IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. FAM 180 OF 2011

BETWEEN:

B

PETITIONER

AND:

B

RESPONDENT

Appearances: Ms. Francesca Dowse of Samson & McGrath for the Petitioner
Mr. Shaun McCann of Campbells for the Respondent

Before: Hon. Justice Williams

Heard: 16th December 2011

Delivered: 16th December 2011

EX TEMPORE RULING

1. Due to the nature of the applications made, this matter requires a timely decision. I would like both parties, when leaving Court today, to understand the reasons for my decision. Therefore, I give this as an extempore ruling, a little rough at the edges, and it is not intended to read as neatly as a formal written ruling. In addition, you will see that a court reporter is in Court and copies will be made available to you in the New Year.

2. Although we are sitting in my Chambers, this rather cramped room, I would remind the parties that this is still a formal court hearing. I understand that the substance of the matters with which I am dealing are highly sensitive and that emotions are high. I understand that my decisions are of great importance to both Mr. and Mrs. B as they affect the most important part of their lives, their children. I understand if what I have decided may not be agreeable, and having regard to the nature of the applications, I accept that it will be upsetting. Despite that, I do not expect either party to comment during the delivery of my ruling.

BACKGROUND

3. Mr. and Mrs. B are involved in ongoing divorce proceedings. Although it is undeniable that they both love their children dearly and feel that their actions and positions taken are done so for what they feel to be in the children's best interests, a sad feature of this case is their inability to resolve between themselves a number of issues that keep arising concerning the immediate and long-term future of their children. As a consequence, the Court has over the last few months been called upon to an unusual degree to assist them with arrangements for their children. In addition, the Court has had to intervene to assist the parties with how they should conduct themselves as it relates to each other. The required involvement of the Court hitherto has been to a level that one would not ordinarily expect having regard to the fact that the parties appear to be two intelligent adults.

4. I remind myself of what I said in my extempore ruling on 1st November when I addressed Mr. and Mrs. B directly and said:

> *"...The root cause in this case lies in the relationship between the two of you, and I understand why this is at this time. You will understand that I have made no findings in relation to conduct allegations set out in the earlier affidavits, and it is not appropriate for me to have done so. But whether those are right or wrong, they may go partly to the problems that you are having with each other. But as I said to you earlier, for the long-term plans, whatever they may be, with great respect to both of you, you are going to need to address them."*

I went on to say:

> *"I am sorry to say this, but the parents have got to realise that the deterioration in their relationship is affecting the stability of the children's relationship with both of them and they are going to have to find a way to stop it. They have different views and they can't seem to accept the other person's views."*

I went on to say:

> *"Mr. B, take a step back, think about when the children are with the other parent, you must give credence to that. Rely on the other parent to use their commonsense and give them a degree of*

freedom without having to continually ask them are they doing this, are they feeding that, are they getting to bed at this time. ... I would ask that there is sensitivity as to what the other parent feels is appropriate or not."

5. I aimed these comments at both parents at that time, but I was keen that Mr. B understand that it was not his role to take it upon himself to oversee what Mrs. B was doing. She is an adult and due to the maintenance Orders which were put in place, she should be able to be independent from him regarding her day-to-day budgeting and her care for the running of her house and the children when they are with her. It was clear that she desired that independence and the Order was designed to enable that. Of course unusual expenses, like substantial car repairs, are not budgeted for in the maintenance figures and may be requested, preferably through attorneys.

6. I also digress but I note there has been confusion about the electricity bill and the water bill. I accept for the purpose of this hearing that the parties and their differing interpretations of the Order reflects their genuine belief as to what was ordered. For the avoidance of doubt, the Order meant and means that Mr. B was responsible for payment of usage of those utilities up to 1st October 2011 and Mrs. B was responsible for payment from her global maintenance for any usage after that date.

7. At some stage, both of these parties will need to recognise and accept that the other is entitled to act independently and that they must cooperate for the sake of their children without the almost continual involvement of the Courts. That time may understandably not have yet arisen due to the fact that a substantive application by the mother for permanent removal of the children from the jurisdiction to the United States will be heard at some stage in the New Year and thereafter the hearing of the ancillary financial claims of the parties. Emotions are high.

8. The only positive that could possibly be derived from the volume of earlier hearings is that I have been able to gain a greater familiarity than may be usual at this stage of the proceedings about the case, the issues involved and the personalities. I reviewed the case when giving an extempore ruling on the issues of interim maintenance and access on 22nd September 2011. After receiving oral evidence over two days, I gave a substantial extempore ruling on the 1st November 2011 ordering return of the children to Mrs. B's care after their removal by the Department of Children and Family Services and also Orders for access. This knowledge of the case has been further added to by the exhaustive live evidence of the parties given over the past three days.

APPLICATIONS

9. At this juncture, there are two Summonses before me for determination. On Monday the matter came before me for directions and for the court to attempt to approve any sensible agreement that the parties (with assistance of their attorneys), may have been able to reach. As evidenced by the need for a hearing with oral evidence being given over three days, the parties were not able to agree.

10. On Monday, I indicated that due to Mrs. B's hope to be able to leave the jurisdiction on the 16th December 2011, which is actually today's date, for a holiday with the children to the USA, due to limited time, the application for temporary removal would be the primary application for the Court to determine. As the hearing progressed, it became clear that the Court was also being requested to hear Mrs. B's applications for Mr. B to pay the Mrs. B's legal fees to date and for a protection Order.

11. The first relevant Summons filed by Mrs. B is dated 25th November 2011 and concerns the immediate future of the two children, that is their son C, who was born on 14th May 2007 and is four, and their daughter K, who was born on 26th December 2008 and is three.

12. On 12th August 2011, Quin J ordered ex parte that Mrs. B do have interim care and control and that Mr. B have access to take place on 14th August 2011. At the

inter partes hearing before Quin J on 18th August 2011, the children's access to Mr. B was further defined and increased. At the hearing that came before me, I believe it was in September; access was refined, resulting in the children being able to have access to Mr. B each Tuesday after school until Wednesday morning, each Thursday from 3:00 p.m. to 6:00 p.m. and each Saturday from 5:00 p.m. to Sunday 6:00 p.m.

13. At a hearing in November 2011, the children were ordered returned to Mrs. B's care after they had been removed by the Department of Children and Family Services. The children's access to Mr. B was slightly varied so that it also took place each Tuesday from after school until 6:00 p.m. and from each Thursday after school at that time until Saturday at 6:00 p.m.

14. In light of paragraph four of the Order made by Quin J on 18th August 2011 preventing either party to remove the children from the jurisdiction without the written consent of the other party or Order of the Court and due to Mr. B's refusal to give his consent, the mother seeks:

- Firstly, an Order of the court permitting her to temporarily remove the children from the jurisdiction to Florida between 16th and 24th December 2011.
- Secondly, permission to buy flight tickets on the parties' joint credit card.

15. It is important to note that the non-removal Order came about not at the behest of Mr. B, but due to paragraph 5 of Mrs. B's ex parte Summons dated 11th August 2011 seeking such an Order. It is Mrs. B who sought and was granted an Order prohibiting both herself and Mr. B from removing the children unless there was an Order or consent.

16. If permission is given, then Mrs. B is content for the Order to reflect that she must:

- Provide full travel movement details, phone contact details and details about where she will be residing whilst away.
- Put in place arrangements for the children to have daily telephone access to Mr. B.

17. If leave were to be granted, I view these provisions as being sensible and they would be encompassed in any Order made by the Court.

18. The same Summons also deals with the amount of time the children should enjoy with Mr. B over the holidays if Mrs. B is permitted to take them overseas for a holiday between 16th and 24th December 2011. Mrs. B proposes that the children would be with Mr. B from Christmas Eve, obviously 24th December 2011, from 4:00 p.m. until 12:30 p.m. on 26th December 2011, Boxing Day. As it is K's birthday on 26th December 2011, it is intended that the children be with the Mrs. B from 12:30 p.m. on that day until 12:30 p.m. on 27th December 2011. This

means that K would be able to spend some time with both of her parents on that important day. It is then proposed by Mrs. B that the children return to Mr. B from 12:30 p.m. on 27th December 2011 right through to New Year's Day at 6:00 p.m. and thereafter the children will revert to the established access routine.

19. If Mrs. B is granted leave to remove the children from the jurisdiction for a period of time up to 24th December 2011, the proposed access arrangements are sensible and seem to be agreed by Mr. B. The arrangement would ensure that the children spend a considerable period of time with Mr. B and the paternal family over the Christmas holidays, recognising that they have spent a similar amount of time with Mrs. B and members of her family over the Jewish holiday. If Mrs. B had applied to remove the children over the Christmas period, it is questionable whether that would have been in the children's best interest and a number of issues about the suitability of leaving at that time would have needed to have been canvassed and considered.

20. I will return to this part of the application after I have dealt with the remaining parts of this Summons and also the other Summons which is before the Court.

ORDER FOR PAYMENTS OF LEGAL FEES

21. In the same Summons, Mrs. B also seeks pursuant to **Section 20(c) of the Matrimonial Causes Law** an Order of the Court that Mr. B pay $50,000 towards

meeting her legal fees accrued to date. It is claimed in the skeleton argument of Miss Dowse to be to *"enable her to have representation for her forthcoming applications to remove the children permanently from the Cayman Islands and for final ancillary relief."*

22. Mrs. B states in paragraph 22 of her affidavit sworn on 29th November 2011 that she makes the application because it is *"in the interest of justice that she be entitled to legal advice in order to be represented fully in these proceedings."* Mrs. B stated in cross-examination that her lawyers have told her that if they were not paid that they *"may not act for me... They may not be able to represent me... I am not one hundred percent sure they would not agree to be paid later. I guess they will not wait for their fees as I would expect you want to get paid also."*

23. In a letter from Samson and McGrath to Mrs. B dated 6th December 2011, the picture becomes somewhat clearer when they write:

> *"In all the circumstances of this case our firm is not in a position to enter into an agreement whereby you grant us a charge over any settlement or award which you might receive. Obviously we can discuss funding options with you and applications which you can make and the Court grant."*

24. On 18th August 2011, Quin J made an Order for the payment of legal fees in this case in the sum of $10,000 after considering the ruling of **Holman J** in the

English case of **A v A Maintenance Pending Suit: Provision For Legal Fees** 1 FLR 377 and the ruling of **Graham J** in the Cayman case of **Huig Zuiderent v Patricia Layne Zuiderent** [2001] CILR *N (9)*, D122/2000 where interestingly Mr. McCann, who appears before me, persuaded the Court that it had the jurisdiction in Cayman to make such an Order. I am similarly satisfied having reviewed the cases, and as it is accepted by the parties, that the Court may make such Orders. I also endorse **Graham J's** sentiments about the nature of interim Orders and the fact that at the final ancillary relief hearing, the interim Orders will be reviewed and the final Order may well take into account sums already paid out, including payments towards legal fees.

25. As stated in **Sears Tooth (A Firm) Payne Hicks Beach (A Firm)** 2 FLR 116 at 118H-119A **Wilson J** referred to:

> *"... ... A grave and widespread problem encountered increasingly in the Family Division: namely, how can a spouse, usually a wife, who is ineligible for legal aid but who has negligible capital, secure legal advice and representation in order to pursue her rights against the husband, particularly one who is rich, litigious or obstructive or whose financial circumstances are complex or unclear."*

26. This concern is at least equally applicable to the Cayman Islands where legal aid, at least before the recent restrictive legal aid reforms in England, was more difficult to obtain for such cases. In addition, in the absence of direct taxation in the form of income tax, the benefit that one would have in England of reviewing such accounts, even after an ingenious accountant has had a chance to get to work on them, is not present here, thus potentially making the party's true financial circumstances less clear.

27. In this case, Mrs. B finds herself in such a position, and although at this stage of the proceedings I would not say that Mr. B is litigious or obstructive or particularly rich, there is some complexity to his financial affairs. Mrs. B may be described in the similar terms expressed by **Holman J** when commenting about the wife at page 387 of **A v A** when he said.

> *"...always been dependent on her husband. She is locked into a bitter struggle with him, whose outcome is of intense importance to her. She has acute need for good legal representation in which her lawyers do not have always to be desperately economizing relative to the husband."*

Holman J went on to say at page 382 that the costs of the suit are:

> *"... after the provision of a roof over her head and food in her mouth, the wife's most urgent and pressing need and expense. ... ...She simply cannot make any progress with the dominating issue*

in her life if she cannot pay her lawyers, and for which the State will not provide."

28. I accept that in both **A v A** and **Huig Zuiderent** it appears that there was no doubt that the husband's and the matrimonial assets were well in excess of the levels claimed for legal fees at the time of the hearing.

29. I also accept that in **A v A**, unlike the matter before me also, the Court found that the husband was paying huge sums on litigation. In the matter before me, I am told that both parties' legal fees are at a similar level at this time, I believe around somewhere in the region of $50,000. I am told that Mr. B's fees were in the region of $40,000 in October 2011. No updated figure has been placed before the Court during this hearing, but one can easily envisage that due to this hearing and preparation for it that the fees will be in the region of the $50,000 figure. I have not been taken through a breakdown of either firms' fees and cannot determine whether they are reasonable. If I am minded to order the payment to Mrs. B, I would not be willing at this time to deplete this asset in the amount of $50,000 without carrying out such an exercise. At this stage on the submissions and the review of the evidence, if I deem it appropriate to make a payment, it will be at approximately 75% of that level, namely $37,500. I come to this conclusion as I feel it is proper with such a substantial figure in a matrimonial matter which may not be regarded as being "a big money case" that the Court should at least carry out such review, and I say so not because I see any merit in Mr. B's contention that Miss Dowse and the firm of Samson and McGrath are not acting in the best

interest of their client and are litigating in such a way to benefit from the receipt of increased legal fees.

30. The issue in this case, if satisfied that the sought fees are outstanding and to a degree reasonable, is whether there is a source from which any payment can be made by Mr. B. The Court at all times must have regard to the requirement of "equality of arms," affording each party a reasonable opportunity to present their case.

31. Despite the questioning concerning the alleged value of Mrs. B's jewelry and the contents of the Lexis Nexus report, it appears that Mrs. B lives in financial isolation, being totally reliant upon the ordered interim maintenance payments. In relation to the jewelry, even if valued at the level contended by Mr. B, there is no evidence before me as to whether it would be realistic to expect that to be sold in Grand Cayman for its market value at this time. The value of the jewelry may of course become more relevant if deemed to be a relevant asset at the final ancillary relief hearing. The Lexis Nexus report produced Mr. B in support of a contention that Mrs. B has assets and is registered as being resident in Florida cannot be relied upon. The first paragraph of the document under the bold heading "Important" states:

> *"The Public Records and commercially available data sources used on reports have errors. Data is sometimes entered poorly, processed incorrectly and is generally not free from defect. This*

system should not be relied upon as definitively accurate. Before relying on any data this system supplies, it should be independently verified."

32. In the absence today of the full and frank disclosure that the parties will be obligated to ensure is before the Court at the final financial hearing, I am not in a position to determine whether the husband has any further assets save for those disclosed in the Royal Bank of Canada account number 10446569. The parties at the final hearing will need to look carefully at the corporate structure and payments made by any companies/business entities that Mr. B has a possible connection with very carefully. What is clear today though is that Mr. B's position is different to Mrs. B's. Mr. B has financial independence. He is the one who is controlling the bank account. He is not living in financial isolation in Cayman, and fortunately Mr. B is embraced by a commendably supportive family, as evidenced by their obtaining of evidence from Phillip Rabinowitz, a Floridian attorney, to assist his position in these proceedings.

33. Mr. B, unlike Mrs. B, is in a position to decide, if a request is made by his attorneys, when he pays any legal fees due to them. When cross-examined, he agreed that both parties needed legal representation. He also said, when asked if it was appropriate for him to pay for both an attorney and a paralegal that:

"This is a serious matter, divorce ... I not take lightly, involves two children, not in their best interest. I am a simple man, do the best I

can, best possible attorney to represent my children and myself. ...

I do not disagree that she needs representation."

34. Mr. B accepted that both parties had legal bills and that these would need to be paid, in his words, *"at some point"*. When asked how he would pay his legal fees, he said, *"I will pay bill from whatever is left in the $134,000 account,"* and later added, *"My intention is that I will pay out of that account."* Mr. B stated that the contents of the account was owned by him before the marriage, inferring that it should not be seen as a matrimonial asset. In light of that contention and his contention that this is a short marriage and his submission that Mrs. B's view of his financial worth is incorrect, as he has no other significant assets, it is not clear what source he feels that she will pay from when he suggests that she pays, in his words, *"out of the settlement that will be available to her."*

35. In this case, having regard to Mr. B's contention about his lack of significant assets save for the bank account and on the financial disclosure currently before me, I am not able to predict, as I may be able to do in most cases, the approximate amount of capital that the wife may receive at the hearing. It is submitted that Mrs. B is unable to obtain a loan to cover her fees and her attorneys have stated in the skeleton argument and letter of 6th December 2011 that they are not willing to rely upon any deed of assignment of her rights to financial provision as in the **Sears Tooth** case.

36. I am satisfied that Mrs. B does not have sufficient income or capital to enable her to pay for her lawyers and in Cayman is totally dependent upon her maintenance payments. There are funds in the Royal Bank of Canada account and I am satisfied that a payment by Mr. B to her legal fees should come from that account. The amount, for reasons already stated, at this stage, will be $37,500.

37. Before I move on, I can only echo the concern made by both Mr. and Mrs. B that significant matrimonial assets that would be best retained for their and their future after the divorce and ancillaries are concluded are being swallowed up in legal fees. I will trust that they will both have regard to that when hopefully recognising a need to sensibly cooperate in matters concerning their children and ensure that there is compliance with court orders and directions, including full and frank disclosure in the ongoing ancillary matters.

PROTECTION ORDER

38. I will move on to the second Summons which was filed by Mrs. B on 2nd December 2011. Therein Mrs. B seeks, pursuant to **Section 5 of the Protection from Domestic Violence Law 2010** ("the Law"), an Order prohibiting Mr. B by himself, his servant, agents or otherwise from assaulting, threatening, abusing, molesting, interfering with, texting, emailing, telephoning or entering 121 Omega Drive, approaching or in any way communicating with her save for in relation to the children.

39. The Court may make an Order prohibiting a person from committing any further act of domestic violence if satisfied that he or she has committed or threatened to commit an act of domestic violence against a spouse, who is a prescribed person, and is likely to repeat such acts or having regard to all the circumstances the Order is necessary for the protection of the spouse.

40. A person commits an act of domestic violence against a spouse if it is proved his conduct caused or is intended to cause, amongst other things, emotional or physical abuse **(Section 3(1)(a))**. Pursuant to **Section 3(2)(b)** emotional or physical abuse means behaviour which is intended to harass or undermine the emotional or well-being of a prescribed person, which is a spouse, including, amongst other things: (i) following the spouse or waylaying her (in other words by blocking her path or obstructing her doing something) at any place.

41. Pursuant to **Section 3(3)**, any **Section 3(1)** act of abuse, including **Section 3(1)(a)** emotional or physical abuse, which is committed on a single occasion shall, and I repeat the word "shall", be regarded as an act of domestic violence even though some or all of those acts when viewed in isolation may appear minor.

42. As required by **Section 7(a)**, I must have regard as to whether there was a previous protection Order or interim Order made. On 2nd August 2011, Quin J granted ex parte protection and occupation Orders. At the inter parte hearing on 18th August 2011, Mr. B did not oppose the protection Order remaining in place.

However, that evidence was not tested and it does appear that Mr. B intended at a later date to seek to vary the Order and challenge the factual basis upon which it had been originally granted. On 23rd September 2011, Mr. B, in place of the protection Order, gave a solemn undertaking to this court not to use or threaten to use violence against Mrs. B or her property and, I add, not to enter or attempt to enter her property without prior invitation. On 26th September 2011, Mrs. B gave cross- undertakings to this Court in the same terms save that they related to Mr. B.

43. Although Mrs. B alludes to the alleged violence that led to the protection Orders at paragraph 20 of her affidavit sworn on 2nd December 2011, she clearly bases this application on the alleged events on the night of 30th November 2011. On the way the case has been presented, it would be improper for me to embark on a unilateral exercise of making any findings concerning those earlier alleged incidents. However, I may have regard to the fact that Mr. B is aware that he has been the subject of protection Orders in the past and that he should recognise what they are intended to represent. He also, as of 30th November 2011, was subject to a non-assault undertaking and as such would have been wise to think carefully before acting in a manner which may be construed as being aggressive. He should have had that in mind on 30th November 2011.

44. The allegations concerning what happened at Camana Bay at 8:49 p.m. on 30th November 2011 would unlikely amount to a breach of Mr. B's undertaking as it was phrased. That said, Mr. B should be aware that his admitted actions by

turning up at the house, knocking the windows and the door, he says at 7:30 p.m. at night, even if Mrs. B was not at home, might be argued as being entering or attempting to enter Mrs. B's residence without prior invitation and thereby be a breach of paragraph 3 of his undertaking. I, of course, do not go so far as to make that finding today as I have not been invited to do so.

45. The purpose of the injunction is to keep him off the property she resides at, and she is entitled not to have him anywhere on the property. Mr. B should understand that even if the children were at Mrs. B's house under the care of the nanny and she was out, that does not mean that he can turn up at the house at 7:30 p.m., even if he is passing, on a non-access night to see the children without the consent of Mrs. B. As I clearly spelt out in my extempore ruling on 22nd September 2011:

> *"It is very important that the father builds up the trust of the mother,...he should not show up at school to see the children outside defined access. He should not make private arrangements with his son to do so. Defined access is what it says - defined - it is done for a reason - it gives certainty to the parents and more importantly to the children."*

46. The Orders are defined for a reason and unless varied by clear consent of the parties and the sentiment and reasoning I expressed on 22nd September 2011 is equally applicable to one of the parents turning up at the other's house at least

7:30 p.m. on a non-access night to see the children, even if the other parent is out and even if it is to deliver a present.

47. I need not go into the events of that night in great detail as Mr. B accepts that he drove behind the car which was parked in the night-time hours at Camana Bay. He accepts he parked his car horizontally behind the car and thus prevented Mrs. B from leaving. He admits he approached the passenger side of the car where JB was sitting and took at least one photograph. He says that the incident was for three minutes and 45 seconds. That is not an insignificant amount of time.

48. Mr. B states that he was driving past Camana Bay and that he happened to see Mrs. B's car in the car park and that she was getting into it with a man he thought from photographs that he had seen was one JB. He was concerned because he was either a current or former boyfriend of Mrs. B whom she had told him took drugs. He was concerned that she was in the company of such a man and also feared that he would come into contact with the children. As a consequence, he felt it appropriate to take the action he did in order to gather evidence to use in the ongoing matrimonial and child related proceedings.

49. I do not accept that his reasoning justifies his actions on that night. It does not make the actual actions of Mr. B more excusable as Mrs. B may have been less vulnerable as there was a male in the car. I note from the 911 tape that Mrs. B

sensibly ensured that the incident did not escalate by telling JB to stay and do nothing despite Mr. B actions and the invasion of JB's privacy.

50. It is clear from the instant report that the officer who recorded that Mr. B told him that he felt that Mrs. B was cheating on him viewed Mr. B's actions as constituting harassment. PC Stephen Shaw said that the accused was warned to stop harassing the complainant. I agree that even on the agreed facts, Mr. B's actions in waylaying -- and I use the word "waylaying" again because it is specifically mentioned in the law -- that his actions in waylaying Mrs. B amounted also to harassment. Mr. B may regard his actions, which he still feels were appropriate, (and as a consequence I have to say his expressed apology is not sincere), and to be minor, but pursuant to **Section 3(3)** the Court is bound to find that by waylaying her, even on his evidence, by blocking her car in and preventing her driving away at Camana Bay he caused emotional or physical abuse as defined by the Law, which amounts, in the Law to be an act of domestic violence. Having regard to that, I make a protection Order in the terms sought. I find that Mr. B, due to his lack of genuine remorse, and all the surrounding circumstances, is likely to repeat similar acts and therefore an Order is necessary to protect Mrs. B against such acts. Having regard to his acceptance that he was at her residence uninvited at 7:30 p.m. that night and his failure to recognise that that was inappropriate even if Mrs. B was not there, the Order in the terms sought should also make it clear that he cannot turn up at the property where she resides or enter the curtilage of the said property without her prior approval.

51. For the purpose of making the protection Order, I do so and can do so based on Mr. B's version of events and how he says he found himself to be in Camana Bay. Saying that, on the balance of probabilities, I find his explanation as to how he came to be at the scene to be less than convincing. He is at Mrs. B's house at 7:30 p.m. He bangs on the doors and windows and makes telephone calls but gets no response. He says that he had gone to give a present, but in earlier proceedings he had actually reported Mrs. B to Social Services for putting C to bed at 7:00 p.m. and K at 6:30 p.m. He gets no response at the house, and he says that by coincidence on the way to a party about an hour later, from the main road, he happens to see Mrs. B's car, which I find on Mrs. B's evidence to be parked three to four rows back into the car park at Camana Bay.

52. As JB was not called to give evidence, despite the lateness of the request, (in fact made during the hearing) for him to attend by Mr. B, when reviewing JB's affidavit, I only have regard to the parts that were consistent with the contents of the 911 tape and also consistent to the facts admitted by Mr. B.

53. Having made these findings, based on Mr. B's rash and inappropriate conduct, and finding that they meet the criteria for making an Order, I find, as I have said, that it was appropriate for Mrs. B to seek such an Order. I find that her motivation in applying is to obtain the wider protection that such an Order would give her when compared with the current undertakings.

54. I do not accept Mr. B's submission that the Order has been sought so that it can be produced to a court in Florida to support an application for custody pursuant to Florida Statute 61.517 or to support a contention that it falls within one of the exceptions to the making of a return order under the Hague Convention.

TEMPORARY REMOVAL FROM JURISDICTION APPLICATION

55. Now, I return to the application of Mrs. B to remove the children from the jurisdiction for a short holiday in Florida returning on 24th December 2011.

56. It is made at a time when there is a pending application by Mrs. B to permanently remove the children to Florida. Mr. B is Caymanian and Mrs. B is an American citizen who comes from and has family in Florida. She has limited ties in Cayman. The children have spent all of their lives in Cayman, but they do hold dual nationality. It appears that Mrs. B and the children were last in the USA in around May of this year.

57. Initially the application for permanent removal had been scheduled for a hearing on 1st and 2nd December 2011. However, due to the decision of the Court that the allocated social worker, Ms. Feliciano, was not a suitable person to carry out the investigation into and report on the application, that date proved to be unrealistic. At this time, it appears that the hearing is sometime off, at the very least three

months. Hence, no one has yet been appointed to prepare the absolutely necessary report.

58. Mr. B cites this pending application as a reason why the Order should not now be made. He contends that it should wait until after that hearing. This means that even if a permanent application failed and temporary leave were given at that time, the children and Mrs. B would not have been to the United States for approximately 12 months. It is clear to this Court, from Mr. B's evidence and his demeanor, that due to his inherent mistrust of Mrs. B, whom he throughout his evidence has referred to as being deceitful, and his difficulty with coming to terms with the breakdown of the marriage and the resultant inevitable independence that must bring to Mrs. B that it would be a considerable period of time after that hearing, if at all, (despite his evidence that he might consent to it), before he would ever consent to the children leaving the jurisdiction with Mrs. B. Of course, such a position would be totally unrealistic.

59. The resistance to them going requires the Court at this time not to delay the decision about the principle and the risk of her at least taking them temporarily, rather than simply putting it off to a later date. Mr. B argues that Mrs. B may not return them as once they are with her in the US and she retains them there, she would not have to worry about the pending application here. I do not accept that submission. Having seen Mrs. B under detailed cross-examination, I am sure that she recognises the consequences of any failure to comply with the terms of an

Order for temporary removal. I am satisfied that she recognises that if she does so, there is a real likelihood that Mr. B would be awarded care and control of the children and that any later application for either temporary, let alone permanent removal, would more than likely fail. I am satisfied that Mrs. B is aware that she would also be in contempt of court with all the consequences that would flow from that. It might be said that if she was to abduct the children or unlawfully retain them in the USA that the time to do so would actually be after a failed permanent removal application as she may feel that as all the legal avenues for her wishes have been exhausted, she would have nothing to lose and take the law into her own hands.

60. In light of this, it is right and proper that I now fully consider the merits of this application and I do so at this time.

61. It is extremely important to recognise at the outset that the application is made for temporary removal to a Hague Convention country. Even in a Hague Convention country, of course there is always a possibility of competitive litigation, especially if the exceptions to making a return order under the Convention are argued. However, it cannot be said that the courts in the United States have a system of law that reflects greatly different traditions and cultures than those in Cayman. The vast majority of the case law involves removal to non-Hague countries and often one in which there are fundamental differences in religious culture and in which the mother's rights in relation to her children are supplanted by the father's.

62. Ordinarily a court would grant leave if satisfied that the type of sensible and appropriate arrangements which have been suggested by Mrs. B have been put in place, especially for removal to a Hague Convention country. Importantly, I note that Quin J's Order of 18th August 2011 clearly reflects both parties' agreement that the Cayman Islands is deemed to be the children's country of residence for the purpose of the Hague Convention.

63. Mr. B's case has focused greatly on submissions that if Mrs. B were to unlawfully retain the children, that any application in the US courts would be expensive, time-consuming, unproductive and that at worst the Floridian courts in particular would only pay lip service to the USA's obligations under the Convention. Great reliance is placed upon the affidavit of Mark Rabinowitz sworn on 8th December 2011 which was filed almost at the door of the Court on the 12th December 2011. Mr. Rabinowitz is an experienced family law attorney in Florida. It seems that he is an experienced attorney as it relates to domestic family law, but I am unable to adduce from his affidavit whether he has expertise in the specialised area of Hague Convention cases. In addition, as his evidence is placed before the Court as expert evidence, he does not in his affidavit set out his recognition of his duty to this Court when presenting such evidence. This is significant in this case due to the unclear way in which this affidavit evidence was obtained. Mr. B was surprisingly resistant to outline the background as to how it was obtained. I am not clear who paid for it, whether it was gratis/paid for at all and whether Mr.

Rabinowitz is in fact a friend of the B family or a friend of a friend of the B family. Mr. B was most reluctant to answer questions about this and in the end he seemed to give various scenarios.

64. Although I found that Mr. Rabinowitz's evidence to be an interesting statement of the domestic child law in Florida and about the jurisdiction of the courts there to enter a custody order pursuant to the **Uniform Child Custody Jurisdiction and Enforcement Act** -- in fact, I should say legislation which is very similar in a number of the states in America -- there were glaring omissions. He failed to even acknowledge the fact that either the US and Cayman were governed by the Hague Convention. He failed to mention **Florida Statute 61.538 and 61.506**. He failed to mention that the US was a major force in preparing the 1980 Convention which came into force on the 1st of July 1988 for the United States. He failed to mention that the Hague Convention is the primary civil law mechanism for parents seeking the return of children from other treaty countries. He failed to mention that the 69 Convention countries have agreed that a child who is living in one Convention country (and remember in the matter before me there is an agreement in a Court Order of the 18th August 2011 that they are habitually resident here - a fact that Mr. Rabinowitz was apparently not aware of), and that child has been retained in another Convention country in violation of the left-behind parent's custodial rights, that that child should be promptly returned. He failed to mention that despite **Statute 61.525** that that section does not necessarily advocate non-compliance with the governing principle, which is that the child is to be returned

promptly and that the custody dispute can then be resolved if necessary in the courts of the child's jurisdiction. The Convention does not address who should have custody of the child. It addresses where the custody case should be heard.

65. He fails to mention that each country has designated a Central Authority and that in the United States, as I said, since 2008 the Department of State's Office of Children's Issues has been designated to carry out specialised convention duties. The role of the Authority is to communicate with each other and assist parents in filing application for the return of their children. These children, who are under 16 and who a court here has clearly recorded the agreement of the parties that they are habitually resident in these Islands if unlawfully retained, would clearly fall under the Convention. Even if a child was born in the United States, if the child is found to be habitually resident in another country, the child may be ordered to be returned to that country under the Convention, provided the case meets the requirements of the Hague and the child's country of habitual residence as Cayman is a signatory.

66. The Court may take judicial notice that the American Authority regards its duties as being to accept applications for return, assist left-behind parents in assisting locating children within the US, attempting to achieve voluntary returns, assisting left-behind parents to find attorneys, including some who are willing to work pro bono or on a reduced-fees basis and finally assisting with a safe return of children to the habitual residence.

67. The purpose of the Convention is to ensure a prompt return under a return order rather than promote satellite custody litigation in the country in which their retention is taking place. I did not find Mr. Rabinowitz's non-Hague Convention evidence to be particularly helpful, and I am mindful also of the fact that there was no opportunity for Ms. Dowse to cross-examine him. Before I move on, I note that the courts in the past have stated that in non-Hague cases applications should not continue without expert evidence dealing with the practicalities of the foreign legal system and questions also of how a return from that non-Hague Convention country could proceed if a child is not returned.

68. In **Re M (A Child) (Removal from the Jurisdiction: Adjournment)** [2001] 1 F.L.R. 1943 the Court of Appeal in England stressed that it was incumbent upon a judge to approach the matter in accordance **Re K (A Minor) (Removal from Jurisdiction: Practice)** [1999] 2 F.L.R. and therefore the judge should ordinarily view that such an expert evidence to be necessary, but if the judge felt that there should be a departure from that practice in a particular case, he should clearly explain why that is so. The reasoning for such a practice in non-Hague Convention cases is of course sound, for even if a judge believed the applicant's promises that he or she would return, he should still consider what could be done if the child was not in the end returned. The court would need that expert evidence to understand the actual risk of the child being irretrievably retained and what safeguards there were and to determine whether it was in the child's best interest

for that risk to be taken. I accept that in all cases, including cases involving Hague Convention countries, I must still consider the above factors as well as the harm that children would suffer if they were retained and were to lose contact with the country where they have been brought up and where there father lives. However, I am not of the view that the party seeking to remove a child for a holiday to a Hague Convention country, in particular to one like the United States which has an experienced and established Central Authority and has a sophisticated legal system and is religiously and culturally not too different from the Cayman Islands, is not required to file such expert evidence. However, if it is evident that the country does not intend to fulfill or is failing to fulfill its obligations under the Convention, then expert evidence concerning that failure and the effect of that on the above-mentioned factors, whether it be from our Central Authority and/or whether it be from an expert in that country, should be obtained. I do not find that that is the case in the United States or in the State of Florida.

69. The Central Authority for Cayman very kindly attended court. The parties were content, primarily at Mr. McCann's request, for her to speak to the Court in the absence of their clients. I was not sure of the purpose of this exercise as what she said did not constitute evidence. However, it was an interesting conversation and although outlining difficulties that have been encountered in some cases, she was keen to emphasise that each matter was case specific. She made it abundantly clear that the Court should not regard her as saying that the US was being non-compliant to the Convention.

70. When considering the application for removal, the Court must apply the test of the paramountcy of the children's welfare. Ordinarily a parent with care and control of a child would not need to make an application to remove the children for this intended period of time. I am satisfied with such arrangements in place that it would ordinarily be in a child's best interest to be able to travel with a parent overseas to a country such as the United States to enjoy a holiday with that parent and his or her wider family. This benefit to a child is increased if the holiday is, even at a low level, to include some celebration of the cultural and religious background of that parent and in turn the children. However, it is important to say each case turns on its own unique facts.

71. In this case, Mr. B forcefully objects to Mrs. B taking the children with her primarily because he fears that Mrs. B will fail to return the children. This fear is coupled with a concern that Mrs. B would allow the children to come into contact with JB, now her friend but who was her former boyfriend for two years, when I believe she said she was 19 years of age, a man though who does appear to have some form of criminal record. Mr. B also objects as he contends that there are no funds available to pay for the trip.

72. The matter before me, despite the important distinguishing factor that we are dealing with a culturally similar Hague Convention country rather than a very different Islamic non-Convention country, has similarity to the English case of **Re**

L (Removal from the Jurisdiction: Holiday) [2001] 1 F.L.R. 241. In **Re L**, the mother of a three-year-old boy was applying for permission to remove him to the United Arab Emirates for a 28 day holiday to visit her family. A final residence hearing in relation to the son was imminent. Both parents were genuinely concerned about the child and the father wished to "build a proper and meaningful relationship, or to continue a proper or meaningful relationship" with his son. The father strenuously opposed the application as he was convinced that the mother's intention was not to return. The father, as in the matter before me, contended that the application to remove was intended to pre-empt an upcoming substantive hearing. Similarly, the father pointed out that the mother had no ties in the country -- in that case it was England -- had no property there and no close family ties there. In the matter before me, it is contended that Mrs. B has recognised that there are only limited matrimonial assets and therefore she has nothing to stay for despite Mrs. B's case that she does not accept Mr. B's contention about the assets under his control. The Court in that case, having regard to the paramountcy test, found that it was in the best interest of the child to have a holiday to visit family with the mother and interestingly **Connell J** took into regard that it was at a time of great pressure. The Court was persuaded that the mother had shown a genuine intention to return and that the purpose of the trip was convincing. Permission was given subject to the compliance with certain conditions including swearing on the Koran that the child would be returned, giving an undertaking to return and provide flight tickets. The Court in that case also asked for GBP 50,000 as a bond against return. Mrs. B clearly does not have that type of capital, but if leave is

given for her to remove the children, I do not view that a bond of that nature would ordinarily be required for a short vacation to a Hague country and in particular the United States.

73. As I have said already, each case is fact specific and the Court must look at the actual evidence before it in this case. When doing so, I am guided by the approach of **Connell J** although recognising that the risk is inherently greater in an application to remove, as in that case, to a non-Hague Convention country. I remind myself about the paramount concern about the best interest of the children. I must consider the harm an unlawful retention would have on them. As there is an application for permanent removal pending, it would be inappropriate to say in the absence of a report on the substantive application that there would be significant harm if they were to relocate to Florida. However, I can say that there would be significant harm if that were done by an unlawful retention as that could potentially cause separation on a permanent basis or on a more extended period from the Cayman Islands in an unstructured manner and also a loss of contact with the father and his family, who all play an important role in their lives.

74. I, like **Connell J**, who states on page four of the provided transcript in **Re L**, must look with care at the mother's application and try to assess the risks which the father feels are real risks before granting that application. I must ask myself whether Mrs. B is bona fide in putting her proposals before the court. As **Connell J** says, I must also ask myself, as varied in this case, whether she genuinely

wishes to go to Florida for a holiday and whether she will, as she has promised the Court, return to Cayman on 24th December 2011.

75. As I have already stated Mr. B's concern, accentuated by the fact that there is a pending permanent removal application, is, as I say, of a firm view that Mrs. B is attempting to deceive the Court and that she has no intention of returning.

76. The arrival of JB, a person who Mrs. B readily accepts was a boyfriend about ten years ago, a man with whom Mr. B believes his wife has been having an adulterous affair during the marriage, to the Cayman Islands and the fact that he had a ticket to fly out on American Airlines, a flight more expensive than the flights always used by the B family on Cayman Airways, on the same date that Mrs. B was seeking to leave is argued as evidence that he was here to pick her up, pack up all her items and move. Mr. B believes, but that is only so far as he can submit as he has not referred to any other evidence to verify it, that when JB left on 3rd December 2011 that he took some of her suitcases then and that the intention is that he will now help her with her remaining items. Although I believe JB is back in the country, and he provided an affidavit, he was not called to give evidence. I have regard to the fact that Mr. McCann has not been afforded the opportunity to investigate Mr. B's belief with JB. Mr. B has not expressed in his evidence that he has received any indication of unusual packing from the children. It is clear from the earlier proceedings that he is comfortable asking the children about things happening whilst they are under Mrs. B's care.

77. JB's arrival at this time on the island may, with hindsight, be seen to be insensitive when considering Mr. B's position. I don't find though that he came here in a surreptitious manner, seeking to assist Mrs. B to leave permanently without anyone seeing. As Mr. B graphically illustrated using Hurley's supermarket, it is easy to bump into people on the islands. As evidenced by the events of the 30th November 2011, Mr. B would have gained knowledge, whether he might say it was by chance on that night or by information given, that JB was here. He went around Mrs. B's house, which is only 200 feet away from his, and upon which he says she knew that at the time he had parked a boat due to the weather. However, Mrs. B, it appears, had only had two visitors in Cayman in recent times, and it is clear to the Court that she feels, at least, isolated here. I prefer Mrs. B's evidence that JB is a lifelong friend who attended to support her. I am unable to make a finding about JB and his past. However, at the very least, he has had involvement with the Florida police for potentially very serious matters. If they are convictions, which is unclear on the evidence before me, one can understand Mr. B's reluctance for him to come into contact with the children. Therefore, if it is intended that he will at some stage be involved in the children's lives, in whatever way, then the persons preparing the report for the permanent removal may be well placed to carry out the necessary investigations. However, at this stage, I feel that he should not have contact with the children. Despite the fact that I accept on Mrs. B's evidence that he came to her residence only when the children were out at Mr. B's, if I were to grant her permission to remove the children for a holiday, at this

stage, I would require a solemn undertaking that JB would not come into contact with the children.

78. I have also reviewed the events of March/April this year. Mr. B relied upon them as evidence that the mother's intention is not to return. It is suggested that Mrs. B went for only four days but did not return for about two months. There appears to be little dispute about that. It is accepted by both parties that at the time Mrs. B had expressed a desire to live in Florida. It is accepted that she had been making enquiries about real estate, and it was quite clear that she did not have sufficient means to buy any of the properties, details of which she showed Mr. B at the time. I accept that when enquiring about properties, she was doing so with the intention that Mr. B would pay for any such property. I also find that she obtained details of rental properties. When she was in Florida, despite ensuring that Mr. B pay the Cayman Montessori fees for the next term, she stated that she tried, it appears, to get the children into school in the US. Mr. B says that the only reason that she returned to Cayman was because she ran out of funds. Mr. B submits, but does not say where it has come from, that since that impecunious return she has been able to set aside sufficient funds sufficient to enable her to relocate to Florida without his financial support. Mrs. B gives her version of why she extended her stay, a stay which she wished to include the nanny, and which ended for one of the children when Mr. B came over and took C back. I am satisfied that although she wanted to move to Florida, that at the time she did not intend to unilaterally move there permanently and that she stayed an extended time to spend time with friends

and to an extent family, the type of connections that Mr. B enjoys in Cayman and that appear in her view to be limited for her in Cayman. I accept that it is evidence of a desire of her to move to Florida. That was and is no secret to Mr. B. However, it is not evidence that she will not go about the procedure in the appropriate manner, namely, by seeking leave. I do not agree with Mr. B that she and JB "hatched a plot" at the time in April/May to see how she could leave Mr. B, take as much money as she could and move to Florida to be with JB with the children illegally in tow. An important difference between April when she did return and now is that there is a Court Order preventing removal, which she instigated, as well as a formal recording in a Court Order where the children are habitually resident here.

79. I am satisfied that Mrs. B's reasons for going to Florida are genuine. I am satisfied that she intends to return, and she is fully aware of the potentially dire consequences if she fails to do so. I am satisfied that USA is a safe country for such a temporary removal, being a major signatory to the Hague Convention. I have regard to the fact that if there is concern that she will make an application to the courts in the USA under the Florida statutes, which I am satisfied that she will not, but in order to address this concern, I would require a notarised agreement from Mrs. B setting out the dates that she will be away, her acceptance that the children are habitually resident here and her acceptance that any issues in relation to their custody can only be determined in the Cayman Islands jurisdiction.

80. I have regard to the fact that even if a party were to raise the exceptions under the Hague Convention to making a return order, namely, that there is a grave risk, for example, it is a very heavy burden to discharge.

81. I make the Order and I give permission subject to the pre-conditions set out in the Summons of Mrs. B as well as the undertaking concerning contact with JB. There should be an undertaking that she will return as well as the contents of the notarised agreement as set out.

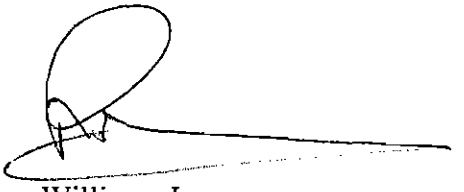
82. I am satisfied that it is best for the children to be able to see members of their maternal family and actually, as in **Re L**, to get away from Cayman for at least a week, when there are the pressures that have clearly been placed on this family brought by the proceedings. This holiday will benefit the children as will, and this is extremely important, their extended time with their father on their return over the Christmas holidays.

83. I am satisfied, subject to the pre-condition, that it is in their best interest that I should give permission for them to go.

84. I would like it noted - I have been extremely careful not to stray into areas of primary evidence relevant to the permanent removal application. That will be a hearing where a number of different considerations must be made, importantly with the addition of a report, I hope, from an experienced reporter who

comprehends the factors that the Court will have to take into account. Anyone in court today would be most unwise to view today's Order and my ruling of today as an indication as to how this Court might rule in the different permanent removal application.

Dated the 7th day of March 2012.



Williams J

Judge of the Grand Court