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

**CAUSE NO.: FAM 2023-0339**

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| **BETWEEN:** | **FW** | **Appellant** |
| **AND:** | **TG** | **Respondent** |

**Appearances:** **Ms. Natasha Bodden of BB & Associates for the Appellant**
**Ms. Stacy Ann Kelly of Kelly Law for the Respondent**

**Before:** **Hon. Mr. Justice Richard Williams**

**Heard:** **13 December 2023**

**Draft circulated:** **14 December 2023**

**Judgment delivered:** **15 December 2023**

**HEADNOTE**

*Children Act - Appeal from Summary Court to Grand Court - Procedure for appeals – Importance of determining whether the order or decision appealed is interim or final - Approach in relation to appeals of interim orders - Who can apply for a parental responsibility order - Nature of hearing that should be held in the Summary Court for contested Children Act applications and when should the opportunity for cross-examination be afforded - Need for there to be consideration of the 'welfare checklist'*

## RULING

### Introduction

1. This Ruling follows a mention hearing resulting from a Notice of Appeal filed by FW ("the father") on 5 December 2023 with a supporting affidavit sworn on 6 December 2023. The proceedings concern a 16-month-old female child ("the child"). In his Notice of Appeal, the father seeks to appeal parts of the Summary Court's Order made on 1 December 2023 ("the Order") in which: (i)

an interim residence order was granted to the mother; and (ii) an order allowing the Respondent mother ("the mother") to remove the child to Jamaica was granted. It is not abundantly clear from the Order or the Learned Magistrate's Note of Hearing whether the removal from the jurisdiction order was a permanent or temporary removal, although the Magistrate did state that *"at this point in time"* it was in the child's best interests. The Order includes an open-ended provision which might lead one to believe that it is a permanent removal order but, apart from the notation recorded in my previous sentence, the order also includes directions in relation to the father's ongoing residence application which both may point towards the order being a temporary removal order made until the determination of that application.

2. It is important when challenging any order or decision of the Summary Court to determine whether the order or decision complained of is interim or final. Interim orders are of short duration and made until such time as the matter can be fully considered. This seems to be the position in relation to the interim residence order and also in relation to the removal jurisdiction order, as they would both be back before the Summary Court in February 2024 for further consideration due to the father's live residence application. The continuation or the dismissal of the present removal order will depend on how the residence application is decided. An interim order is capable of being altered by the same tribunal that made it, namely the Summary Court. Therefore, the removal jurisdiction order and the interim residence order could be reviewed and changed by the Summary Court. Although they are not orders that have been challenged in the Notice of Appeal, the subject matter of the wider orders[1] made in the Order can also be considered by the Summary Court.

3. I am aware, and remind the parties, that appeals against interim orders are discouraged by the Courts and the Grand Court should only interfere if the decision is plainly and obviously wrong or unless there are the clearest indications for doing so. Ormrod J in ***G v G (Interim Custody: Appeal)*** 1983 FLR 327 at 330D said:

> *"... this court has said time and time again that it will not interfere with interim orders for care and control or custody of children unless there are the clearest indications were doing so. The reasons that have been given by Dunn LJ but, nonetheless, a surprising number of appeals from interim orders to reach this court. They are, practically speaking, always dismissed; very rarely does this court intervene, and that should be known to the profession*

[1] See paragraph 6 below.

*generally. If something new or some changes happened, then the right course is to go back to the judge. I know there are difficulties in getting a hearing date in these cases, but ultimately these are all matters of discretion and if an application is made to the judge for an early hearing date, and it is supported by adequate evidence indicating the urgency of the matter, I have no doubt arrangements will be made for the case to be heard."*

Purchas J said in ***Edwards v Edwards*** [1986] 1 FLR 205 at 209C:

*"I venture to comment that appeals concerning a matter of care and control, in order to hold the position pending a full enquiry, are very difficult to establish successfully. The reason for this is simple: it is a matter which is essentially in the discretion of the judge sees the parties (although in this case they did not give evidence before him) and who has a "feel" of the case, and, moreover, it is essentially a matter for him during the interim proceedings."*

4. If, however, the challenged orders are expressed as final orders, then an appeal must be lodged. This is because the Magistrate would not have the power to order a rehearing and only has limited powers to correct an error in an order. Any order relating to a child (except an adoption order) is capable of being altered by a subsequent decision made on a subsequent application made in accordance with the rules of court. However, where the complaint is that the order was wrongly made, at the time it was made, then the aggrieved party should appeal. That is why it is important when considering an order to determine whether it is an interim or final order.

5. In the Notice of Appeal, the Appellant wrongly pleads that the Magistrate made a final residence order. Arguably, his characterisation of the removal from jurisdiction application as being a permanent order is also incorrect. Even though the removal order made does not have the clarity one might expect, I am satisfied that, as the father's live residence application is still awaiting determination in the Summary Court[2], that order must also be a temporary removal order which may only become permanent if the father is unsuccessful in his residence application. I am, therefore, treating both orders as interim orders and consequently, the Summary Court has the

[2]In the Order, the Magistrate adjourned the matter to 23 February 2024 *"for the court to consider DCFS's further welfare report concerning F's application for a residence order and whether to list for a hearing"*. It appears that a referral was made to the DCFS for a further welfare report.

jurisdiction to further review them. This Court would expect such a review to be undertaken by means of a hearing at which the parties are afforded the opportunity to give oral evidence and to cross-examine witnesses. If consideration is being given to making any orders in favour of a non-party, the expectation would be for the Magistrate at the directions stage to give thought to: (i) whether the Court has the jurisdiction to make that order; (ii) whether that person should be invited to join the proceedings; and (iii) whether that person should file the application or seek leave to make the appropriate application.

6. I note that the Notice of Appeal makes no mention of the other wider orders made including: (i) the shared parental responsibility order granted to the maternal grandmother ("the MGM"); (ii) the *"liberal"* indirect contact orders made in favour of the father; (iii) the defined contact orders made for Christmas, Easter, and the summer holidays in favour of the father; and (iv) the Schedule 1 Order for the father to pay CI$500 per month in child maintenance. Due to the content in the Notice as presently drafted, technically these orders are not being challenged by the father.

7. I note in the Notice of Appeal that an order is sought granting residence to the father. However, there can be no appeal of the father's application for residence at this stage because that live application is still to be determined by the Summary Court. In the Notice, the father seeks a prohibited steps order preventing the mother from leaving the jurisdiction permanently with the child. The father's pleaded Notice does not seek a prohibited steps order preventing the mother from leaving the jurisdiction temporarily with the child.

8. If this appeal was to proceed to a *de novo* hearing before the Grand Court, the father has stated that he would need to file an Amended Notice.[3] That said, I see merit in making the above and additional observations about the wider orders for the benefit of the parties and the Summary Court concerning those wider orders in this Ruling.

[3] The Court was informed that the Notice was drafted without sight of the Magistrate's Notes of Hearing.

**Background – The parties and the child – the foster carers**

9. The parties are the child's parents. The child was born out of wedlock. The child has been acknowledged as Caymanian, but she does not have Jamaican status. The father's name is on the birth certificate, so both he and the mother have parental responsibility. The father is a Cayman national. The mother is a Jamaican national and at this hearing she disclosed that she is now due to move to Jamaica on 28 December 2023[4], as her immigration status and ability to be employed in Cayman is coming to an end.

10. Due to the mother's mental health issues and a concern that she had physically abused the child, the child was voluntarily placed with foster parents in October 2022. The father agreed to that placement. I note that at the time, the father requested a paternity test[5] and he did not put himself forward as a carer for the child. The child has remained with the same foster parents to date. The social worker at this hearing indicated to the Court that the foster carers are willing to continue to care for the child pending the conclusion of the court proceedings. However, although DCFS are content to pay the foster parent's stipend, they say that they will no longer be able to absorb the costs of the caregivers amount of CI$1,300/month. The father informed the Court that, if the Summary Court Order is stayed and the child remains with the foster parents, he agrees to pay the CI$1,300/month caregivers payment by or on the 1st day of each month from 1 January 2024 as well as the $500/month maintenance to the foster parents for this month and onwards. These payments would last until the determination of all the Children Act applications or further order of the Summary Court, whatever is the sooner. As detailed later in this Ruling, I am staying the Order and remitting this case back to the Summary Court, and in such circumstances, I order the father to make the above mentioned payments to the foster parents. Those orders may hereafter be treated as being Summary Court orders and may be varied or discharged by the Summary Court.

11. As I will be staying the Order, I do so on the basis that the child will be remaining in their current foster placement. It is not lost on me that this placement is a voluntary placement. The mother indicated via Counsel that she may have some unspecified concerns about the standard of care being given by the foster parents. I note that, on 4 August 2023, Magistrate McGrath made an order (presumably by consent) that, until further order, the child will remain with the foster carers. As

[4] At the time of the December 2023 hearing held in the Summary Court, the disclosed departure date for the mother and child was the 14 December 2023.
[5] Magistrate McGrath indicated at a hearing on 3 February 2023 that paternity was no longer an issue.

the Order has been stayed, the 4 August Order now remains in place. If either party chooses to remove their consent to the child being with the foster parents pending the conclusion of the Children Act proceedings, then they should make an application in the Summary Court to discharge Magistrate McGrath's Order. It would then be a matter for the Summary Court and possibly the DCFS to consider what private or possibly public law orders should be made/applied for.

12. The Court was informed that the foster parents would like to take the child for a holiday to Disney in Florida from 22 December 2023. It is not clear how long they would intend to be out of the jurisdiction. However, to enable them to temporarily take the child out of the jurisdiction, they will need the consent of the parents (as they both have parental responsibility) or an order of the Court. The father agrees to the foster parents and the child taking this trip and he has already facilitated some of the immigration paperwork. The mother appears to object to the trip. Although it will not be for the Grand Court to decide, it seems that, if the child is able to remain with the foster carers at this time, such a trip would be a great opportunity for the child to have a farewell holiday experience with the foster carers who have stepped in and cared for the parties' child for the majority of her young life when the parents were unable to do so.

**Background – The proceedings**

13. The proceedings began in the Summary Court[6] by a C1 Form filed on 10 October 2022 filed by the mother seeking a Schedule 1 financial provision order. At the first hearing, which was held on 18 November 2023, Magistrate Bothwell made an order that the DCFS were to enquire about the child's health. When the matter next came before the Court on 3 February 2023, Magistrate McGrath made an interim financial provision order for the father to pay $500/month for the benefit of the foster carers. The matter next came before the Court on 28 April 2023 when Magistrate Bothwell ordered a court welfare report.

14. On 14 July 2023, Mrs. Commoy Watkins-Powell filed a detailed Welfare Report. It was reported that the mother had initially said that her plan was for her 18-year-old daughter to care for the child in Cayman. It is reported that she then changed the care arrangements to her daughter and the MGM caring for the child in Jamaica and then that was changed to the carer being a maternal aunt, while she remained working in Cayman. The mother told the social worker that the father should only

[6] Case No. SMA 44/2022.

have supervised contact with the child and that any overnight contact should not start until the child was aged 3. It is reported that the father said that if, as he had suggested, the child had been born in Jamaica, she would have received all the necessary support from family members including the MGM and there would be no need for foster care. The welfare officer said that the mother would have come back to Cayman to work whilst the MGM cared for the child, the plan being that the child would return to Cayman at age 5 for her schooling. The father had told the welfare officer that he did not possess the skills needed to raise *"a baby girl"* on his own and as a result he would not be requesting that she be released to him. He told the social worker that he did not believe that foster care was the right place for a child and that the child would be better off with the MGM in Jamaica.

15. On 4 August 2023, the matter came before Magistrate McGrath. The father's position changed as he said he was content for the child to remain with the foster parents. The mother said that she was also content for the child to remain there, but only for a few months because she would like the child to be *"reintegrated"* with her when she was *"rolled over"* by Immigration and had to return to Jamaica. As already mentioned herein, the Magistrate ordered that until further order, the child would remain with the foster carers and the parents must enroll in a coparenting program at the Family Resource Centre. The Magistrate also made orders that both parents pay maintenance to the foster parents. He directed that the parents would have contact as recommended by DCFS and that a Home Study Assessment Report was requested from the Child Protection Agency in Jamaica ("the Jamaican report"). That report was received on 13 October 2023 and as an addendum report was filed by Mrs. Watkins on 24 October 2023.

16. The Jamaican report dated 27 September 2023 recorded that the MGM was a suitable caregiver and that her accommodation was appropriate. The Jamaican report highlighted that the low socio-economic rural community in which the MGM lives could be violent at times. It is evident from the father's now expressed position that this part of the report greatly concerns him. The addendum welfare report dated 26 October 2023, prepared by Ms. Watkins-Powell after the Jamaican report was received, reported that the mother's contact had increased to 2 days per week and that she had been hands-on, whereas the father had only seen the child on two occasions since the last hearing. The Welfare Officer noted that a visitor's visa for Jamaica would be obtained for the child. The mother told the welfare officer that the long-term plan was for the MGM to apply for the child's

Jamaican citizenship and that, after a year, the mother would consider returning to the Cayman Islands with the child. The Welfare Officer recorded that the father said that he thought it best for the child to remain with the foster parents and eventually be adopted by them. She said that when he was informed that this would not happen, he said that he would be filing for custody of the child. He said to her that he did not wish for the child to be relocated Jamaica, as he has concerns about the crime rate in the proposed community. The Welfare Officer's assessment is contained in three brief paragraphs of that report, and she concluded that although relocation would not be *"ideal"* it was the *"most suitable option... to provide a level of stability and structure that the child needs"*. There is no consideration of what is known as the welfare checklist (s.3 (3) Children Act). It is evident that great reliance was placed by the Welfare Officer on the content in the Jamaican report and interestingly her recommendation was that the child *"be placed into the care"* of the MGM. Therefore, it appears that the Welfare Officer was recommending the making of a residence order to the MGM, a non-party to the proceedings who has not applied for leave to apply for a residence order.

17. On 26 October 2023, at a hearing before Magistrate McFarlane, the Magistrate noted that the father was stating that he would be applying for a residence order. She ordered that the orders made remain in place.

18. On 17 November 2023, at a further hearing before Magistrate McFarlane, she noted that the father made it clear that he was challenging the DCFS recommendation that there be a placement to the MGM and that he would seek a residence order. He was directed to file a formal application by 24 November 2023. The Magistrate rightly said that a further welfare report would be required, but she highlighted that this could not be done until January 2024. She noted that the foster placement was not at risk, but that DCFS was complaining about the financial contribution that they had to make. The Magistrate opined that the child moving to Jamaica long or short term did not prevent the father making a residence application. At paragraph 9 of Notes of that Hearing the Magistrate ordered an adjournment of the matter to a hearing on 1 December 2023 to consider whether to make an interim residence order to the MGM as recommended by DCFS.

19. Unfortunately, the approach adopted at the November 2023 mention hearing has contributed to the issues that are raised before this Court. The child was in a settled foster placement in which she would be very well cared for until a structured full hearing with oral evidence enabling an informed

deliberation concerning all the intertwined issues could be heard and determined. I am sympathetic to the pressurised position the Magistrate found herself in, with a 14 December 2023 'deadline' being presented to her by the mother and it seems concerns being expressed to her (which turned out to be inaccurate) that the foster placement may not be able to continue. My primary view is that the fact that a welfare report would not be available until January was not a good reason, even where the mother was exerting pressure by saying that she was leaving Cayman on 14 December 2023, for hearing a permanent or extended temporary removal from the jurisdiction application and the mother's residence 'application' and delaying the extrinsically linked residence application made by the father. This is especially so in a case where neither parent has cared for the child and where great reliance is being placed on the capabilities of the MGM who is a non-party and who has never appeared at Court. Structured directions should have been given to a substantial hearing to deal with all the applications. If the mother had said that she was able to stay in Cayman until all applications could be heard and that there should be an interim residence order in her favour with the child remaining in the jurisdiction until a substantive hearing of all application, I feel that the Court would have been obligated to consider whether to make an interim residence order to either one or both parents. To enable it to do that in an informed manner, there should have been a more substantial hearing at which the Court would have had to consider the absence of any care support being offered by the MGM in Cayman.

**The 1 December 2023 hearing**

20. Despite the direction given on 17 November 2023 that the December 2023 hearing would be used to determine whether to make an interim residence order to the MGM, the Court at that hearing did not consider making that order, but actually proceeded to make much wider and differing orders. The father should have been made aware in November of the issues that the Court was going to be considering in December to enable him to properly prepare. At the December 2023 hearing, the Court went on to make: (i) what at first glance may appear to be a permanent removal from the jurisdiction order but which I have found to be an extended temporary removal order; (ii) an interim residence order to the mother; and (iii) a parental responsibility order to the MGM. In addition, arguably long-term contact orders were made to the father. Despite the change of circumstances flowing from the order, the interim Schedule 1 finance order of CI$500 arguably may be regarded as being a final order to the non-party MGM with no financial analysis undertaken despite the differences in the cost of living in Jamaica when compared to Cayman. It is unclear why the payment was made in favour of the MGM when interim residence was granted to the mother and

only shared parental responsibility purportedly to the MGM. However, it is not clear whether the Magistrate intended the financial orders to be of a potentially interim nature because, of course, those orders would not remain in place if the father was successful with his live residence application.

21. When reviewing the Summary Court file, I could not locate any Children Act application forms filed by either the mother or the MGM. Counsel for the mother confirmed that no written applications had been filed. The MGM is not a party to these proceedings (nor has she been invited to join) and, despite that, a parental responsibility order was made in her favour. The parties were not informed at the November 2023 hearing that such an order was being considered. Although there is an expectation that, and it is good practice that, formal applications be filed by a person who is entitled to apply for a section 10 order with respect to the child[7] or by a person who has obtained a leave of the Court to make the application[8], the Court may make a s.10 order if it considers that the order should be made even though no such application has been made[9]. Although not clear from the Order, as no formal written application has been made by the mother, it seems that the Magistrate may have made the interim residence order pursuant to s.12(1)(b) of the Act. That said, it seems a rather inconsistent approach for the Summary Court to insist that the father could only seek a residence order if he filed a formal application whereas no such requirement was imposed on the mother or the non-party MGM. However, I accept that the Summary Court may have taken this approach because the father had changed his mind a few times about what orders should be made, he had only taken up some of the child contact available and he had not embraced the counselling/co-parenting program. Having regard to the provisions in the Act, the Magistrate could have considered making a residence order or interim residence order in favour of the father without him filing an application if the Court had felt that such an order should be made. If that course had been followed, the delays caused or the refusal to consider the application (or even an order for interim residence to the father) at the December 2023 hearing by requiring the filing an application would not have occurred.

22. It appears that the Summary Court made the various orders based on very limited written evidence from the parties, the three 'welfare' reports, a position paper and draft order submitted by the

[7] Section 12(1)(i) Children Act.
[8] Section 12(1)(ii) Children Act.
[9] Section 12(1)(b) Children Act.

mother's Counsel and oral submissions made by both Counsel. In fact, the mother had not filed an affidavit or statement and the father's 2-page affidavit only contained 13 brief paragraphs. I have not seen the position statement or the draft order. However, Counsel for the mother conceded that the Order made by the Summary Court mirrored the draft order that she had submitted and that parts of the position statement she submitted contained evidence relied upon by her client which should have been in an affidavit. Position statements must not be used as a vehicle to introduce a party's evidence but to highlight or to a degree analyse oral or written evidence from that client and other witnesses, which is going to be placed before the Court for consideration at that hearing.

23. Although the father disagreed with the DCFS Welfare Officer's recommendations and the content of the mother's draft order, the hearing proceeded in the absence of the reporting social workers. The father was given no opportunity to examine either the Jamaican or DCFS social workers and it appears that the Magistrate accepted and greatly relied upon the content of their reports. It appears that the father's residence application, which was supported by an affidavit, was considered only to the extent of giving directions relating to it. No opportunity was given for any consideration of making even an interim residence order to the father. There was no oral evidence given by either party or the MGM (who did not even attend the hearing remotely). There were clear issues of fact between the parties even in relation to interim orders and, of course, there was an entitlement and need for proportional cross examination to enable those to be explored. Counsel for the mother informed me that the 1 December 2023 hearing lasted for only 25 to 30 minutes. It is difficult to see how the contested applications and issues before the Court which resulted in such a comprehensive order could have been properly considered and the parties' cases properly and justly presented in such a short period of time. Part of the blame for this state of affairs, regrettably, likely lies with the father's Counsel. His Counsel appears to have failed to discharge his obligation to his client by failing to raise concerns about the summary approach that was being adopted at the hearing by the Magistrate, especially when considering the wide ranging and significant orders contained in the draft order which the mother was asking her to make and which the Magistrate went on to make.

24. The Magistrate did not present a reasoned judgment for the conclusions reached and it is not clear from the Notes of the Hearing what findings of fact were made on the disputed facts and how the conclusion that it was in the child's best interests to be leave Cayman at this time was reached. It

is not clear whether the Welfare Checklist was considered. I accept that a more summary approach may be appropriate when the Summary Court is being invited to make straight forward interim s.10 orders. However, in the circumstances of this case, such an approach was not to be commended, especially as the orders included an extended temporary removal order in favour of a parent who had not had care of a child who had been in foster care for over a year. For reasons best known to the Appellant, the Notice of Appeal makes no reference to the way the hearing was conducted and, from what the Court was told at this hearing, the Notice would have had to be amended due to it being drafted without sight of the Judge's Notes of Hearing. Despite that, this Court feels it appropriate to comment about its concerns relating to the approach taken at the hearing, especially as it is remitting the matter back to the Summary Court.

25. Although it is not part of the pleaded appeal, I also see merit in my commenting on the parental responsibility order granted to the MGM. From the Notes of the Hearing there is nothing to show the jurisdictional basis for a free-standing parental responsibility order being granted to the MGM. It is arguable that under the Children Act only an unmarried father or a stepparent can apply for a parental responsibility order. Of course, those who have a residence order in their favour will acquire parental responsibility if they did not previously have it. Although the terms of the financial order made seem to envision that the MGM will be the child's primary carer, the interim residence order was made in favour of the mother. Despite Section 12 (1) (b) of the Act, one would not ordinarily expect to see a s.10 order being made in favour of a grandparent without that person first applying for leave to make such an application. As mentioned above, at the 17 November 2023 hearing, the possibility of making a residence order in favour of the MGM was something that the Court was saying that it was focusing on despite her not being a party to these proceedings and her not having sought leave to make an application.

26. Again, although no part of the pleaded appeal, I observe from the Notes of the Hearing that the long-term contact orders were made. This was done without any oral evidence given and it appears that little or no opportunity was afforded to the parties to make submissions in relation to such important orders.

27. It does not appear that a sufficient hearing was offered to the parties in the Summary Court. If the Court is making disputed orders that include: (i) permanent removal or an extended temporary removal of a Caymanian child from a jurisdiction for a substantial period of time; (ii) an interim

residence order; (iii) contact orders: (iv) final schedule one financial provision orders; and (v) a parental responsibility order to non-party, then it may see merit in requiring such applications to have been properly brought or (for any s.10 orders) for consideration to be given to section 12(i)(b) of the Act[10]. At a contested hearing one would expect orders to be made only if there was jurisdiction to make such orders and, in the circumstances of this case, after the parties had been afforded the opportunity to cross examine relevant witnesses, especially when there are factual disputes and recommendations of welfare officers that are not accepted. In this matter, one would have expected the hearing to have been more substantial in nature due to the evidence that would need to be explored to enable a reasoned decision to be reached and then presented by the Court.

**The Appeal**

28. Section 15(1) provides that:

> *"An appeal to the Grand Court shall be made by notice of appeal in Form 8 which must be filed within 14 days from the date upon which the judgement or order appeal from is filed in accordance with GCR O.42, r.5."*

It is not clear whether Order 42 has been complied with.

29. However, s.87 of the Act is the section that provides that an appeal lies to the Grand Court against the making or refusal of the Summary Court to make an order under the Act. The subsection does not apply to an interim order for periodical payments under schedule 1[11], but it is not clear whether the order made in this case was an interim or final order as only an interim residence order was made to the mother. In any event, the financial provision order is not mentioned in the Notice of Appeal. Rule 3.22 the Children Act (Grand Court) Rules 2013 sets out what should happen when an appeal lies under S.87 of the Act. Rules 3.22(2)-(4) set out procedural requirements for the Appellant. Although the majority of these are yet to be fulfilled by the Appellant due to the course that this Court is taking with the agreement of the parties, I do not seek to rehearse those requirements herein.

[10] In relation to any s.10 orders made.
[11] Section 87(3) Children Act.

30. On an appeal, the Grand Court may make such orders as may be necessary to give effect to a determination of the appeal[12] and when such an order is made it may also make such incidental or consequential orders as appear to it to be just.[13] Although GCR Order 55 does not apply to appeals from the Summary Court[14], I am satisfied that under the Grand Court's wide discretion it may remit a matter back to the Summary Court (especially where the orders appealed are interim orders) with the opinion of the Court for hearing and determination by it. It is most regrettable that GCR Order 55 does not apply to appeals under the Act to the Grand Court, as the almost mirror RSC Order 55 enabled the High Court in England and Wales to take a better approach to such cases by enabling a far more expeditious consideration. The appeal under RSC Order 55, although by way of a rehearing, did not mean that the judge would rehear the evidence of all the witnesses, but he would review the whole of the evidence and the way that the Magistrate carried out the balancing exercise. The form of appeal was a rehearing as prescribed under RSC Order 55 r.3 and the English Court would not hear evidence save in exceptional circumstances.[15] The current approach in an appeal to the Grand Court requiring a de novo hearing is time consuming, expensive, and often not in the child's best interests as a decision is inevitably greatly delayed.

31. The Court may grant a stay of execution. This is something that I would have to consider in this case as the mother is intending to leave the jurisdiction with the child on 28 December 2023. The authorities are clear that this discretion is to be exercised to avoid injustice and to ensure that the appeal, if successful, is not rendered nugatory: see ***Wilson v Church*** (No. 2) (1879) 12 Ch D 454. The authorities are also clear that a party claiming that the appeal, if successful, may be rendered nugatory, must show good reason why a stay should be granted. The mere existence of an appeal is not enough. Even though the residence order is only an interim order, that order is coupled with an extended removal from the jurisdiction order. If this appeal was to proceed to a full hearing in the Grand Court, if the Order remains in place, parts of any appeal may be rendered nugatory. As I am remitting the matter, the present order should be stayed until the Summary Court can ocnosder the issues.

**Conclusion**

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[12] Section 87(4) Children Act.
[13] Section 87 (5)Children Act.
[14] In England and Wales RSC 55 used to apply to Children Act appeals from the Magistrates to the High Court.
[15] Procedural Directive (lord Chancellor's Department: Appeals from Magistrate's Court to High Court: Children Act 1989) [1992] 2 FLR 503.

32. I have explained my concerns to the parties about how the hearing in the Summary Court was conducted and about the manner in which the resultant wide-ranging and significant orders were reached. Counsel seemed to accept, noting my above expressed concerns, that the Summary Court must, when it considers even these interim orders, conduct a more substantial hearing. Counsel did not object to me remitting the matter back to the Summary Court for a more comprehensive hearing. In such circumstances, there was an understanding why I would be staying the Order pending reconsideration by the Magistrate.

33. **Accordingly, I stay the Order and I remit the matter back to the Summary Court for further hearing and consideration within the live Children Act proceedings.** When I remit it back I have regard to the fact that the only two orders challenged in the Notice of Appeal are interim orders and therefore may be further reviewed by the Summary Court.

34. This Court's expectation is that a Summary Court hearing will be listed, preferably before 28 December so that this case can be comprehensively case managed whilst the mother is still in the jurisdiction. The expectation would be that the case management would involve giving directions to a final hearing date and about the filing of evidence. One would expect there to be a review at that case management hearing about what orders the Court may be asked to make and whether the Court has the jurisdiction to make those orders. Thought might also be given as to whether any formal applications are required or not (especially by the MGM) or whether the MGM should be made a party to the proceedings if any orders are being sought to be made in her favour.

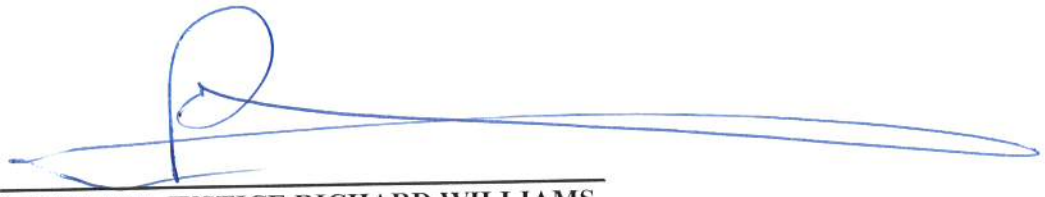
35. Nothing prevents the mother or father from making applications for interim residence in the Summary Court if they felt that to be in the child's best interest. It would be a matter for the Magistrate to decide whether there should be an interim hearing or whether it would be in the child's best interests for there to be hands-on case management for all the applications to be heard together at a final hearing. However, any interim application in the circumstances of this case with substantial factual issues relating to the child and parties which are unresolved would mean that it would not be proper to make an order without the Summary Court hearing oral evidence, even if there is advice being given by a social worker. That oral evidence need not be far ranging, but it should be proportional and relevant to the issues relevant to an interim application. It would then be a matter for the Magistrate to determine whether an interim residence order (or any other ancillary interim child orders) should be made to the applying party, but only after a proper hearing.

It is trite law that an interim order should be made only if the welfare of the child requires it and it should never be applied for in order to gain a tactical advantage. The child is in a secure foster placement which can remain in place until the Court can conduct a proper and fair hearing. With this in mind, and although I accept that the case was dealing with children moving from parent to parent, I note the observation of Butler-Sloss LJ in ***Re B (A Minor) (Residence Order: Ex Parte)*** *[1992] 2 FLR 1* at *5* when she said:

> *"What is more important than anything else is that [children] should not be treated as packages are removed from one place to another and back again because the grown-ups or involved in a dispute and have overlooked that children have rights and the children's rights are to remain somewhere until after calm and sensible consideration and a decision by the court that the particular place in which they are living is changed by the decision of the court to them living somewhere else."*

**Costs**

36. I am unaware whether the parties are legally aided or not. My preliminary view is that no order for costs be made on the appeal. However, if either party wishes to be heard on costs, they must file a costs application within 14 days of receiving a perfected copy of this Ruling.



**THE HON. MR. JUSTICE RICHARD WILLIAMS**
**JUDGE OF THE GRAND COURT**