IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 2230 of 2007

BETWEEN	MICHELE ANN STRONG-FORRESTER	CLAIMANT
AND	KEVIN LEIGHTON FORRESTER	DEFENDANT

Mr. Gavin Goffe instructed by Myers Fletcher & Gordon for the Defendant-Applicant.
Mr. Ransford Braham and Mrs. Suzanne Risden-Foster instructed by Livingston Alexander & Levy for the Claimant-Respondent.

Heard: the 21st, 22nd August and 14th September 2007.

Mangatal J:

1. These proceedings are concerned with two little boys who I shall refer to as Q and K. Q was born on the 18th October 2002 and K was born on the 3rd of March 2005. Q is therefore 4, almost 5 years old at this time. K is almost 2 1/2 years old. Both children were born in the United States of America "the U.S.".

2. These children Q and K are not only citizens of the U.S. They are also naturalized Jamaican citizens and possess Jamaican passports. Both the Claimant/Respondent "the wife" and the Defendant/ Applicant "the husband" are Jamaican nationals by virtue of being born in Jamaica. The husband migrated to the United States in the late 1970's and has lived in California since then. The husband is a citizen of the U.S. The wife holds permanent resident status in the U.S. The wife met the husband in 1996

in Jamaica and the parties were married in Jamaica in June 2001. In September 2001 the wife migrated and joined the husband living in California. The husband is a clinical pharmacist and a Professor of Pharmacy at the University of Southern California. The wife is a management consultant and enjoyed professional positions and an active social and civic life in Jamaica before migrating to the United States. She states that she was dissatisfied living in Pomona, California and that the circumstances there represented a fundamental lifestyle change for her. The wife spent her time in Pomona principally as a housewife before and after the birth of Q and K. The boys were both born in California. On a number of different occasions the wife came to Jamaica for extended periods accompanied by the children with the husband's consent. The wife came to Jamaica with the children in January 2007 with the husband's consent, for the stated purpose of vacation. She enrolled Q at a preparatory school in Jamaica and K at a nursery school. Initially it had been agreed that the wife and the boys would have returned to California in April 2007. The wife states that she raised with the husband the question of herself and the boys remaining in Jamaica until July 2007. This she states was because she was very happy with the progress of the children at these 2 schools in Jamaica and she wanted them to stay there until the summer instead of returning to California in April. The wife states that they had nothing to do from April until summer and Q would not be starting school until September in California. There is some dispute between the parties as to whether the husband agreed that the children should remain in Jamaica until July 19 2007. There is also an issue raised as to whether the wife was the primary caregiver or whether both the wife and the husband were the primary caregivers. The husband came to spend 3 weeks with the family in Jamaica in March - April 2007. The children were left with the husband's parents in Jamaica for one week while the wife and the husband went back to California, the wife for one

week before returning to Jamaica. One of the reasons for this according to the wife was in order to effect a school enrollment for Q at Pantera Elementary School in California. During the week when the wife had gone back to California with the husband the husband increased the tempo of suspicions which he voiced and acted out, suspicions he harboured in relation to the wife having an affair and in relation to the wife having a hidden agenda in going to Jamaica in January. Consequent on these marital problems the wife says that since her return to Jamaica she realized that the marriage had broken down and that she wished to remain in Jamaica, the country of her birth, with the children.

3. On the 29th of May 2007 the wife filed an application to this Court by way of Fixed Date Claim Form claiming against the husband amongst other relief, that she should have custody of the relevant children of their marriage Q and K.

4. On the 29th of May 2007 when the matter came up for hearing before him ex parte, my brother Mr. Justice Campbell granted amongst other orders, interim custody care and control of Q and K to the wife. On the 30th of July when the matter came up *inter partes* before him, Justice Campbell extended the previously extended interim order for custody care and control. He also ordered that both the wife and the husband be restrained from removing Q and K from the jurisdiction of this Court without a court order. It was further ordered that the children's travel documents be deposited with the Registrar of the Supreme Court. Counsel for both sides have advised that the travel documents have been delivered to the Registrar.

5. On the 27th of July 2007 the husband filed an application principally seeking an order that the children Q and K be returned to the jurisdiction of their citizenship and habitual residence, namely the U.S. further or alternatively, that this Court make a ruling as to the appropriate forum for the determination of the issue of custody in respect

of the children and asking that the Court rule that California, U.S. is the appropriate forum. It is this application which came before me as a matter of urgency during the Legal Vacation of Jamaica's Supreme Court and in respect of which I now make my decision. The matter was originally scheduled to be heard on the 20th August 2007. However, due to the passage of Hurricane Dean close to the shores of Jamaica on the 19th August and the attendant damage, problems and dislocation caused on the Island, the hearing did not get underway until the 21st August. On the 21st I extended the orders made by my learned brother in respect of the interim custody and restraint against removal of the children from the jurisdiction until the determination of this application by the husband.

6. Subsequent to the date of filing of applications by both the wife and then the husband here in Jamaica as described above, the husband filed on or about 30th July 2007 court documents in the Superior Court of California, County of Los Angeles. In these court documents the husband is seeking sole custody, professionally supervised access, child maintenance and spousal maintenance and legal fees. There was no Court order for custody or anything else in relation to Q and K in existence in California before the proceedings were filed here in Jamaica , or before the children were brought here. The wife says that she was served with those documents on the 9th August 2007. Ex parte the California Court appears to have formed its views on the respective jurisdiction of California and Jamaica.

6A. The stated grounds of the application by the husband, amongst others, are that the children are both citizens of the U.S. and have been habitually resident in California up until January 2007 when they came to Jamaica on vacation. Based on their habitual residence the children have closer connections to California in the U.S. The wife has wrongfully and unilaterally kept the children away from the jurisdiction of their habitual residence. The husband submits that it is in the best interest of the

children that they be returned to California and that the appropriate forum for the ventilation and determination of the issues relating to the custody care and control of the children is the U.S.

7. The application has been vigorously contested and both parties filed affidavits in respect of their claims. The first question I must resolve is what approach should the Court adopt in dealing with applications of this sort.

8. Section 18 of the **Children (Guardianship and Custody) Act** commands that in any proceedings before the Court where 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. The Court is expressly instructed to disregard whether from any point of view the claim of the father is superior to that of the mother or vice versa.

9. In our Court of Appeal's decision in **Lisa Panton v. David Panton**, S.C.C.A. No. 21 of 2006, unreported judgment delivered 29th November 2006, the Court made clear that in relation to summary return or peremptory return applications or in questions relating to children and the jurisdiction of this Court in the context of private international law, (both of which issues arise in the present case), the welfare principle is the applicable principle. The President of the Court Harrison P. at page 3 of the judgment stated :*A court considering the summary return of a child to another jurisdiction must be guided at all stages by the principles of what would be in the best interests of the child.*

10. The welfare of the child concept encompasses such matters as the child's happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings- **Forsythe v. Jones** S.C.C.A No. 49/99 delivered 6th April 2001, at page 8, cited with approval in **Panton v. Panton** (supra) at page 3.

11. A useful starting point in an analysis of the relevant principles is the House of Lord's decision in **Re J (A Child)(Return to Foreign Jurisdiction: Convention Rights)** [2005] 3 All E.R. 291, notably the lucid and discerning judgment of Baroness Hale of Richmond. That decision, which was referred to in **Panton v. Panton**, establishes the guidelines/principles which follow in paragraphs 12 -21 below.

12. The Court has power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full hearing on the merits. In doing so the court is not punishing the parent who has acted without the other parent's consent or authority or the "kidnapper". but is applying the cardinal rule as to the best interests of the child –**Re J.**

13. There is always a choice to be made by the Court. Summary return should not be the automatic reaction to any and every unauthorized taking or keeping a child from his own country.-**Re J.**

14. To make the proper choice, the trial judge's focus has to be on the individual child in the particular circumstances of the case.-**Re J.**

15. It may be convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what may be best for him in the short run. It is not to be assumed that allowing a child to remain here while his future is decided here inevitably means that he will remain here forever.-**Re J.**

16. One important variable is the degree of connection of the child with each country. The idea is not to apply the technical concept of habitual residence, but to ask in a common sense way with which country the child has the closer connection. What is his "home" country? Factors such as his nationality, where he has lived most of his life, his first language, his

race or ethnicity, his religion, his culture, and his education to date will all come into this- **Re J** and **Re L(minors)**.

17. Another closely related factor will be the length of time the child has spent in each country. Uprooting a child from one environment and bringing him to a completely unfamiliar one, especially if this has been done clandestinely, may well not be in his best interests. A child may be deeply unhappy about being recruited to one side in a parental battle. But if he is already familiar with this country, has been here for some time without objection, it may well be less disruptive for him to remain a little while longer while his medium and longer term future is decided than it would be to return.-**Re J.**

18. The court cannot be satisfied that it is in the best interests of a child to return him or her to the court of habitual residence in order that the court may resolve the disputed question, unless the court is satisfied that the welfare test will apply in that foreign court-**In Re JA**[1998] 2 FCR 159 at 172. However, as foreign law is presumed to be the same as the law in this jurisdiction, it is for the party resisting return to show that there is a difference which may be detrimental to the child's welfare.-**Re J**. Differences between the legal systems cannot be irrelevant but their relevance will depend on the facts of the individual case.

19. The law does not start out with any a priori assumptions about what is best for any individual child. The Court must look at the child and weigh a number of factors in the balance, these include the child's own wishes and feelings, his physical, emotional and educational needs and the relative capacities of the adults around him to meet those needs, the effect of change, his own characteristics and background, including ethnicity, culture and religion, and any harm the child has suffered or risks suffering in the future.-**Re J.**

20. The effect of the decision on the child's primary carer must also be relevant, although again not decisive. A child who is cared for by nannies

or sent away to boarding school may move between households, and indeed countries, much more readily than a child who has always looked to one parent for his every day needs, for warmth, for food, clean clothing, getting to school, help with homework and the like. The courts are reluctant to allow a primary carer to profit from her own wrong by refusing to return with her child if the child is ordered to return. It will often be entirely reasonable to expect that a mother who took the risk of uprooting the child will return with him once it is ordered that he should go home. But it will sometimes be necessary to consider whether it is indeed reasonable to expect her to return, the sincerity of her declared refusal to do so, and what is to happen to the children if she does not.

21. As pointed out in **Re J** the effect of the decision on the child's primary carer is also relevant. The question of the primary caregiver's state of mind and the effect of the summary return order on that parent's well-being are relevant factors as this may impact on the welfare of the children. This approach was taken in the English Court of Appeal decision in **Re P(A MINOR) (CHILD ABDUCTION-NON-CONVENTION COUNTRY)** [1997] 2 W.L.R. 223. In that case the English Court of Appeal allowed an appeal by a mother against an order for the summary return of her daughter to India. There was evidence before the judge that the mother had had the daily care of her daughter throughout her life and that the mother was in a state of some depression. India, like Jamaica, was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980. However, the judge at first instance had felt himself compelled to apply the spirit of the Convention in preference to the principle that the welfare of the child is the proper test. The headnote indicates that in allowing the Appeal, it was held that:

> *.....on an application for the return of an abducted child to a country which was not a party to the Hague Convention, the welfare of the child was the paramount and the only relevant*

matter for the court to consider; that, accordingly, the judge had misdirected himself in applying in a non-convention case the test set out in article 13 of schedule 1 to the Child Abduction and Custody Act 1985; and that, having regard to the evidence that the mother, rather than the father, had cared for their daughter throughout the child's life and to the overwhelming likelihood that her ability to properly care for her would be affected if she were required to return and remain in India, there was abundant material justifying the conclusion that, if the judge had applied the welfare test, he would have dismissed the father's application.

22. **Re B(Minors) (Wardship: Interim Care and Control)** (1983) 4 F.L.R. 472 is another case in which the Court examined the risk of emotional harm to children if they were to be separated from their mother. I found the facts and discussion in this case quite useful . In this case the children were twin boys who were at the time of the application just over 4 years old. There was much conflicting Affidavit evidence.. The mother had obtained an order in England making the children wards of Court , having taken the children from their nursery school in Belgium. There was a dispute between the parties as to what had been agreed in respect of the children and where they should be located and with whom they should reside once the mother had found permanent accommodation in England. The judge dealt with the application in a summary way without carrying out a full investigation of the facts and there was no cross-examination. In dismissing the Appeal , the English Court of Appeal, in a judgment delivered by Cummings-Bruce L.J. had this to say at pages 480-481:

It is common ground at the bar that it is the welfare of the children that matters and in a kidnapping case one starts from the position that, unless there is some good reason the sooner the children are bundled back home to a parent who can look after them the better.

Mr. McLaren submits that the judge got this case the wrong way round and thus arrived at the wrong answer.

I have come to the conclusion that Mr. McLaren's submission is a little too simple and leaves out of account the factor which probably matters most, having regard to the welfare of these children. It is not explicitly stated in any affidavit. The children are just over 4. Up to the moment when the mother rushed off to England with them she had always played a mother's part in their lives.....There is nothing in the affidavits to lead to an inference that the bond between the mother and twins is not a perfectly normal emotional bond of the kind that one would expect where children have been brought up all their lives by their mother.....

Mr. McLaren submits that this is a fairly fine balance, that there are factors pointing in the direction of the advantage to the children of living with their mother in the Minehead flat above the garage and that there are also advantages for the children, in the upset of their family life now that the mother and father have fallen out, in their being, at any rate, given the stability of the environment at home which for years they have been used to, fortified by the sanity of continuing life in their nursery school with their little friends; it being finely balanced , the principles referred to in ***Re L*** *, repeating what had been said in earlier cases, decides the matter to get them back where they belong, to end the kidnapper's advantage and so show that this court will not give any consent to the idea that parents can get tactical advantage in interlocutory proceedings by snatching children, without any resort to legal procedures, from one country to another.....*

I have come to the conclusion that (Mr. McLaren's submission)... is wrong, having regard to the tender age of the children and the undisputed fact that, until the mother fled to England with them, she

had always been the person responsible for bringing them up and against whose care, during that period of 4 years, nothing is said. The bond between those young children and their mother is likely to be so close and the children are likely to be so emotionally dependent upon their mother's continuous care that, for the purpose of deciding their future for a matter of 5 or 6 weeks, there is a real risk that greater harm will be done to the children if they are now separated from their mother than if they stayed with her.One cannot measure the probable harm on a computer; one has to use the common sense and such experience as one has picked up in the course of one's professional life when dealing with small children . In the light of that experience I have come to the conclusion that there is a real risk of emotional damage to the children if they are now taken from their mother after the short period in which they have been trying to get used to life in the flat and restoring them to the father and the lady who would have the responsibility of looking after them when they are in Belgium.

23. In **Re B(Minors)** there was conflicting evidence and the mother told a quite different tale from the father, including on Affidavit her tale of unhappiness and discontent about the circumstances of her life with the children's father in Belgium and a gradually developing intention by her to extricate herself from the liaison.

24 . "Kidnapping", like other kinds of unilateral action in relation to children is to be strongly discouraged, but the discouragement must take the form of a swift, realistic and unsentimental assessment of the best interests of the child, leading, in proper cases, to the prompt return of the child to his or her own country, but not the sacrifice of the child's welfare to some other principle of law-Per Buckley L.J **Re L (minors)** [1974} 1 All E.R. 913 at 925-926.

25. A child's status could probably best be summarized by saying that the child's habitual residence was a factor in all cases persuasive, in many determinative, but in none conclusive-per Waite J.. **In re H (Minors)** The Times 28th February 1992, cited with approval by Carey J.A. in the Jamaican Court of Appeal decision in **Thompson v. Thompson**30 J.L.R 414 at 420.

26. The welfare and happiness of the infant is the paramount consideration in questions of custody....to this paramount consideration all others must yield. The order of a foreign court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment. Comity demands, not its enforcement, but its grave consideration. This jurisdiction rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final.-Per Lord Simmonds in **McKee v. Mc Kee** 1All E.R.942 at 948. Earlier on page 948 Lord Simmonds stated "Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment."

27. The Court in exercising its *parens patrie* jurisdiction compels the Court to be slow to decline jurisdiction or to exercise its jurisdiction when the occasion arises, because of the Court's all-encompassing interest in the welfare of the child- **Panton v. Panton** page 3.

28. If the Court properly makes an order for the speedy return of a child abducted from another country on the basis of the welfare of the child, the Court is not declining to exercise its jurisdiction; it is exercising its jurisdiction by making an order dictated by the welfare of that child-**Re P.S., ex p. Z.P.** [1994] 1 C.L.R. 639, cited with approval in the English

case of **In Re P (A Minor) Child Abduction: Non Convention Country** [1997] 2 W.L.R. 223.

29. The Court has jurisdiction on the basis of the children's physical presence in the jurisdiction-see **Re J** page 298 and the judgment of Lord Denning M.R. in **Re P(G.E.) (an infant)** [1964] 3 All E.R.977at 980 D. Being a subject or citizen is also a basis for jurisdiction.

Issue of forum non conveniens

30. In Australia, although there has been a line of conflicting decisions, the Courts have taken the view that the doctrine of forum *non conveniens* is not applicable to a custody case where the child is within the jurisdiction-see for example **Re: P.S. ex p. Z.P.** [1994]1 C.L.R. 639, particularly pages 646-648 where Mason C.J. expounds on the unique nature of custody proceedings. At page 647 it is stated that proceedings for custody or access are not disputes *inter partes* in the ordinary sense of that expression because the court is not enforcing a parental right to custody or access but rather is carrying out its duty to make an order that will promote the best interests of the child. Mason C.J. explains that this is quite dissimilar from ordinary *inter partes* cases where the concept of forum *non conveniens* is discussed and in which injustice, expense, inconvenience and legitimate advantage to one or other party arises for consideration. However, in Jamaica it has been accepted that the doctrine of *forum conveniens or forum non conveniens* applies. At pages 4-5 of the judgment in **Panton v. Panton** Harrison P. indicated that in resolving the conflicting positions taken by the parties in relation to the choice of jurisdiction, the concept of *forum non conveniens* as derived from **Spiliada Maritime Corporation v. Cansulex** [1987] A.C 460, is applicable to custody cases in that a court may stay proceedings in certain circumstances. The learned President of the Court of Appeal went on to

point out however that the concept of *forum non conveniens* is not the means by which the determination is made. He stated:

> *In particular cases it may be a factor in determining the appropriate forum, for example, in circumstances where the evidence in support of events relevant to the custody application is available in the foreign jurisdiction. However, the welfare of the child is the prime test to be applied by a court in deciding whether or not it will consider anew the application for custody.*

31. In discussing the issue of *forum non conveniens* in the manner which it has, in my view the Jamaican Court of Appeal in the **Panton** case in substance approaches the posture taken by Mason C.J. in the Australian case of **Re : P.S.ex p. Z.P.** (at page 647) where he states that although those matters such as injustice, expense and such like which are relevant issues in a *forum non conveniens* case are not relevant issues in a custody application, in some cases those matters may bear on issues which touch the welfare of the child but they are not themselves relevant issues when the issue arises whether the welfare of the child requires the making of an order that the issue of custody be determined in another forum.

32. The doctrine of forum *non conveniens* was also applied in the Jamaican Court of Appeal decision in **Thompson v. Thompson**[1993] 30 J.L.R. 414. In **Thompson** Carey J.A. discussed the well-known decision on forum *non conveniens* in the commercial law, **Spiliada Maritime Corporation v. Consulex Limited** [1986] 3 W.L.R. 972. The Court of Appeal held that where a party is entitled to commence an action in Jamaica, a stay will only be granted if the applicant satisfies the Court that some other forum is more appropriate for the trial of the matter, the forum which is the more suitable for the ends of justice. The Court held that the welfare of the child is paramount and therefore overrides all other

considerations. The Court held that Jamaica was the proper forum to decide the issues because it was the country with which the children had the more real and substantial connection.

33. In **Spiliada** it was held, amongst other matters, that in a case of an application for a stay of English proceedings the burden of proof lay on the defendant to show that the court should exercise its discretion to grant a stay. Moreover, the defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and substantial connection, e.g. In terms of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English Court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate the court would normally grant a stay unless there were circumstances militating against a stay, e.g. If the plaintiff would not obtain justice in the foreign jurisdiction. At page 855h, having opined that the defendant had to show that the other forum was clearly and distinctly the more appropriate forum, Lord Goff stated:

> *In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example of he is served with the proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.*

34. In the **Panton** case at page 21 Harrison P. stated:

A court which is asked to consider whether it will make an order for the summary return of the child, ever mindful of the welfare of the child, must consider which of two jurisdictions is better suited to determine that issue. Inevitably the doctrine of forum non conveniens arises and closely aligned thereto is the question of the ordinary residence of the child. This is equally described as the country to which the child enjoys a closer connection, which may be a factor in the determination of the issue of summary return.

Approach to be taken to the evidence

35. Another issue which the Court must grapple with is the approach to be taken in relation to the evidence. In **Panton v. Panton** Harrison P . at page 34 of the Judgment ruled that the learned judge at first instance had applied the proper test in taking into consideration the uncontradicted affidavit evidence in the case. Smith J.A. also offered sage guidance when he stated (at page 48):

The nature and extent of the enquiry undertaken by the trial judge will vary from case to case. The learned judge may be satisfied that in the circumstances of a case the undisputed evidence comprises all the material she needs to determine the application for a summary return order. In other words, in the context of the welfare principle it is for the trial judge to decide whether in the particular case an examination of the conflicting affidavit evidence is necessary before granting or refusing a summary return order.

A not dissimilar approach to that of Smith J.A. is advocated in the judgments of Deane and Gaudron J.J.s. in **Re P.S., ex p. Z.P.**

36. In the instant case the approach which I took was to examine the evidence which was uncontroverted. However, I also felt that in order to properly determine the instant application it was necessary to examine

some aspects of the case upon which there was dispute and to make findings in relation to these points. I therefore invited cross-examination on the following issues:

(a) Whether the wife was the primary caregiver, or whether both the husband and the wife were primary caregivers.

(b) Whether there was agreement by the husband that the children should stay in Jamaica until July 19 2007.

Other matters upon which there is conflicting Affidavit evidence may properly be left for resolution at the substantive custody hearing.

37. In paragraph 11 of her First Affidavit the wife stated that after the children were born she continued to be a housewife and she was the children's primary caregiver. She then itemizes some aspects of her day to day routine with the children whilst in California. In paragraph 12 of that same Affidavit the wife states that because of the husband's long work hours at the job which he loves as a Professor of Pharmacy he did not interact with the children as closely as she did on a day to day basis and she states that even when the husband was at home the children interact less with him than with her.

38. In his Affidavit in response sworn to on the 6th July 2007, at paragraph 65 the husband states that he and the Claimant are the primary caregivers to their children although admittedly the wife would spend more time with the children on a daily basis based on their discussions, agreement and the wife's own choice.

39. In cross-examination the wife said that the husband was a good father and was the sole bread winner. She said that she could not say that she was the sole caregiver.

40. In his Declaration which he swore to in July 2007 in support of the proceedings in California, the husband at paragraph 30 stated that whilst during the marriage the wife was the primary caretaker of their children by choice and by agreement, she never parented the children alone. Also

in paragraph 34 the husband stated that while living in California the children were in the primary care of the wife.

41. In cross-examination the husband said that he agrees that in the U.S. Declaration he said that the wife was the primary caretaker of the children. He said that his interpretation of the term "primary caretaker" is a person who stays home with the children. However, he stated that there are differences within that definition. He said that someone who is the sole breadwinner, who provides the financial support for the children could view themselves as the primary caretaker. He stated that he was not resiling from his position that wife was the primary caretaker given his definition. However he seemed to be maintaining that both he and the wife were the primary caregivers.

42. As regards the issue of whether the husband had agreed to the children remaining in Jamaica until July 19 2007, the husband had this to say in his Affidavit evidence sworn to on 6th July 2007, paragraphs 69-71:

> *69. That, as agreed by the (wife) and I, when our children left California for Jamaica in January 2007, it was for the purpose of vacation. The agreement was that they would stay at their maternal grandmother's home until I arrived for my vacation at which time we would all return to California on April 12, 2007.*
>
> *70. That as I trusted the (wife) I agreed for (Q) to be enrolled at the St. Hugh's Preparatory School. I did not consent to our other son K being enrolled in a nursery. I was of the opinion that he would stay with the (wife) while she was on vacation or with my retired parents if the (wife) needed a baby-sitter at times.*
>
> *71. That in March 2007 the (wife) informed me that she decided, even though she knew I was not in agreement, to keep the children in Jamaica until the Summer and changed their return date to California to July 19 2007. She also advised me by e-mail, two weeks prior to*

my scheduled arrival in Jamaica that she had intended to stay in Jamaica until the summer.

43. In her Affidavit of 16 August 2007, the wife indicates that whilst she agrees that the initial arrangement was that she would come to Jamaica for the purposes of vacation in January of 2007 and that they would return to California when the husband came to Jamaica in April of 2007, she finds it difficult to understand how the husband could say he was still not in agreement with the children staying until the Summer. This is because she said that the husband even offered that his mother would baby-sit K when the wife was at work after the wife returned from California. In the 3 weeks in April 2007 when the husband was in Jamaica for 3 weeks he never indicated any disagreement with the wife's proposal that the children remain in Jamaica until the Summer. She states that when the husband was in Jamaica he departed with her leaving the children's passports and tickets in the bedroom where the wife and husband had been in Jamaica. When the wife called the husband from the American Airlines ticket office here in Jamaica while she was trying to change the airline ticket, she asked the husband which credit card she should use to deal with the cost attendant on changing the tickets and the husband told her which credit card should be billed.

44. In the Declaration which the husband filed for the U.S. proceedings, he indicated at paragraphs 24, 25 and 27 thereof the following:

24.....I questioned the (wife) concerning the circumstances of her stay in Jamaica. (The wife) assured me that she merely wanted to extend her vacation in Jamaica. (The wife) promised me that she and the children would be returning by July 19 2007. (The wife) planned to come back to the United States with me on April 12 2007 so that we could spend some time together at home and get Q registered

in...school. (The wife) did return to the U.S. with me. (The wife) left the children in Jamaica with my parents.

25. ...(The wife) and I thoroughly discussed Q's enrollment for the 2007-2008 school year.(The wife) reassured and promised me again that she and the children would be returning to California on July 19 2007.

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

45. In cross-examination, the husband said that he did not consent to the children remaining until July 19 2007. He says that the dates had already been changed without his knowledge, hence his reference to July 19 2007. He says that when he and the wife left in April the children remained in Jamaica. He states that he did not do anything to procure or ensure their return to the U.S. as he did not have the means. He claims that he asked for the passports but they were not given to him.

46. The husband admits that he did not make any statement to that effect in the declaration for the U.S. proceedings. He says that when he stated that the wife "did not have his consent to keep the children in Jamaica past July 19 2007" he was not saying that she does not have his consent past July 19 2007, but has his consent up to July 19 2007. He says that he was saying that the wife didn't have his consent up to July 19 2007 and beyond.

47. The wife was cross-examined about an e-mail which she sent to the husband dated March 14 2007 and which forms part of the exhibits to the

husband's declaration in the U.S. proceedings. In that e-mail to the husband the wife states, amongst other matters :

> *....I just need to get another ticket for about the 19th, that'll give me time to do Q's school registration on the 17th.*
>
> *I know that at this time you're not in agreement, but this is the only time that he'll ever be able to spend such a long time in Jamaica.....*
>
> *Sorry that we're not in agreement with this....*

48. The wife says that having read that e-mail what she is saying is that while the husband had initially disagreed, and was in disagreement as at March 14 2007,in his subsequent visit to Jamaica towards the end of March, early April for 3 weeks, when they were all together the husband never mentioned once that he was in disagreement with the children remaining in Jamaica until July 19 2007 and that he also mentioned several matters which implied that he was not then in disagreement .

49. The wife was also cross-examined about an e-mail from the husband dated May 26 2007, which is exhibit MASF-1 to the wife's First Affidavit. In that e-mail the husband states:

> *You have told me that I gave permission for Q and K to stay in Jamaica beyond April 12 2007 which I have refuted. I understand that they have airline tickets to return to Los Angles on July 19 2007, a date to which you say that I agreed, which I have also refuted.*
>
> *So that there is no miscommunication between us, I am requesting that you give me Q and K's United States and Jamaican passports when I arrive in Jamaica next week. I do not want it to be ever said again that I left them in Jamaica. I did not choose to leave them in Jamaica in April and they are currently in Jamaica without my consent, and if they remain in Jamaica for any period beyond July 19 2007, it will also be without my consent.*

50. When asked whether in light of this e-mail, on May 29 2007 when the wife applied to the Court here in Jamaica for custody of the boys, whether

she still thought that the husband was consenting to K and Q remaining in Jamaica until July 19 2007, the wife states that she had to consider this e-mail in relation to what the husband had said before on other occasions, the 3 weeks spent together in Jamaica when there was no such issue raised, and the wife and children continuing to be in Jamaica on the understanding that they would be there until July. The wife repeated her evidence about the ticket purchase and the credit card information .

51. On the 22nd August 2007, in addition to ordering that there should be cross-examination in respect of the issues outlined above, I also ordered that the husband be permitted to refer to and rely on the expert witness report of Mr. J Michael Kelly, who, amongst other matters, attested to the law applied in the State of California. I also ordered that the wife be permitted to refer to and rely upon the Expert Witness Reports of Professor Samms-Vaughan, Consultant Developmental and Behavioural Paediatrician and Dr. Wendel Abel, Consultant Psychiatrist I did not expressly deal with the medical report of Dr. Leslie Gabay as it was a part of the exhibit including Professor Samms-Vaughan's report, but I have allowed its use and made reference to it as an expert report. The Defendant's attorney made no objection to its inclusion or use in the wife's Affidavit.

FINDINGS ON DISPUTED AREAS

52. Before turning to the difficult task of weighing and placing the relevant factors in the balance, I make the following findings of fact on the disputed areas of the evidence which in my view are important for a proper resolution of this matter.

53. Firstly, I find on the evidence that the wife was really the primary caregiver in relation to these two little boys. Despite the husband's intriguing definition of primary caregiver it is obvious that, even if only by virtue of the fact that she was a "stay-at-home" mother, that the wife was the primary caregiver. It was she who spent most of the time with the

children, cooking for them, caring for them, taking them on outings, with and without the husband, attending school meetings and indeed, when the children traveled to Jamaica, it was the mother with whom they spent considerable time here in Jamaica from time to time.

54. Secondly, I find that the husband did in fact, albeit it may have been reluctantly, agree to the children remaining in Jamaica until July 19 2007. The evidence demonstrates that the wife took the children to Jamaica with the agreement of the father at all material times and there is no credible evidence that he objected to their extended stay in April when he came to Jamaica. I find that it is after this time that the wife felt that irreconcilable differences had developed in the marriage which led to the wife changing her mind and deciding to reside permanently in Jamaica. It is only after the wife indicated that she intended to stay in Jamaica with the children and would not be returning at all, that the husband sought to not just revoke his consent, but to say that he had not agreed to them staying until July 19 2007 initially, mid-stream, or at all. I agree with Mr. Braham, Counsel for the wife that the children had been brought to Jamaica with the consent of the husband and had been here with the husband's consent to the children remaining until July 19, 2007. From the 29th May 2007 to date the children have been kept in Jamaica pursuant to Court Orders and there is therefore no proper basis for saying that the children have been wrongfully brought or retained in Jamaica. It follows that I am not of the view that this is really a "kidnapping" case.

55A. In coming to my conclusion that this case does not involve kidnapping I rely upon the English Court of Appeal decision in **Re A (infants)** 1970 3 All. E.R. 184 where the Court held that as the children were not brought or retained in England as a result of stealth, deceit or wrongdoing, the case was not really of the kidnapping variety.

I agree with Mr. Braham that if there is no element of wrongful retention of the children by the wife here in Jamaica, then some of the cases show

that the question of summary return does not arise and therefore the Court should proceed to a full hearing of the matter on its merits – See **Re A B and B Kidnapping Re J**

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

RESOLUTION OF THE ISSUES

Summary Return Application

57. It is not in dispute that the Jamaican Court has jurisdiction on the basis of the children's physical presence here in Jamaica as well as the fact that they are citizens of Jamaica.

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

59. The children have lived most of their lives in the United States, and until the wife decided that they were not returning to California, the children had made their home in the United States. I agree with Counsel for the wife Mr. Braham that the Court ought not to get entangled in the technical concepts of domicile and habitual residence, but as stated in **Re J**, the Court should ask itself with which country the children have a closer connection. Based on the fact that the children were born in California and are citizens of the United States and have spent most of their lives there, it is my view that California is the country of the children's habitual residence and also they have a closer connection to the United States than Jamaica. However, that degree by which the children are closer to the United States than Jamaica, is fairly small. I so find because, although the children were born in the United States and are

U.S. citizens, they are also citizens of Jamaica and they possess Jamaican passports. In addition, although the children have spent most of their lives in the U.S., they have upon a number of different occasions spent considerable periods of time here in Jamaica with the mother. Indeed, even in his e-mail to the wife dated May 20 2007, exhibit MASF 18 to the wife's Affidavit sworn to on the 16th August 2007, the husband points out that as at that time, Q would have spent 16 of his 57 months in Jamaica (almost a third of his life), and K would have spent 13 of his 28 months (almost a half of his life). Of course there have now been a further 4 months that Q and K have spent in Jamaica. In addition, the children have started school here in Jamaica and had not yet done so in the United States, although Q was enrolled to begin. Further, because the children are so young, they have not really developed deeply-embedded roots in the U.S – See **Re P** page 233. In other words, I find the U.S. to be the country with which these children have the closer connection, but only marginally.

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

61. The question of the approach that would be taken by the California Court to the question of welfare is a relevant consideration. The Law in California is presumed to be the same as Jamaican Law. However, in

addition, the expert report of J. Michael Kelly, an eminently qualified Family Law Specialist Attorney who practices in the State of California, filed by the husband testifies that (at paragraph 3 of his Report and in the Code Sections of the California Family Code attached to the Report) , California Courts are bound to apply the "Best Interest of the Child" test when making any award of custody in the State of California. That evidence was unchallenged and I readily accept it. Hence this Court would have no concern or hurdle in its way presented by the Law the foreign Court would apply in making the choice whether to order summary return.

62. In this case there is no pre-existing Court Order in the California Court. Those proceedings started long after the proceedings were filed in Jamaica and there has been to the date of this Judgment no final order made in the California Court. This situation is distinguishable from that which obtained in the **Panton** case and a number of the other authorities cited by Counsel. Mr. Goffe on behalf of the husband has sought to argue that the Superior Court of California's determination that California is the home state for Q and K and that it has jurisdiction over this matter, although not binding on this Court should be given great weight in accordance with the principle in **McKee v. McKee**[1951] 1 All E.R. 942. However, in **McKee** the Court was dealing with the question of how to treat a decision by a foreign court as to custody, not a decision by a foreign court in relation to jurisdiction. With all due respect, whilst I can see that great weight properly ought to be paid to a custody order made by a foreign court, in other words an order or decision dealing with the subject matter of custody, this Court would be abdicating its responsibility if it allowed another Court's finding that that foreign Court had jurisdiction, even more so that Court's decision in respect of whether our own local has jurisdiction, to affect its own independent view as to whether and how to exercise its jurisdiction. That is an entirely different

matter and in that type of situation, especially where as here the proceedings were filed in Jamaica before the proceedings were filed in the U.S., I strongly disagree that this Court should give great weight to the California Court's decision that it has jurisdiction and that the Jamaican Court does not. As to the former, it is of course possible for several Courts to have jurisdiction at the same time and that is the whole point of the question of forum *non conveniens*, and as to the latter, the decision as to the jurisdiction of a Jamaican Court for the purposes of the law in Jamaica is for a Jamaican Court and a Jamaican Court alone. To apply the principles distilled in the **McKee** line of cases to the circumstances of this case is misconceived. Whilst therefore I treat and consider the decision of the Superior Court of California regarding jurisdiction with respect, it has no weight in relation to the issues before me, not being a pre-existing order as to custody.

62A. Mr. Goffe on behalf of the husband has submitted that the court also should consider the inconvenience that may be imposed on the husband if he has to maintain his children in a foreign jurisdiction and that it is in the best interests of the cause of justice and the welfare of the relevant children that the issue of maintenance of the children which is directly related to the issue of custody, be determined by the Superior Court of California. The submission is that although the wife has not included a claim for maintenance in her Fixed Date Claim Form, the court may nevertheless make such an order if it is in the best interests of the children's welfare. Mr. Goffe submits that it is in the best interests of the Court that is seized with the jurisdiction to make the custody orders, also to be in a position to make orders as to maintenance, which orders it should be capable of enforcing in its jurisdiction. I do not agree with Counsel's submission that this is a factor which points in the direction of the California Court since by virtue of our Maintenance Orders (Facilities for Enforcement) Act and the Maintenance Orders (Declaration of

Reciprocating State) Order, 2000, there is provision for reciprocal enforcement of maintenance orders made in Jamaica in California as California has been declared to be a reciprocating State.

63. In carrying out the balancing exercise, I have to consider each child Q and K as individuals, and separately. I have to look at the children's physical, emotional and educational needs and the relative capacities of the adults around the children to fulfill those needs.

64. Here in Jamaica it is the evidence of the mother that the boys reside with her and her mother in a home in Saint Catherine jointly owned by the wife and her mother. The children have access to a large network of extended family here in Jamaica, including, on their mother's side, aunts, uncles, cousins, godparents and maternal grand parents and on their father's side, uncles, an aunt, and paternal grandparents. The children spend every other weekend with the husband's parents here in Jamaica. Godparents and neighbours assist the wife with the transportation of the children to and from school, in the case of Q to St. Hugh's Preparatory School, and in the case of K, to Nursery at Crayon College. The wife's home here in Jamaica has considerable land space and the children have plenty space in which to play. The wife says that since January 2007 she has been working as a Management Consultant and that the job allows her a certain amount of flexibility, including sometimes working from home. The children attend Webster Memorial Church here in Jamaica with their mother, a church where the parents got married and both boys were christened.

65. The husband has made arrangements for the immediate care of the boys since the wife has indicated in her Affidavit that she does not intend to return to the United States to reside. The husband says that his parents will return to the United States to complement the care he will give to the children. The husband's parents are retired pharmacists both in their 70's and are U.S. citizens. Recognizing that this is not a

responsibility that he would like to indefinitely impose on his parents, he would in a short time, conclude arrangements to obtain on a fulltime basis, a nanny to assist with the children's care. Q would attend Pantera Elementary School where he was enrolled. In addition, the husband, who is a full-time lecturer at the University of Southern California, says that the University offers day care facilities for children who are K's age and he intends to use that facility or any other facility that will offer optimum care while he is at work.

66. According to the wife, both children are doing well at the school and nursery here in Jamaica. That opinion appears to be supported by school reports exhibited to the wife's Affidavit at MASF 17 and the assessment of Professor Maureen Samms-Vaughan, Professor of Child Health, Development and Behaviour, University of the West Indies, and Consultant Developmental and Behavioural Paediatrician at the University Hospital of the West Indies, exhibit MASF5.

67. The husband has in his Affidavit indicated that the children have an identified paediatrician and regular dental appointments for Q in the United States, one of which has been missed by Q. K has been identified by the husband as having delayed speech development. On a referral form, dated the 22nd May 2007, a date well after the children had been in Jamaica for some time, K's paediatrician in the U.S. made a referral for speech therapy evaluation and treatment in relation to K. The husband has expressed the view that California offers greater accessibility, and more affordable extensive, specialized and systematic care than that which is currently provided in Jamaica. It is the professional opinion of Professor Samms-Vaughan, page 8 of her Expert Report, that Q and K can receive health care and education similar to that provided in the U.S.

Dr Leslie Gabay, who the wife says is a paediatrician highly recommended to her by the husband's sister, examined K and has stated in his report, MASF 5, that in his assessment K is of normal development with good

receptive speech and a mild delay in expressive speech. Dr Gabay according to the wife does not consider K to be a candidate for speech therapy. However, notwithstanding, the wife has had K interviewed by Michelle Skeete, speech pathologist. The wife is therefore confirming that K is getting medical care and attention here in Jamaica. Whilst the wife concedes that in a developed country such as the U.S. there may be more extensive health care facilities, she does not share the husband's view that there is a higher standard of health care in the U.S. than in Jamaica. I need not of course determine in which country there is the higher standard, my concern at this stage is to see the relative capacity of the children's needs being met, particularly in the short term, factors to be put into the balance with all the other factors in deciding what is in the best interests of these children.

68. In this case, whilst there may have been disagreement as to whether both the husband and the wife were primary caregivers, it is not in dispute that the wife was the one who spent most time with the children, she being a stay-at-home mother, and the husband working for at least four full days per week. The children have also traveled with the mother, and it was with her that the children have spent considerable periods of time here in Jamaica. The wife has therefore been a constant in their lives wherever the children have been. These 2 boys have not spent any substantial period of time away from the wife. Prior to starting school here in Jamaica, the children do not appear to have attended any formal early childhood centres. The children's days were according to the wife taken up mainly with activities carried out by the wife and the children in the home and for short periods with group- based activities along with their mother. Although there are one or two instances where the husband has criticized the wife's conduct and management of the children, as in **B and B** there really cannot be said to be any major or substantial criticism by him of the wife as mother's care overall over the years of their lives, in

the case of Q almost 5 years, and in the case of K, 2 1/2 years. In light of experience and common sense picked up in my professional life dealing with small children, it does appear likely to me that the bond between these children of tender years and their mother is likely to be so close that, for the purpose of deciding their future in a matter of a short period of time, say a few months, there seems to me to be a real risk of greater emotional harm being now done to the children if they are now separated from their mother than if they stay with her. In **Re B** there was no medical evidence in relation to such a finding, the Court being content to rely upon common sense and experience in inferring from the close bond between the mother and the twin boys that there would be a risk of emotional harm. I am bolstered in the view which I have taken by the opinion of Professor Samms-Vaughan, which I accept, backed up by supporting literature, that for young children, it is important to ensure close physical proximity to the attachment figure. The Professor opines that she would consider the wife the primary attachment figure based on time spent and repeated presence across time in the life of each child. Professor Samms-Vaughan states at page 8 of her Expert Report:

> *Physical disruptions to children's lives are considered to be much less consequential to their development than emotional disruptions(Kelly J & Lamb 2000)...Children can be assisted to adjust to physical disruptions by providing set routines in their new physical environment. Based on the teacher reports received, both children have adjusted well to living in Jamaica, their most recent physical environment.....*
>
> *Removal of the children from their most consistent and therefore primary caregiver, their mother Michelle Strong-Forrester, is likely to cause the children undue stress. This will be compounded by the simultaneous need, in the absence of an appropriate transition period, to adjust to varied and new caregivers (day care centre*

caregivers, nanny) , as well as to caregivers with whom they have had contact in Jamaica, but who have never been consistent primary caregivers(grandparents).The grandparents would themselves be adjusting to a new physical environment at the same time as the children are adjusting. This may result in internalising or externalizing behavioural or emotional manifestations. Internalising behaviours include withdrawing from peers and family, becoming sad and tearful and refusing to speak. Externalising behaviours include aggression, lying, stealing and disruptive behaviours in class. Q, in particular, has shown that he is sensitive to the emotional changes around him and would therefore be at a greater risk of manifesting those responses.

69. On page 6 of her Report Professor Samms-Vaughan reports on her observations of the 2 boys in July. She states that K explored his environment appropriately, but often located his mother, who was seated at a distance and went to her for comfort for a few minutes before leaving again to explore his environment. This she states demonstrates that K has developed a secure attachment to his mother, and is known to be the result of a responsive parenting environment provided for him.

As regards Q, the Professor states that he was able to explore his environment by remaining in visual and auditory contact, typical behaviour of a securely attached child of his age.

The Professor does indicate that she did not have the opportunity of observing the children with the husband.

70. In addition to the evidence of the effect that the separation of the children would have on the children, there is also evidence that separation would have an adverse effect on the mother's mental health, and consequently this may have an indirect effect on the children as her young charges and affect her ability to care for them and/or her interactions with them when those in fact take place. Dr. Wendel Abel, Consultant

Psychiatrist attached to the University Hospital of the West Indies, in his Report dated August 16 2007, states:

> *Based on research evidence (Schen, 2005, Hock et al, Miranda) and an evaluation of Mrs. Forrester, separation of these two children from their mother could have devastating psychological consequences for both mother and children.*
>
> *The close relationship and bond with the 2 children, a separation could be very devastating emotionally and mentally to a mother who has committed herself to the upbringing and care of her two children.*
>
> *In addition, the children are also likely to have long term adjustment problems and emotional issues were they to be separated from a mother who has been very committed, played a nurturing role in their lives and been pivotal in their socialization. This is supported by attachment theories.*

71. As Baroness Hale stated in **Re J**, it will often be entirely reasonable to expect that a mother who took the risk of uprooting the child would return with him once it is ordered that he should go home. However, it is sometimes necessary to consider whether it is indeed reasonable to expect her to return, the sincerity of her declared refusal to do so, and what is to happen to the children if she does not. In this case the wife has indicated that she felt unhappy and socially isolated in Pomona California. She has no close friends or family for support and she has no employment there. She had earlier indicated how difficult it was for her to secure employment in Pomona. She would therefore have no financial independence and no income to sustain her. The wife states that she believes her desire to relocate to her home country is a reasonable one, she has secured sound employment here. She does not own a home in California or elsewhere in the U.S., has no job, and says that it would therefore be well neigh impossible for her to return to the U.S. She states that she would be unable to afford the high cost of litigation in California. In addition, in

order for her to participate in any custody hearings in California, this she says would necessitate her being away from her new job here in Jamaica for extended periods thereby jeopardizing her employment in Jamaica, as her employers would not permit an extensive absence. She would need to rent accommodation and a car to facilitate her presence in California and the wife states that she would be unable to afford these requirements based on her present income.

72. The wife states that her Attorneys in Jamaica have conducted research and have advised that under U.S. Federal Law, specifically the International Parent Kidnapping Crime Act of 1993, 18 U.S.C.1204, she may be exposed to criminal sanctions if the Court in California finds that she ought to have returned the children. She has also been further advised that she may also be exposed to criminal sanctions in the State of California based on the California Penal Code 278.5. The wife also expresses the view that if the custody matter is heard in the United States of America, she would almost certainly lose custody as the Court may well accept the husband's expressed view that given its high crime rate, Jamaica would not be a safe place to raise children.

73. In this case the husband has through his Attorney Mr. Goffe indicated that he would be prepared to bear whatever costs the wife would incur in returning to the State of California to have the matter litigated, not limited to the husband living in the same premises. He says he would be prepared to give an undertaking to that effect. However, this Court would really not be in a position to enforce that undertaking as was pointed out in **B and B(Kidnapping)** (1986) F.L.C 75,447 at 75, 457. In addition, one has to put into the balance that in the California proceedings the husband has sought spousal maintenance and legal fees against the wife and the wife claims that the husband has demonstrated somewhat frugal behaviour and has since April cancelled their joint credit cards. In those circumstances I am not satisfied that the husband's offer

to bear the costs would make it reasonable for the wife to return to the U.S. to litigate the custody battle there.

74. I am satisfied that the wife genuinely does not intend to return to the United States and I do not find her reasons for not doing so unreasonable. These reasons are very relevant to the central question of the welfare of the children. This Court has no power to order her to return to California with the children - **Band B** and a number of other authorities. In **Band B** the Family Court of Australia held that notwithstanding that this was a kidnapping case, the question of the custody of the children should be litigated in Australia and not Malaysia. The Court considered, and this case is also relevant under the issue of forum *non conveniens*, that on the issue of the proper venue for the hearing:

Per the whole Court: having investigated the matter, the trial judge had two choices; to order the return of the children to Malaysia to be dealt with in accordance with the laws of that country; or to order that the question of the children's guardianship and custody be dealt with in Australia. Per Strauss J.: the following considerations were relevant to the present case: the wife's doubtful security of residence in Malaysia, particularly after the divorce, the doubts about her maintenance and support in the future; the doubt whether she would be able to present her case adequately in Malaysia; the wife's liability to punishment for failure to resume cohabitation in accordance with an order of the Kadi Court..per Strauss J.: both the children were very young. If they had to return to Malaysia after a hearing in Australia, no significant damage was likely to arise from their remaining in Australia for some little time. If they were separated from their mother it may have had serious effects on them. Even if the wife returned to Malaysia with the children, it could not be predicted how long they might remain in her care

...

The question of what would therefore happen to the children if the wife does not return to California therefore looms large and the risk of detriment to the children has already been discussed above.

Making the Choice

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

Although I have found that the children's habitual residence has been in California, this factor is persuasive, it may be determinative, but in no case is it conclusive. However, summary return cannot be the Court's automatic response.

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

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

(b) These children have substantial connection to Jamaica; they are Jamaican citizens. They have spent considerable periods

of time here in Jamaica and so they are not at all in an unfamiliar environment.

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

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

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

76. As regards the question of forum *non conveniens* I have indicated that the children in my view have a marginally closer connection to California than to Jamaica. The husband has not therefore in my view shown that the Court in California is the clearly or distinctly (my emphasis) more appropriate Court than the Jamaican Court. It must be remembered that the Jamaican Court has by right jurisdiction as a result of the children's physical presence here in Jamaica and the fact that, in addition to being U.S. citizens, the children are also Jamaican citizens. There is therefore a distinction between saying that the children have a closer or more real and substantial connection to California and saying that the California Court is clearly and distinctly the more appropriate forum. Questions of degree of closeness are involved in this exercise.

In contrast to the difficulties which the wife says she would experience if she had to litigate the substantive matter of custody in California, the husband has not given any evidence as to any difficulty or inability he would suffer in litigating the custody issues here in Jamaica. Although his evidence is that he has a full-time lecturing position which he has held for many years, I cannot make assumptions based on that.

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

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

79. In the event that I am wrong in finding that the husband has not shown that California is clearly or distinctly more appropriate than the Jamaican forum and if the California Court is *prima facie* the

clearly more appropriate forum, there are circumstances mitigating against a stay. These are the wife's doubtful ability to return to California and support or maintain herself there while fighting the custody litigation there and the issue whether she would be able to be able to present her case adequately. I must also consider the wife's potential liability for criminal sanctions in California, the wife's reasons for deciding to remain permanently in the land of her birth, Jamaica, and not return to California. Also there is the fact that the children are very young and in my view no significant damage to them is likely to arise from their remaining in Jamaica for a little time, if they have to eventually return to California after a hearing in Jamaica. On the other hand, they may be seriously and adversely affected if they have to be separated from their mother in the short term.

80. In conclusion therefore, the question of what is in the best interest of these two little boys Q and K, in other words the welfare principle, permeates all of the court's considerations and balancing exercise, whether one is considering either the issue of summary return or forum *non conveniens.*

81. In my judgment, it is not in the children's best interest for me to make a summary return order and my ruling is that the substantive custody application should be heard here in Jamaica. In so deciding I wish to make it clear that in allowing Q and K to remain here while their future is decided here does not mean that they will remain here in Jamaica forever. Further, or alternatively, my ruling is that Jamaica is the forum conveniens for the determination of the matters of custody and access of Q and K.

82. I make the following orders: -

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

(2) Permission to Appeal is granted.

(3) The substantive hearing of the Fixed Date Claim Form is fixed for hearing on 16th January 2008 at 11.00 a.m. for the rest of the day. (Counsel for the wife indicated they were not available before that date based on previous Court fixtures)

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

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

(6) No order as to Costs.