "Section 6 (of the Status Act) is drawn in terms of principle, and is in my opinion, intended to be applied generally to legislation in which the relationship of a child with its father falls to be determined and to alter the operation of that legislation accordingly. Having regard to the evident purpose of the Status Act, it should in my opinion, be given a wide and beneficial operation. In a case in which the jurisdiction of a court depends upon whether the relationship of a natural parent to his child is nuptial or ex-nuptial, that relationship within the Status Act, 'falls to be determined'".

106. **McM v. C**, to which I have already referred previously, is in my view, a very important and relevant case in relation to the matter now before me.

The plaintiff was an unmarried mother of an illegitimate child. The mother was born in Victoria and ordinarily resided there, and the father was a national of New South Wales and lived for some years in Victoria.

The mother came to New South Wales for a holiday, met a gentleman and decided to return to live there and marry. She took the child and left. The father went to Emerton and took the child and returned with the child to Melbourne. The mother filed proceedings seeking custody of the child and an order was made to that effect and served on the father who did not return the child.

At the contested hearing, at which the father was required to purge his contempt and return the child, there was a dispute between the parties as to whether the father had acquiesced in the child being removed from the state as against his denial that he knew of nothing of the mother's intention to leave the jurisdiction. It was held inter alia that:

> "If the inherent jurisdiction of the Court is invoked then, either the child must be present within the state, or it must be ordinarily resident within the state; In the present case, since the child was not, at any relevant time, in fact present in the State, the question was whether or not it was, none the less ordinarily resident in the State; it appeared that at all relevant times, the ordinary residence of the respondent was within the State; it did not follow from this, however, that the child was resident within the State; This was because from the coming into operation of the Children (Equality of

Status) Act... the rights and obligations of the mother and father of an ex-nuptial child, vis-à-vis that child are by s. 6 to be equated to the rights and obligations of the parents of a legitimate child, vis-à-vis that child; it did not appear that the position would be any different if the matter fell to be decided pursuant to s. 3(1) of the Status of Children Act 1974 (Vic); From this it followed that it was not open to the plaintiff unilaterally to change the ordinary residence of the child; she could do so only if the defendant acquiesced." (Headnote)

The learned judge made the following holding with respect to the issue of change of ordinary residence involving a child born out of wedlock in these terms:

"I accept that, as a matter of law, it is possible for a person to change his or her ordinary residence virtually overnight: **McCrae v. McCrae**; and I accept as well, that, unless the right to do so has in some way been cut down by statute, it was and is, the right of the mother of an ex-nuptial child to change its ordinary residence at her whim. If therefore, the matter were to be decided without reference to the effect, if any of the provisions of the ***Children (Equality of Status) Act***, I would have been disposed to hold in the present case that, at all relevant times, the ordinary residence of the mother (and thus of the child) was within this State, for the only evidence relevant to this issue would have been the unchallenged evidence

of the mother that, at the time when she came to this State, it was her intention to reside here indefinitely.

However, Mr. Hewitt has submitted that, even if (which was disputed) this might otherwise have been the position, the rights of a mother in respect of her ex-nuptial child, and in particular, the right of such a mother to determine the place of ordinary residence of her child, have been dramatically diminished by the provisions of s. 6 of the ***Children (Equality of Status) Act***, which provides as follows: "Subject to sections 7 and 8, whenever the relationship of a child with his father and mother, or with either of them, falls to be determined under the law of New South Wales, whether in proceedings before a court or otherwise, that relationship shall be determined irrespective of whether the father and mother of the child are or have ever been married to each other, and all other relationships of or to that child... shall be determined accordingly...." [page 12]

107. Powell J reasoned that with "the coming into operation of the ***Children (Equality of Status) Act***, the rights and obligations of the mother and father of an ex-nuptial child, vis-à-vis that child, are to be equated to the rights and obligations of the mother and father of a legitimate child, vis-à-vis that child.....if one is to apply such approach, that it was not open to the plaintiff unilaterally to change the ordinary residence of the child; she

could change the residence of the child only if the defendant acquiesced in her doing so: ***Re P. (GE (An Infant)*** ...per Denning M.R." [page 13]

108. As Miss Robinson states in the footnote 18 on page 13 of her opinion, there is an argument that since the Barbados Family Law Act contemplated expressly children born out of wedlock and equalized the position of such children where they were born in a union to those of marriages, given the express provision for children of a union, joint custody is limited to the specific purposes outlined therein. The logic continues that outside of the Barbados Family Law Act what would be established is non-exclusive guardianship by both mother and father of a child born outside of marriage.

109. In my view, the effect of the Status of Children Act of Barbados is clear in abolishing the old common law distinction and in creating equal status. The Act not only equalized mothers and fathers as applicants before the Court, but in abolishing the old common law distinction, had the result that the mother and father of a child born out of wedlock have joint custody and guardianship of their child, or at any rate, non-exclusive rights of guardianship. For present purposes it matters not whether there was joint custody or non-exclusive guardianship; the point is that they had equal rights under the law in relation to the child in a situation **prior** to application before the Court. It follows that "K" would have had the same rights, prima facie or otherwise, as would "D" in relation to "A" under the law of Barbados before the removal of "A".

110. I now turn to consider the 1976 Status of Children Act of Jamaica. The Act declares in its preamble that its " purpose is "to remove the legal disabilities of children born out of wedlock and to provide for matters incidental thereto".

The Act provides, in section 2, that, "child" includes a child born out of wedlock".

Section 3(1) states:

> "Subject to subsection (4) and to the provisions of sections 4 and 7, for all the purposes of the law of Jamaica, the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly".

111. Section 18 of the Children (Guardianship and Custody) Act provides as follows:

> "Where in any proceeding before any Court the custody or upbringing of a child...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 point of view the claim of the father, in 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"

112. Our Court of Appeal has considered the question of the parties' rights to apply for custody in the case of **Forsythe v. Jones** Civil Appeal No. 49 OF 1999. The matter concerned an application by an unmarried father for custody of his son.

113. Harrison J.A. had this to say at pages 5-6 of the Report, having cited section 18 of the Children (Guardianship and Custody) Act:

> "At common law, the authorities have established that the mother of an illegitimate child has a prima facie right to its custody:(**Barnado v. McHugh** [1891] A.C.388). This right arose as a consequence of her obligation to maintain her child..."

Then having referred to sections 2 and 3 of the Status of Children Act, Harrison J.A. expressed the legal position thus:

> " The rationale therefore, is that the father of the illegitimate child, previously not contemplated as competent to apply for custody under the Act provisions of the Children (Guardianship and Custody) Act, may now do so.

114. The relationship of all children to their parents, particularly an illegitimate child to its father who has accepted paternity is now the same, whether or not the parents "are or have been married to each other". (my emphasis).

115. In my view, the words of Justice of Appeal Harrison are wide enough to encompass the fact that under Jamaican law, even prior to application for custody, the rights of the father and of the mother in relation to their child

born out of wedlock are equal. This is because at common law, the father of the child born within wedlock was the guardian of a child, and this must also be the position of the father of the child born out of wedlock, to accord with the legislation (Youngman v. Lawson). Equally, the child born within marriage cannot be in any different a position vis-à-vis his or her mother and so the mother of a child born within marriage would after the Status of Children Act become a guardian of the child. Having regard to the evident purpose of the Act, it must, on the authorities, be given a wide and beneficial interpretation, and it appears to me that although the Jamaican Act, unlike the Barbadian Act, does not speak directly to the question of whether all children are now of equal status, (though the marginal note is "all children of equal status"), if the converse to the argument put forward in **Gorey v. Griffin** were to be put forward i.e. that the Act changes relationships between the mother and father and the child, but not status, a Jamaican Court would reject such an argument.

116. In sum, therefore, I find that the position under the law of Jamaica is the same as that under the law of Barbados, i.e. that the father and mother have equal and non-exclusive rights to guardianship and custody.

117. I wish at this juncture to deal with a contention advanced by Counsel for "D" to the effect that the wording of subsection 4 supports her argument that custody rights are to be determined by the law of domicile. Subsection 3(4) provides:

" nothing in this section shall affect or limit in any way any rule of law relating to---

(a) the domicile of any person.

118. I think that the submission is misconceived. What the sub- section means, is that in so far as Status is determined by the Law of domicil, in so far as section 3 deals with the question of status, it does not affect the general conflict of law rule that Status is determined by domicile. I do not understand the section to be addressing domicil in relation to the rights of the parties.

119. I am therefore of the view that whether under the law of Barbados, or the law of Jamaica, "K" would have had equal rights to guardianship or custody prior to any court application. For completeness, I must deal with the law of Montserrat in the event that I am wrong about the correct choice of law to be applied.

120. I accept Counsel for "K's" submission that "K" having clearly acknowledged and accepted paternity, and actively acted as father towards "A" right up to the date of her removal, it is arguable that he has the same rights as "D" under the laws of Montserrat. In so far as the superior common law right of a mother to prima facie custody is based on a duty to maintain, where a father of a child born out of wedlock is required to maintain the child, there should be a corollary right to custody. At page 7 of her Report, Miss Robinson indicates that "K" would have a duty to maintain "A" under the Magistrates' Court Act of Montserrat, 1984.

121. Miss Robinson, I note with interest, seems to share Counsel for "K's" views. However, she states, at page 7 of her opinion:

> "to the best of my knowledge, no courts in the Caribbean have taken this extended position. The anomaly of placing obligations on men to support but providing very limited rights to custody appears to have been accepted throughout the Caribbean Region"

122. It appears to me that a number of the Caribbean cases to which I was referred, were decided either prior to the passage of legislation imposing a duty on men to maintain, or alternatively, the point has not been forcefully argued before a court. I am of the view that support for the rationale of the father being entitled to custody rights as a result of the imposition of the duty to maintain is to be found in the Judgment of Harrison J.A., in the case of **Forsythe v. Jones**, which I have already cited.

123. The case of **Barnardo v. Hugh** [1891] A.C.388 is oft cited in this context. Part of the reasoning in that case seems to have been concerned with simply the relationship of mother and unborn child. In so far as that aspect of the reasoning is concerned, it seems to me that a father who has accepted paternity, has his name registered as father on the birth certificate, and has actively played the role of father in a child's life, should not be accorded inferior rights to a mother by regarding him through the prism of 19th Century vision.

124. In so far as part of the reasoning in that case was based on the duty to maintain, I note with interest that there is support for the view being

advanced in the well-known Text, **Principles of Family Law, by Creightney, 4TH Edition**. Having referred to **Barnardo v. McHugh**, in relation to the natural rights of the mother to custody, at page 611, footnote 16, the learned author states:

> "Part of the reasoning was that the obligation imposed on the mother by the Poor Law to maintain her child gave her a corresponding right to custody: see per Lord Halsbury L.C. [1891] A.C. at pgs. 395, 398. Since a man who has been adjudged the putative father is now also bound to support the child (Supplementary Benefits Act 1976, s.17(2)), he should on this reasoning be entitled to custody."

125. A bold Court of Montserrat, armed with the fact that some of the earlier cases dealing with short thrift with the rights of fathers were decided before the imposing legislation, and that the point may not have been argued previously, would be justified in deciding that "K" and "D" have equal rights to guardianship and custody in relation to "A". This is the type of moment Lord Denning spoke about in **Re P. (G.E.)** when the law needs to be unlocked. I daresay Harrison J. A has opened it a peep.

126. I have therefore come to the view that whether under the laws of Barbados, Jamaica, or Montserrat "K" had equal rights to the guardianship and custody of "A" at the time of her removal from Barbados, and he was actively asserting those rights.

127. I now turn to a consideration of the law relating to this summary jurisdiction. Many cases were cited to me in relation to this jurisdiction, all of which cannot be addressed.

128. A useful starting point is the English Court of Appeal decision in **<u>In re T (Infants)</u>** [1968] 3 W.L.R.,430,the Court rejected an argument that there had to be in existence a court order in the foreign jurisdiction before such a summary order should be made.

129. In **<u>In re H. (Infants)</u>** [1966] 1 W.L.R. 381 concerned a mother who removed two American boys from the United States of America.

In upholding the decision of Cross J. ordering the return of the children to the jurisdiction of the New York Court, Wilmer L.J. stated: (page 396-397)

> " It has been argued before us that the judge was precluded by authority from making an order which he did, permitting the boys to be removed from the jurisdiction unless and until he had himself conducted a full inquiry into the whole merits of the dispute between the father and the mother...it was contended by Mr. Lightman that this court cannot abdicate its responsibility for its own wards.
>
> As I think was pointed out by the judge, if the view of Mr. Lightman is correct, it would undoubtedly confer a great and undesirable advantage upon the parent whom I may call the "kidnapping" parent who has wrongly brought the infant in question to this country. I entertain no doubt that such a full enquiry as he envisages might

well last for months, especially having regard to the need for evidence from abroad. There would thus be a grave risk that, by the time the judge who eventually had to deal with the case came to his decision, he would find it very hard to make any order which would have the effect of taking the children away from a home in which they would, by that time have taken root. For my part I wholly agree with that view...that if these boys are to be sent back to the United States at all, it is in their interest, and in the interests of their welfare that, that they should be sent back as soon as possible, indeed the sooner the better."

130. In the leading English Court of Appeal decision **In re L.(Minors)**[1974] 1 W.L.R., 264, dismissing a mother's appeal from an order that the children be returned to Germany, the Court of Appeal held that , inter alia, in a kidnapping case, whether the court made a summary order or an order after investigating the merits, the welfare of the child was always the first and paramount consideration.

At page 264 of the judgment, Lord Justice Buckley stated:

"To take a child from his native land, to remove him to another country where, maybe his native tongue is not spoken,.... To interrupt his education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a

case is promptly brought to the attention of the court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may well be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing new roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child."

It is to be noted that earlier in his judgment on the same page, Buckley L.J spoke of the matter this way:

> "(the court) may conclude that the child should be returned to his or her native country **or the jurisdiction from which he or she has been removed : in re T. (Infants)**[1968] Ch. 704." (my emphasis).

131. In **R (Minors) (Wardship: Jurisdiction)** (1981) 2 F.L.R. 416 the court had to consider a mother's kidnapping of her children from Israel to England in breach of an Israeli court order. It was held, inter alia:

(i) all decisions relating to children were governed by the principle stated in s. 1 of the Guardianship of Minors Act 1971 that in any proceedings in which the custody of a minor is in question, the court in deciding that question shall regard the welfare of the child as the first and paramount consideration;

(ii) it followed, therefore, that the strength of an application for the return of a child to the country from which he had been removed must rest not on the "kidnapping" of the child, nor on an order of a foreign court, but on an assessment of the best interests of the child;

(iii) "kidnapping" was to be strongly discouraged by the swift, realistic, and unsentimental assessment of the best interests of the child which would lead, in proper cases, to the prompt return of the child to his own country, but *not* the sacrifice of the child's welfare to some other principle of law; the question was not whether the child would be " harmed" by being sent back to the country from which he had been removed **Re H (Infants)** [1966] 1 W.L.R. 381, but whether that course would best serve the child's interests:

<u>Re: L (Minors)(Wardship; Jurisdiction)</u> [1974] 1 WLR 250 and **<u>Re C (Minors) (Wardship: Jurisdiction)</u>** [1978] Fam followed;

(iv) when, at the hearing in December 1979, the judge dismissed the father's application for the children's return to Israel, thereby refusing to make a summary order, he should then have considered the case on the merits, for there was no *via media* between a ruling that the foreign court was the *forum conveniens* (whereby the English Court abdicated its jurisdiction) and considering the matter on its merits; indeed, the concept of *forum conveniens*, as the phrase was used in other kinds of jurisdiction, had no place in the wardship jurisdiction.

132. Right after indicating at page 425 his view that "kidnapping" is to be strongly discouraged, Omrod L.J. stated:

> " It might remove some of the confusion of thought which bedevils these cases if "the kidnapper" was allowed to join "the unimpeachable parent " in forensic limbo.

133. In **<u>Re R</u>**, the case took over two years to be resolved in the English Courts which the Court of Appeal criticized as being protracted, and involving inordinately prolix proceedings, which impacted negatively on the children concerned.

At page 427 Omrod LJ stated:

"The *a priori* assumption that return to Israel would inevitably be in their best interests had become untenable by March 1981.... The pull of gravity from the country of origin diminishes at an accelerating speed with the passage of time."

In **Re R** the judge in March 1981, on the basis of forum non conveniens, made an order for the children to go back to Israel, which was effectively making a summary order that had been refused from as far back as 1979. The Court of Appeal allowed the Appeal, and indicated that the children should remain in England with the mother, since on the facts as they were at the final hearing the order resulting in return could not be supported.

134. The relevant principles governing the Court's power to order the summary return of the child to the jurisdiction from which he or she has been removed have been distilled in **Re Z (Abduction)(Non-Convention Country)** [1999] 1 F.L.R. 1270. In this case seven months had elapsed between the arrival of the children in England, from Malta, and the decision to send them back to Malta.

It was held-ordering summary return of the child-

(1) The governing principle in a non-convention case was the welfare of the child, and there was a general presumption that, in the absence of good reasons to the contrary, it would be in the best interests of the abducted child for questions about his or her future to be determined by the courts in the child's country of habitual residence. This presumption was

justified by a number of factors, including the considerations that generally the courts of the country from which a child had been abducted would be in a better position to resolve disputes relating to the child's future, and that generally it was better for a child to have his or her future determined without the impact of a unilateral and wrongful removal of the child from their home. Using this approach, the main focus of the court's attention was upon: (i) the effect that an order for return would have on the child's welfare in the interim period between return and the foreign courts' determination of the child's medium to long-term future; and (ii) the manner in which those courts would determine the medium-to- long-term interests of the child. However, the English court was not precluded from having regard to the medium- to-long term future of the child, and thus to the possible outcome of proceedings in either jurisdiction.

(2) Agreement or acquiescence should be taken into account by the court in the exercise of its discretion in a non-Convention case, but it would be wrong to lay down rules or presumptions about the general effect of agreement or acquiescence in non-Convention cases. Much would depend on the circumstances. In this case there had been no acquiescence. After the child's removal from Malta, the

mother and father had entered into a prolonged period of negotiation, during which no firm agreement was reached.

(3) Although there were welfare factors to place against the presumption that return would be in the child's best interests, such as the fact that the child had settled well at school, the length of time since the original removal, and the real possibility that the Maltese court would ultimately allow the mother and child to return to England, the general presumption was not outweighed and the child's return to Malta would be in her best interests.

135. Charles J. deals with the issue of consent and acquiescence extensively, and in detail, both as to law and as to the facts-pages 1286-1291. At page 1286 he states:

"This has a legal and a factual aspect.

Counsel for the mother, in my judgment correctly, contended and accepted that:

(a) the mother had to establish that the father's consent or agreement was positive and unequivocal but need not be in writing(see by way of analogy Re K (Abduction: Consent) [1997]2 FLR 212, 217H),and

(b) in deciding whether or not the father had so acquiesced I should apply the approach decided by the House of Lords in **Re H (Abduction: Acquiescence)** [1998] AC 72, [1997]

1FLR 872to be the correct one in non-Convention cases. That case was concerned with what constituted acquiescence for the purpose of Art 13 of the Hague Convention and thus as to what constituted one of the grounds for refusing summary return and a trigger to the discretion to refuse an order returning the child under the Hague Convention and the Child Abduction and Custody Act 1985. That discretion is not on all fours with the discretionary jurisdiction in non-Convention cases.

He then stated that non-Convention cases do not need this type of trigger for exercise of the discretion.

Re H (Abduction: Acquiescence) decides that:

(a) acquiescence is a question of fact,

(b) acquiescence is a matter of the actual subjective intention of the wronged parent, save only where his, or her, words or actions showed clearly, and has led the other parent to believe that he, or she, was not asserting, or was not going to assert, his, or her, right to summary return and were inconsistent with such return, and

(c) the courts should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child."

136. Counsel for the Defendant referred me to a Convention case, the reasoning in which I think would have been very useful had I not found that "K" has rights of guardianship and custody of "A". The case is **J (a minor)(abduction: custody rights), In re[1990] 2 A.C562**. I was handed a copy of the case which was printed off the internet and the only pagination I see are pages numbered 1-5 so I will make reference to pages using that numbering. The material facts are these. J was born out of wedlock in Western Australia. His parents were born in England and were citizens of the United Kingdom. The parents had come to Australia separately to work, they met and commenced living together. They never married. Both the father and the mother were registered as J's parents. The relationship deteriorated, and eventually the mother, having concealed her intentions from the father, flew with J to England. It was then, and remained ever since, the settled intention of the mother not to return to Australia but to make a long-term home for herself and J. in England. Both Australia and the United Kingdom are parties to the Convention on the Civil Aspects of International Child Abduction "the Convention". The father applied to the English Courts for the return of J, an Australian Court having declared the removal of J from Australia to have been wrongful. His application was dismissed, and Appeals to both the Court of Appeal and the House of Lords were dismissed.

137. On page 1 of the judgment Lord Brandon of Oakbrook said:

"This appeal concerns the interpretation and application to somewhat special facts of the...Convention."

On page 2 of the judgment he expands:

> "The crucial feature of this case is that the mother was not married to the father, either when J. was born or at any time afterwards. In that situation section 35 of the Family Court Act 1975 of Western Australia as added by the Family Court Act Amendments and Acts Repeal Act 1979, section 23 governed the rights of the parties in relation to J. That section provides:
>
> > "Subject to the Adoption of Children Act 1896 and any order made pursuant to this Division [i.e.this part of the Act], where the parents of a child who has not attained the age of 18 were not married at the time of the birth of the child, or subsequently, the mother of the child has the custody and guardianship of the child."

138. I pause in quoting from Lord Brandon to note that the law in Western Australia appears to differ vastly from the law in Victoria and New South Wales, in respect of which I earlier examined Status of Children authorities.

Lord Brandon analysed the matter as follows on page 3:

> "I consider first the question whether the removal of J. from Australia to England by the mother was wrongful within the meaning of article 3 of the Convention. Having regard to the terms

of article 3 the removal could only be wrongful if it was in breach of rights of custody attributed to i.e. possessed by, the father at the time when it took place. It seems to me however, that since section 35 of the Family Law Act 1975 of Australia gave the mother alone the custody and guardianship of J., and no order of a court to the contrary had been obtained by the father before the removal took place, the father had no custody rights relating to J. of which the removal of J by the mother could be said to be a breach. It is no doubt true that, while the mother and father were living together with J. in their jointly owned home in Western Australia, the de facto custody of J. was exercised by them jointly. So far as legal rights are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide where J. should reside. It follows, in my opinion, that the removal of J. by the mother was not wrongful within the meaning of article 3 of the Convention."

139. It is to be noted that in most of the cases on abduction the point about relevant law to determine parental rights has not arisen, because the parties have been either married, divorced or separated.

140. I have not in my research come across any case in Jamaica where the court has exercised this summary jurisdiction nor have I been referred to any. However, I noted that in one of the cases referred to by Miss Small, one of the experts who referred to the law of Barbados, the learned Chief Justice of Barbados Sir William Douglas exercised summary jurisdiction

on the eve of New Year's Eve 1983 and ordered the return of a child from Barbados to Bermuda. The order was made on terms that the applicant was to pay the economy fare to be incurred for the child and such reasonable hotel and ancillary expenses as may be incurred by the Respondent in returning the child to Bermuda from Barbados. In that case **Reynold Brown v. Audrey Brown No . 287 of 1983** page 222 Douglas C.J. was concerned with a case of persons married in Jamaica and divorced in Bermuda, in which latter jurisdiction the question of the custody of the child was still pending. The child was of Bermudan nationality, born in Bermuda. The child had been in Bermuda for at least 8 months prior to the application for summary return, however an argument by the mother that there was delay in making the application sufficient to justify not making the order was rejected. In the course of delivering the judgment Douglas C.J. referred to, inter alia, **Re L.(minors) [1974]** 1 All E.R. 913, and dealt with submissions regarding the best interests of the child. On page 228 the Chief Justice said:

> "It is urged by the Respondent that it is in Maya's best interest for her to be educated in Barbados. She states that the Bermudan system of education is inferior to that of Barbados. On the other hand the Applicant is of the opinion that the Bermudan system is more advanced in that Maya would be exposed there to computer literacy. Perusal of Maya's school reports reveals that she is making satisfactory progress for a five year old. I am not prepared

to say, not having had any independent assessment of the two systems that one or other is superior. **It is clear to me that whether she returns to Bermuda or stays here, there will be adequate facilities for her education.**"(my emphasis).

141. At page 229 of the judgment Douglas C.J. stated:

" Most of the evidence in regard to that question will have to be given by people resident in Bermuda. In my view it is in the best interest of Maya that she should return to Bermuda so that the Supreme Court of Bermuda may adjudicate as to her custody and control. If the Respondent wishes to pursue the issue she has raised about Maya's paternity, then the Supreme Court of Bermuda is the proper forum for the trial of that issue also. **Neither the Respondent nor Maya has any real connection with Barbados.**The Respondent is here because she has a contract with the Caribbean Development Bank as a communication specialist."

142. In considering the welfare of a child in the context of cases where child has been removed from one jurisdiction to another, it is the Court's parens patrie jurisdiction that is being exercised. This jurisdiction was discussed in **R(Minors) (Wardship Jurisdiction)** referred to above. At page 419 Ormrod L.J. describes the matter thus:

"From the moment when the proceedings are started in the Family Division of the High Court by the issue of an originating summons,

the child concerned becomes a ward of court, and the judge who is dealing with the case becomes the guardian of the child and responsible for making all the decisions which seriously affect his or her life and welfare. It is his duty to hear and adjudicate upon the disputes between the parents of the child, or any other adult parties to the proceedings, but, in reaching a decision on any matter concerning the interests and welfare of the child, he is acting as the guardian of the child, so that the overriding consideration is always the welfare of the individual child, which is to be determined by the standards normally applied in this country. The wishes and interests of the parents are very important considerations, but they must yield to the prior interests of the child. In the same way, although an order or judgment of the court of another country relating to the child must be given the fullest respect, it too must yield, if is found to be in conflict with the best interests of the child. **These principles apply to all children who are physically within the jurisdiction of the court. It is rightly called the "parental jurisdiction", and supersedes both parents.**" (my emphasis).

In the case of **G v. P** discussed above, Kaye J. noted that this parental jurisdiction exists whether the child is born in or out of wedlock.

143. I now turn to consider **In re: M** referred to earlier . **In re: M** is to my mind a very interesting application of the court's jurisdiction. It is to be noted that it was not an abduction case. What had happened was that the

parents of the children separated in 1994. The family home was in Malta and interim shared care orders were made in the Maltese Court. The mother later came to England, leaving the children and the father in Malta. The father visited England a few days later and brought the children with him. It was at this stage that the mother applied for and obtained ex parte prohibited steps order, a residence order and an order directing the transfer of the children into her care. At the inter partes hearing, the ex parte orders were discharged and an order was made for the return of the boys to Malta. The mother appealed. The Appeal was dismissed by the English Court of Appeal which held, inter alia, that there was no limit to the jurisdiction of the English court to act in the interests of any child who happened to be within the jurisdiction. However, if the child was not habitually resident in England, the English Court would usually decline jurisdiction except to ensure a speedy and safe return of the child to the country of habitual residence. Far from there being any inherent conflict between the considerations of policy which normally require a return of children to the country of habitual residence and the considerations affecting their welfare, both lead to one and the same result, namely that it will, in general, be in the best interests of children to have their future decided in the courts of the country in which they habitually reside. This is a principle which has particular force in a case like the present, where the competing jurisdictions are represented by two countries with close historical ties and closely corresponding legal systems, applying a similar

approach to the difficult problems to which cases of this nature inevitably arise.(pages 225 and 228). At page 228 Waite L.J. stated:

"Mrs. Walker ...charges the judge with having acted precipitously , without sufficient knowledge of the Maltese legal system and without taking sufficient account of the difficulties with which the mother might be confronted if she was forced to go to Malta and seek to obtain the equivalent of a residence order from a judge in that country . She suggested a number of matters which ought to be considered. What are the rights of representation in Malta for someone who, like the mother, may not, if separated from her husband, have rights of residence there? What would be the means of finance of legal representation in Malta? The judge dealt very broadly with these matters in the passage I have already quoted. He was, in my own judgment, fully entitled to do so. No doubt in an ideal world it would be helpful to be furnished with the kind of information that Mrs. Walker refers to. **But an imperative element in all cases of this nature is the need for expedition. The recent case of D v. D (Child Abduction :Non-Conveniens Country) [1994] 1 FLR provides a good illustration of the difficulties which are liable to arise if problems of this kind are not dealt with swiftly, and the parent abducting children to this country, or seeking to retain them here, is allowed to settle too long within the English jurisdiction. The judge, in my view, had**

every justification for acting with the speed that he did, and for proceeding on the basis of the limited knowledge that he had of the procedures in Malta, which was quite sufficient for the purpose."(my emphasis)

At page 228 Nourse L.J. stated:

"I agree. The essence of Mrs. Walker's submission is that the judge gave too much prominence to the principle of the abduction cases over the welfare principle. She says that Judge Davidson thus erred in principle or gave a decision that was plainly wrong. I do not think that that submission is made out. It is true that, having recognized that it was not an abduction case and that it was not analogous to such a case, the judge nevertheless started by deducing a principle from those cases. However, he treated it as a matter of common sense and for my part I cannot say that he was wrong to do so. Moreover, he went on to make a more particular consideration of the welfare of the children in terms which Waite L.J. has already read.

Judge Davidson had summarized the grounds on which he made the order, inter alia as follows (p.226)

"The children have lived in Malta all their lives. M is at school th ere. They have never lived anywhere else. They have not been separated from their mother before. The arguments say that they have no ties here save for their mother. It is her choice to come

here and before that there were no ties with this country. A home for the children has not yet been sorted out.

144. I believe that there is nothing sufficient here to displace the normal rule that the forum of where the children ordinarily reside should hear the case. That is Malta."

145. Upon making the summary order for the return of the boys, the mother then intimated that she intended to appeal. The judge granted her a stay of the return order pending her appeal. The father appealed against the granting of that stay. His appeal was heard the following day. Another Division of the Court of Appeal discharged the stay, which left the father free to take the children back to Malta, subject to undertakings which he had given to the court in England to apply for an adjournment of the Maltese proceedings ...and also to provide the mother with an airline ticket to Malta so that she could personally attend any adjourned hearing. The Court also ordered an early hearing of the appeal. (pages 225 and 227 of the judgment of Waite L.J.).

146. In **Re Z** to which previous reference has been made, Charles J. elucidates the interaction of the principles enunciated in **Re JA**, which is the same as stated in **Re R (minors)** and **Re M**. At page 1283 the learned Judge stated:

"As Ward LJ points out in the passage I have cited in Re JA (Child Abduction: Non-Conveniens Country) [1998] 1 FLR 231, 234 the principle of forum conveniens as the concept is used in other kinds

of litigation has no place in the wardship jurisdiction and thus a jurisdiction where the paramount consideration is the welfare of the child. As is found in Re M (Jurisdiction: Forum Conveniens) in the passage therein that I have already cited there is no limit to the jurisdiction of the English Courts to act in the interests of any child who is within its jurisdiction and the 'jurisdiction issue' in an 'abduction case' is whether it is in the best interests of the child that he, or she, should be returned to the country of his, or her, habitual residence with the consequence , or likely consequence, that his or her medium- to –long-term future would then be determined by the courts of that country."

147. In the cases dealing with the issue of the summary jurisdiction to make orders the courts have used varying expressions; they have spoken of making orders requiring the return of a child to his or her "home"(in **Re T**), "place of ordinary residence or home country " (in **Re L)**, " the jurisdiction from which he or she has been removed" (in **Re L**), or place where" habitually resident" (in **Re Z**). On the New South Wales Australian authority of **McM v. C,** discussed previously , where the father has equal rights to the custody and guardianship of the child, as I have held, unlike the situation in the Western Australia authority in **Re J**, it is not open to the mother unilaterally to change the ordinary residence of the child; she could change the residence of the child only if the father acquiesced in her so doing. I will have to return to the question of acquiescence.

148. I may either rely on the lower test, " jurisdiction from which he or she has been removed" or determine what is the meaning of "ordinary residence' or "habitual residence" for these purposes. Having compared the relative frequency of the occurrence of these phrases in the cases, there is unfortunately no proper basis for a short cut, and I think that the meaning of ordinary and habitual residence fall to be determined.

149. In **McM v. C**, the court followed the test laid down in **Re P.(G.E.) (an infant)**[1964] 3 All E.R. 977 in relation to ordinary residence. In that case Lord Denning M.R. sought to resolve the interpretation of the child's place of "ordinary residence" and he indicated that the child's ordinary residence is the last place in which the child resided with his parents or with one parent. In **Re P.(GE.)**, the case involved a six-year old boy ordinarily resident in England who was taken to Israel by his father without the consent of his mother. The issue before the English Court of Appeal was whether the English Court had jurisdiction over the child when he was not physically present in England. The Court of Appeal concluded that since the child's ordinary place of residence was England notwithstanding that he had been taken away from the country the Court had jurisdiction over him. His Lordship posed the following question[at p.982 para: C-E):

> "But then we are faced with the question , what is the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say under the age of 16?"

Lord Denning then answers the question as follows:

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

150. I think it is very interesting to note what Lord Denning states at page 982G-983A:

> "I would myself support the view stated by Lord Hodson and the majority of his committee in 1959...that "there should be a pre-eminent jurisdiction which should be the ordinary residence of the child at the time of the application". It is not an exclusive jurisdiction. Other courts may have jurisdiction too. But, in case of conflict, much respect should be paid to the decision of the courts of the country where the child is ordinarily resident.

Applied to this case, it is plain that the child's ordinary residence was at Hendon. That was his home, so arranged by both mother and father. The father broke the arrangement and took him off to Israel. **That did not mean that his ordinary residence ceased to be England.** The father could not change the home without the mother's consent. **His ordinary residence was in England still when the mother took out the summons two months later. That means that the English Court has jurisdiction over him. I do not say that the Court would exercise that jurisdiction in the special circumstances of the case. I do not suggest that it would order the child to be brought back to England. The father says that, in these two years, he has settled down well in Jerusalem. The court will consider what is best for the child. Suffice it to say that the court has jurisdiction.**"

151. If I understand Lord Denning correctly, although Jamaica may have jurisdiction based on "A's" physical presence here, if "K" had filed an application for custody and return of "K" **in Barbados**, then provided that "A" was in fact ordinarily resident in Barbados, that court could have had within its contemplation the making of an order that the child be brought back to Barbados in the best interests of the child.

152. I now turn to look at the term " habitual residence". In **Re Z** (page 1275). In that case it appears to have been accepted that the test of habitual residence is a question of fact and the judge appeared to accept that the

test was properly habitual residence even in a non-Convention case. In **Re M** (the forum conveniens case) habitual residence is also accepted as the test. In **Re:J** Lord Brandon discussed the meaning of the term as used in the Convention. At page 4 he states:

> "The first point is that the expression "habitually resident" is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with any special meaning, but is understood according to the ordinary and natural meaning of the two words it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. ...".

153. Turning now to an application of the law to the instant case, I find the following facts:

    1. Prior to "D's" removal of "A" from Barbados, "A" had made her home with "K" by arrangement between the parties. There are many bases on which I accept "K's" evidence on that point in preference to that of "D". Firstly, there is the contrast in "D's" language when she describes the living arrangement in Montserrat, as opposed to in Barbados. With regard to Montserrat, she said " resided with me", as opposed to " the claimant and I shared control of 'A'" in relation to the time

immediately preceding the removal of "A" from Barbados. Paragraphs 22 and 36 of First Affidavit. In paragraph55 of her first Affidavit, "D" alleges that "K " made the decisions as to how we would share responsibility **without consulting me** and I was expected to accept his decisions". I accept Counsel for "K's" submission, that even if "K" may on "D's" case, be a bully, which is what I think "D" was getting at, controlling personality or no, "K" was in charge, in point of fact. I also have put into the equation the fact that previously when studying "D" has left "A" in the principal care of "K", whether sole, or otherwise. Then there are some paragraphs (62 and 64 of First Affidavit), and 62 and 64 and 67-70 which in my view are only explicable on the basis that "D" was not exercising principal de facto custody or care of "A", and which are consistent with "K's" case that "A" principally resided with himself and his wife, and spent mostly weekends with "D". In paragraphs 62 and 64, the allegation is that "K" would on occasion call when he is traveling on the day he is traveling asking "D" to collect "A" from school, or for "A" to stay with "D" while he is traveling. "D's" response was that these calls would take place mostly during the time when "A" "was supposed to be at his house"...That if she asked why "A" could not stay at his house with his wife during the time he travels "when "A" is supposed to be staying with them" "K"

would get angry, and they would argue. In paragraphs 66-70, although "D" gives an explanation that "K" brought "A" to her house at a time when she had no food in the house since she would be traveling to Montserrat the next morning, so she tried to get "A" to go back into "K's" vehicle,essentially "D" is saying that she allowed "A" to remain outside on a chair waiting on "K", because she could not believe that "K" would leave her there hungry. She does say that she sat on a chair where they could see each other. This all happened the night before she left for Montserrat, when "A" had come to tell her goodbye. These are not the reactions of a parent with residual care and control. I have also looked at the letter written by "K's" Attorneys which supports a case that "K" and "A" came to Barbados at "K's" invitation, with the intention of settling there. I couple with that "K's" evidence that he and "D" had agreed that "A" should come and live with him in Barbados "when Montserrat was then at the height of the volcanic crisis" (para.14-16 of "K's" First Affidavit.) I accept that evidence, along with "K's" evidence at paragraph 9 of his Second Affidavit, that in July 2000, when he took "A" to Barbados from Montserrat, she came to live with him indefinitely, bringing all her possessions. It is difficult to accept instead the evidence of "D". Since she has not denied that she received notification of her admission to the Faculty of Law, in

June 2000, and therefore knew that she would shortly be in Barbados and not Montserrat, it is difficult to see why "K" would have had to make the "conscious decision that "A" was not coming back to Montserrat" to her. On her own evidence, she, "D" would only have been in Montserrat a few more weeks before attending the Faculty of Law. There is no evidence that she means he should have returned her to Montserrat for the few weeks then remaining in the Summer holidays, since she seems not to have taken any active steps or objected when "A" stayed in Barbados from July to September 2000. There is a gap in the time period referred to in paragraphs 33 and 34 of her Affidavit.

154. Applying either the test of ordinary residence, or the test of habitual residence, it is plain to me that "A" was ordinarily, and habitually resident in Barbados at the home of her father "K". I reject the submission that she was ordinarily or habitually resident in Montserrat. I also find that she is not habitually resident in Jamaica, giving the words their natural meaning.

154a. In the event that I am wrong and "D" has sole rights to the custody of "A" under the laws of Montserrat, I do not accept "D's" evidence that she has no intention of returning to Barbados except for occasional visits. It also is doubtful to me that she intends for "A" never to live in Barbados again, especially in light of the letter referred to previously, and of the uncertainty created by the volcanic activity on neighbouring Montserrat. I find that at

the time of removal of "A" from Barbados, both "D" and "A" were still ordinarily and habitually resident in Barbados. (See p. 4 of the House of Lords Judgment in Re J as to the reasoning on this question of residence).

155. The next aspect of the matter which I wish to consider is the question of the volcanic activity in Montserrat. It seems to me that the question of "A" in the future living in Montserrat is, to use "K's" language in paragraph 11 of his Second Affidavit in a slightly different context, "shrouded in an air of uncertainty". I accept "K's" evidence in preference to "D's" as to the dangers still presented by the volcanic activity and ashy conditions of Montserrat. In any event, there being a conflict of the Affidavit evidence or doubt as to the state of the volcanic activity,it must be resolved in a way that best protects "A's" interests.

156. Having determined that "A" was ordinarily and habitually resident in Barbados before her removal, the next issue for resolution is whether "K" agreed that "A" could be removed from Barbados and taken to stay in Jamaica with "D" for the duration of "D's" studies here, or whether he acquiesced in the removal. In my view, there is nothing on the evidence to establish that "K" gave his positive and unequivocal agreement, indeed, "D's" main contention is that she didn't need his consent. "D's" choice of language in paragraph 7 of her first Affidavit, is interesting in this context "He had not indicated then that he was not in agreement with that decision"(i.e. to take "A" with her to Jamaica when the time came). Hardly a study in positive and unequivocal. However, the evidence is crystal clear

that "K" did not agree. Essentially, "K" says he was persistently trying to ensure that "D" gave an undertaking to return "A" to Montserrat for him to collect her in time for school, and eventually "she spoke to him in terms which suggested that "A" would return". (para.34 First Affidavit) . Place that evidence alongside that of "D". She herself describes the persistent behaviour of "K" in this regard, and indeed her own reaction of indignation being "A's" mother. She speaks about telling "A" not to ask her the question about where she would be going after England. In paragraph 15 of her First Affidavit she says that she was on the phone with "A" and that "A" said that if "D" did not answer the question "K" would not allow "A" to come with her (to the U.K.). Then there is this sequence on her evidence:

"I could hear the sadness in her voice.

That "A" eventually came to Montserrat and went to the U.K. with me.

157. It is abundantly clear and I so accept, that "D" led "K" to believe, perhaps said something "to remove the note of sadness from "A's" voice", to assure that "A" would be returning to Barbados.

158. I accept the evidence of "K" at paragraph 20 of his Second Affidavit that because of the circumstances under which "A" left Barbados, her room at his home is still very much occupied with her possessions.

159. I therefore find as a fact that "K" neither agreed to, nor acquiesced in "D's" removal (for any other purpose than the visit to the U.K. to return to Barbados), or retention of "A" by "D" outside of Barbados.

160. Against that background, I now look to see what the welfare of "A" dictates is in her best interests. I note firstly, that I did not request the preparation of any welfare reports, since I felt that would only have delayed the matter, and in any event, unless some input could have been obtained from Barbados, such a report would have of necessity been one-sided. The cases in this area stress the need for expedition, and I find direct support for this, if necessary at pages 1284 and 1293 of in **Re Z**. It is to be noted that in **R (Minors)** at page 419 and page 427 the court commented on the need for welfare reports and for ascertaining the wishes of the children who were 12 years old and 7 years old, principally because of the length of time that the proceedings had been allowed to linger-over 2 years (pages 419 and 427) because, as said at page 427 "the pull of gravity from the country of origin diminishes at an accelerating speed with the passage of time".

161. It seems to me that "A" was abruptly uprooted from a settled and loving home environment in Barbados including "K", his wife and her sister "KA". "A" was not just surviving, she was thriving. She was doing well at a top school in Barbados, and was excelling in the field of sports, particularly swimming, performing at a top level in these tender years. She had settled in perfectly well in Barbados, and had now enjoyed some stability both in terms of heath and lack of movement from schools and homes, unlike what had occurred in the ashy conditions of the volcanic island of Montserrat. "D" has made some allegations that "K's" wife is not a good

care provider because of allegations to do with lack of hair care and of unsanitary conditions in which "A's" lunch things were kept. I reject that right away, since it is difficult to see that there could have been any chronic or severe problem when on "D's" own evidence she often enquired of "K" why "A" could not stay with his wife when "K" had to travel during the times when "A" was supposed to be with them. I also bear in mind that because of the need for expedition, the Affidavit evidence used in the hearing was incomplete.

162. On the other hand, I place in the basket of considerations the fact that "A" may well in all probability be without the presence of her mother in Barbados, in the interim period which would elapse between a return to Barbados summarily, and the ruling of the court of Barbados on the issue of custody. She has never been for any extended time in a country where her mother is not around, albeit she has for the last 3 years been principally in the care of her father, with her mother having access to her and carrying out her full-time studies at the Faculty of Law. Her mother "D" is however, here in Jamaica, to continue full-time studies, a circumstance under which in the past "D" has relied on "K" heavily for his assumption of, or assistance in the care of "A". "D" has previously left "A" in "K's" care whilst she "D" has gone abroad to study. I also put in the mix, that here in Jamaica we may well have schools comparable to the West Terrace school in Barbados, particularly if an order for maintenance were to be made in favour of "D", as in fact she has indicated she would be seeking.

We may also have comparable swim clubs, and indeed, as regards athletics, Jamaica has on occasion been dubbed "the sprint factory of the Caribbean". However, as Douglas C.J. 's judgment in **Brown v. Brown**, indicated, that is really not the question. Like him I am satisfied that there can be adequate facilities for "A's" education or activities whether she stays here, or returns to Barbados. The real question is about whether it is or is not in "A's" best interests for the courts in the country of her habitual residence to determine questions as to her custody and her future. The question is whether it is in her best interests to be returned to the country where she was habitually resident.

163. I also have regard to the fact that it is on the evidence at the lapse of the next 2 years that "A" would normally be placed in a High School in Barbados. In the event that "A" remains here, but thereafter has to resume life in Barbados, whether because a court orders that "K" have custody of her, or because she is in "D's" care but "D" decides to return to Barbados, she would then resume entry into the system possibly at a disadvantage, since the syllabuses and rate of preparation for common entrance or the exams here in Jamaica may not be identical. The question of "D" returning to Barbados is not out of the question, having regard to the volcanic conditions in Montserrat, the proximity of Montserrat to Barbados, and the letter written on "D's" behalf in 2001, which at least deals with "D's" past stated intentions of settling in Barbados. I bear in mind Lord Dennings warnings in **ReP(G.E.)** about the difficulties in

ascertaining intentions as to domicil, and the problems associated with the reliability of stated intentions.

164. I bear in mind that there is no evidence that "D" has any intention of residing permanently here in Jamaica. Prior to "D" coming to study at the law school there were no ties whatsoever with Jamaica. It is "D" who has chosen to go this route.

165. Barbados and Jamaica have very similar legal history and there is no question of justice being denied. Indeed, the principles upon which the matters would fall to be decided are similar, if not identical as we have seen from a review of the law of these territories.

166. Barbados is closer to Montserrat than is Jamaica, so that "A" would if returned to Barbados have easier access to, or be within easier access for, members of her family who live in Montserrat. I take judicial notice of the relative locations of Jamaica, Barbados, and Montserrat.

167. "A" is on the evidence accustomed to a programme of organized extra assistance from "K" in relation to her educational studies.

168. "A" has on the evidence been here in Jamaica exactly 6 weeks, hardly a period of time within which to be fully settled.

169. I also bear in mind that if this court were to proceed to hear the substantive application the case would certainly take many months, and there is likely to be considerable delay having regard to the number and length of the Affidavits already filed in the matter so far and the many different points in dispute.

This would be unfairly advantageous to "D".

170. Most of the witnesses (especially if for example there is a need for cross-examination) reside outside of Jamaica. The surrounding factual context upon which any decision concerning custody is to be determined, occurred principally in Barbados, and to a lesser extent Montserrat.

171. If there is considerable delay, and "A" is required to settle here, it may be only to be later uprooted and replanted elsewhere. On the other side of the equation, if the child is caused to spend a considerable period here in Jamaica, the Court may then be very reluctant to then grant an order that would cause the child to be uprooted yet again, thereby securing an unfair advantage to "D".

172. I think that one of the important factors in the instant case which as far as I recall only occurred in the **Brown** case, separate and apart from the fact that there were no ties to Jamaica, prior to the arrival of "D" and "A" in August, is the relative probability of each jurisdiction being the jurisdiction in which "A" will spend her medium to long term future. On the evidence, Jamaica has almost no chance of being the place where "A" will spend those periods of her life. She is here for 2 years. On "K's" application, if successful, (although I appreciate that custody orders for children are never final) "A" will spend her medium to long-term future in Barbados. On "D's" case, after the 2 years here, "A" will spend her medium to-long-term future in Montserrat. However, "D's" plans for "A's" future are riddled with uncertainties created by the volcanic condition of Montserrat. This factor,

coupled with the closeness of Barbados to Montserrat, and "D's" past statements of intention to, or of having settled in Barbados, also point back towards Barbados as a place with probabilities, even on "D's" case and even if custody were to be awarded to "D", of being the place where "A" will spend her medium –to-long-term future.

173. Whilst I did not have time to order welfare reports, I thought it appropriate to interview "A" in the furtherance of my parental jurisdiction. I did so not with a view to ascertaining her wishes, since in my view that would not be the appropriate question for the Court to ask in considering the exercise of the summary jurisdiction so short a time after the removal. This would also perhaps be inappropriate where "A" has now been here solely with "D", with limited inter-action with "K". I also was mindful of the cases referred to on page of Cretney Principles of Family Law, 4th edition, p. 334 relating to the rules of natural justice and allowing parents to meet any allegations against them- (see C.v. C.91981) 125 S.J.98, H.v.H (Child:Judicial Interview)[1974] 1.W.L.R.595.

174. I interviewed "A", knowing that whatever she said would not be conclusive, and just to see how she was adjusting, to assess her attachments to different places, her likes and dislikes. "A" is a bright, engaging, polite child who clearly is close to both of her parents. It appears to me that, as would be expected, she has great attachment to her life in Barbados.

175. In all the circumstances of this case, I am firmly convinced that it is in "A's" best interests that she be returned to Barbados forthwith in the care and control of her father. It is in the best interests of "A" that the Courts there should determine the course for her future. There is no good reason to the contrary, and nothing to dislodge the *a priori* assumption that a return to Barbados is in the best interests of the child. Though it may be unnecessary to go further in light of what was said in **Re: R(Minors)** i. e that the question is what is in the best interests of the child, not any question of harm. I am in any event more than satisfied that there is no obvious danger or harm in the proposed course of returning "A" to Barbados.

176. Lastly, there are special features of this case which would allow for this court to exercise its jurisdiction along the lines in **Re M.** In other words, even if I have wrongly held, that "K" did not consent to the removal, it appears to me that it would be in the best interests of "A" for the Courts in Barbados, where she is ordinarily resident, to decide the issues as to her custody and care, particularly having regard to the factors discussed above in relation to Barbados' relatively higher probability of being the jurisdiction in which "A" may spend her medium-to- long-term future, the uncertainty surrounding Montserrat, and the fact that "D" has no intention of making Jamaica her permanent home. Though in **Re M**, part of what informed the court's decision was the fact that there had not yet been put in place any arrangements to house the children, and here, "A" is sharing

a one-bedroom home with "D", as Lord Justice Waite said, there is no limit, in legal theory, to the jurisdiction of the court to act in the interests of a child who happens to be within the jurisdiction for whatever purpose and for however short a time. I am of the view that this jurisdiction can be properly exercised, resulting in a return of "A" to Barbados. This Court could exercise such jurisdiction, since "A" is habitually resident in Barbados, and not in Jamaica. See also **Re Z** p. 1287, where it was said that the court has a discretion whether or not the wronged parent has agreed that the child should not return. To be weighed against these considerations would be the fact that this court does have jurisdiction based on "A's" physical presence here, which it should not lightly abdicate. I have not felt bold enough to rely on this jurisdiction alone, without reliance on the abduction cases. This is because the law to be applied to prima facie custody rights impacts on the question of habitual residence.

177. Lastly, In **Re J** is a decision of the English House of Lords in a Convention Case. According to Clarke J in Re Z, in a Non-Convention Country, we do not necessarily need the trigger of acquiescence. In England, there is still a distinction in how persons born in or out of wedlock are treated. In so far as the jurisdiction to be exercised is the pares patrie jurisdiction, it seems to me that in Jamaica, because of our Status of Children legislation, our law embraces children born out of wedlock more closely than does the English law. It is not unreasonable therefore, that instead of applying to the meaning of habitual residence, the meaning applied in Re

J, which allowed that the child took on the habitual residence of the mother, a Jamaican Court could instead give to the words a meaning which accords with their simplest meaning, that it is the home where the child last resided, whether the child was removed from. In that event, whatever the state of the law of Montserrat, this Court would exercise the limitless welfare jurisdiction along the lines of Re M to send "A" back to Barbados.

Summary

1. It is correct that "A's" status is to be determined by her domicile of origin, Montserrat. Under the laws of Montserrat, being a child born out of wedlock, she is illegitimate.
2. However, custody rights are not determined by status or domicile under English Law. Those rights are determined by the law applicable in the jurisdiction in which the child is ordinarily resident or physically present.
3. For the purpose of the exercise of the **Re M** type of jurisdiction, where the question turns on which jurisdiction is in the best interests of the child to determine the matter, the law to be applied is the Law of Jamaica.
4. For the purposes of the decision along the lines of the abduction cases, i.e. whether the child was wrongly removed or retained from Barbados by "D" without the consent of "K", the law to be applied is the Law of Barbados.

5. Under the Status of Children Legislation of Both Barbados and Jamaica, the father and mother of the child born out of wedlock have equal rights to the guardianship and custody of the child.

6. It may well be, that even if the applicable law is the Law of Montserrat, "K" would have equal rights with "D" to the custody and guardianship of "A" based on the fact that under the Law of Montserrat there is a statutorily – imposed duty to maintain.

7. It follows that "D" ought not to have removed "A" from, or retained her away, from Barbados, without "K's" consent or acquiescence.

8. The jurisdiction which the Court exercises when it is being asked to make a summary order for return, is the parental jurisdiction of the Court, or parens patrie, and the welfare of the child is the paramount consideration.

9. The jurisdiction must be exercised swiftly and expeditiously, without going into the full merits of the matter. The Court is entitled to act on the evidence before it, and need not adjourn to seek more evidence or information or welfare reports.

10. There is a general presumption that, in the absence of good reasons to the contrary, it would be in the best interests of the abducted child for questions about his or her future to be determined by the courts in the country of habitual residence.

11. The test is to be applied on the basis of ordinary, or habitual residence.

12. There is no limit in legal theory to the jurisdiction of the Jamaican court to act in the interests of any child who happens to be within the jurisdiction for whatever purpose and for however short a time.
13. I find as a fact that at the time of "A's" removal from Barbados, she made her home with "K", by agreement between "D" and "K", with access to "D".
14. I find as a fact that at the time of the removal "A" was ordinarily resident, or habitually resident in Barbados, and not Montserrat. I find as a fact that she is not habitually resident in Jamaica.
15. I find as a fact that there is still volcanic activity taking place in Montserrat, and the question of "A's" return there in the medium-to-long term future is uncertain, both for reasons of safety and for health reasons based on the ashy conditions. I bear in mind that "A" is a skilled athlete, with great potential, and the risk of exposure to these conditions may be even more detrimental.
16. I find as a fact that "K" did not agree to, or acquiesce in, the removal of "A" from Barbados for onward transmission to Jamaica. "K" agreed that "D" could take "A" to the United Kingdom, to be returned to Montserrat in August for "K" to collect her and take her back to Barbados in time for school in September 2003.
17. It is in the best interests of "A" that questions about "A's" future be determined by the courts in the land of her habitual residence, Barbados.
18. There were no ties to Jamaica, prior to "D" coming here in September 2003, and there is no evidence that "A" would be here for longer than 2

years. There is uncertainty in relation to a future for "A" in Montserrat at the end of the 2 years. Barbados on the case of both parties has a higher degree of probability than Jamaica of being the country where "A" will spend her medium-to-long-term future. The Court should exercise its jurisdiction to send "A" back to Barbados as it is in her best interests for the court there to decide the matter. The Court should merely ensure a speedy and peaceful return to Barbados.

My order therefore is as follows:

(a) A is to be forthwith returned to Barbados in the care and control of her father "K". Counsel for both parties are to agree on a suitable place for the handing over of "A" right after these proceedings,

(b) "A's" passport is to be handed over to the Registrar of the Supreme Court by 9:3O a.m. on Wednesday the 8th October 2003, for collection by "K's" Attorneys, if not sooner handed over to the Attorneys for "K"..

(c) Liberty to Apply

(d) Permission to Appeal Granted.

(e) Defendant's application for stay of order refused

This order is made, subject to "K" giving to this Court the following undertakings:

(a) Custody proceedings in relation to "A" will be filed in Barbados by 4:00 p.m on Thursday 16th October 2003;

(b) To use his best endeavours to have the case set down for hearing during periods when "D" will be on mid-term or holiday break from the Norman Manley Law School.

(c) "K" undertakes that he will return "A" to this jurisdiction if called on by this Honourable Court so to do.

Counsel for "K" has indicated that "K" has agreed to provide two (2) return airline tickets for "D" to attend Court in Barbados.

I N D E X

SUIT NO. HCV 1616/2003

BETWEEN	"K"	CLAIMANT
A N D	"D"	DEFENDANT

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1.	Background/Affidavit Evidence	1 - 17
2.	Submissions	17 - 21
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4.	Custody Rights	
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5.	Summary Jurisdiction – Abduction Cases	59 - 73
6.	Parental Jurisdiction – No Abduction	73 - 78
7.	Ordinary Residence	78 - 81
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9.	Application of Law to Facts	
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