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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION**

CAUSE NO. FAM 277 OF 2021

BETWEEN: HL PETITIONER
AND: JL RESPONDENT

Appearances: Ms. Linda DaCosta of HSM for the Petitioner
Ms. Sara Ismail of McGrath Tonner for the Respondent

Before: Hon. Justice Richard Williams

Heard: 6 April 2022

Perfected ruling

Circulated: 7 April 2022



HEADNOTE

Children Act (2012 Revision) - Specific Issue application for leave to temporarily remove child from jurisdiction for a holiday to California - Covid-19 considerations - Requirement for prompt request to be made to other parent if seeking their consent to temporarily remove a child from the jurisdiction - Requirement to file applications for a specific issue order well in advance of proposed travel departure date - Section 15 Children Act (2012 Revision) and a parent with a residence order and seeking the permission of other parent to temporarily remove the child from the jurisdiction for a period of time under a month.

EX TEMPORE JUDGMENT

1. I have had the opportunity to read the parties' affidavits, F's Skeleton Argument and the contents of the bundle. I have also reviewed the Summary Court file in the related Cause No. SCL 42/2019. I have also received oral evidence from the parties. I deliver this as an ex tempore judgment, since a prompt decision is required and because I feel that the parties should leave Court with knowledge of the reasoning for my decision.

Accordingly, this is not intended to be a detailed analysis of the law and the judgment will be a little rough around the edges. A copy of the Judgment will be perfected and provided to the parties.

2. This matter concerns a 7 year old boy. I shall refer to him as the child in this judgment. His parents are married, but are currently going through divorce proceedings. The mother is aged 37 and the father is aged 38. I shall refer to them as M and F.
3. Both parties are United States nationals from California. M is a teacher and the family moved to the Cayman Islands in August 2018 following M being awarded a two-year teaching contract at a school here. F is an attorney with a law firm in California and the intention was that he would reside in the Cayman Islands as a dependent on M's work permit, but continue to work for his law firm remotely. The parents do not agree on what the family's plan was for the child. M says that the family had intended to remain in the Cayman Islands until at least the expiration of her contract in 2020. F says that the intention had been that they would move back to California in June 2019, after the end of the school year, to enable the child to start his full-time education there.
4. The marriage broke down in or around December 2018/January 2019.¹ F contends that, at that time, the parties agreed to return to California at the winter school break. He says that M later asked if they could remain in the Cayman Islands until the end of the summer. F says that he was able to agree to this as his employers permitted him to remain

¹ Although the parties' relationship had broken down, they remained living in the same household until around November 2019, M having leased a property in her own name in September 2019



living in the Cayman Islands, as long as he returned to California each month. The parties have remained living in the Cayman Islands. F is no longer a dependent on M's work permit, but has global citizen immigration status.

5. The primary application before the Court is F's application for a specific issue order granting him leave to remove the child for a holiday in California for the period of 15 April 2022 up to and including 23 April 2022. The child has not travelled out of the Cayman Islands since February 2020. F also seeks a specific issue order requiring M to deliver up the child's passport forthwith. Those applications are opposed by M due to her health concerns for the child. The child has not had a Covid-19 vaccination and M believes that the risk of the child contracting Covid-19 for the second time would be elevated by him travelling to and staying in California under the care of F, rather than remaining in the Cayman Islands during the upcoming school Easter holidays.

Background - Proceedings

6. I will now go on to deal with the relevant background. I have regard to the approach of *Thorpe LJ in Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397, namely that one of the functions of the judge is to make findings and that another function is to be selective and to make findings that are relevant and necessary for the disposal of the issue. When considering what orders would be in the best interest of the child at this time, I am not required to make findings on every area or issue that has been presented to me for determination or which have become apparent during the hearing. I



must determine the factual issues that have implications for the decisions that I have to take in relation to the child.

7. Unfortunately, this family has already been embroiled in already too long-running and financially draining court proceedings in the Summary Court and in the Superior Court of California, County of Orange. I am concerned to read in M's Affidavit sworn on 5 April 2022 that her legal fees are already in excess of US\$70,000.
8. On 11 November 2019, M filed a Form C1 in Summary Court proceedings SCL 42/2019 seeking the making of (i) a residence order in her favour, (ii) contact orders in relation to F, and (iii) an order granting her leave to travel with the child. On 12 December 2019, F filed a Summons seeking leave to permanently remove the child from jurisdiction to live with him in California, because he felt that M had reneged on an agreement for the family to return to California. Those proceedings came before Magistrate McFarlane on a number of occasions and required two comprehensive Welfare Reports to be prepared and filed by Ms. Kernita Rose-Bailey.
9. On 19 December 2019, Magistrate McFarlane made a number of child related orders. The relevant orders included an Interim Shared Residence Order. That order remains in force. The alternate week arrangement set out in that order was that the child would in week one be with F overnight on Mondays, Tuesdays, Saturdays and Sundays and in week two be with F overnight on Wednesdays, Thursdays and Fridays. The order also included provisions for the arrangements for the child's time with F over the Christmas school holidays. F states that he had to make an application for leave to temporarily remove the



child, as M was reluctant to agree to that, despite the parties' prior agreement. M states that she was resistant because she feared that the child would not be brought back to the Cayman Islands. Therefore, at the hearing on 19 December 2019 the Learned Magistrate also made an order granting F leave to travel with the child to California between 21 December 2019 and 7 January 2020. That order was in the end made by consent. Coupled with that leave order was an order that M was to provide F with the child's passport, which he was to give back to M upon his return to the Cayman Islands.

10. On 10 January 2020, Magistrate McFarlane gave further directions and ordered that the parties' applications be listed for a three-day hearing after 1 May 2020. On 31 January 2020, Magistrate McFarlane gave leave to F to take the child to California during the school half-term for the period between 22 February and 1 March 2020. Again, that order was also made by consent. On the same day, M filed an Application for Financial Provision pursuant to Schedule 1 of the Children Act (2012 Revision) ("the Act").
11. The leave to permanently remove application came on before Magistrate McFarlane on 6 June 2020 and a Consent Order was reached at Court. On 6 June 2020, the parents agreed that the child was habitually resident in the Cayman Islands and that any issues relating to where the child should live would be dealt with in the Courts of the Cayman Islands. They agreed that the shared residence arrangements made on 17 December 2019 were to continue and that F's application for leave to permanently remove the child be adjourned *sine die*. The June 2020 hearing came on in the midst of the Covid-19 pandemic and, at that time, there were no known Covid -19 infections in the community and there were



very strict international travel regulations in place. Despite that, M now seeks to argue that F was compelled to agree to not pursue his removal application due to the contents of the Welfare Report. I am satisfied that it was the prevailing circumstances arising out of Covid-19 pandemic that resulted in the positions taken in the consent order. Consistent with that conclusion is the content of the Learned Magistrate’s notes of that hearing written on the Summary Court file, where she states that, in relation to the adjourned removal application:

“The Parties to contact the court with a view to relisting once clearer picture is known re Covid-19 etc.”

12. On 11 November 2021, M filed her divorce Petition in the Grand Court on the ground of two-year separation. In his Acknowledgement, filed on 12 November 2021, F indicated that the Petition was not defended and he provided the required consent to the ground pleaded. There is very good reason why there should be no delay in case managing the divorce proceedings and, as a consequence, I take up the opportunity to do so at this hearing. I am satisfied that this is a case suitable to mediation. The parties are willing to attend mediation. Accordingly, I order that the parties attend a MIAM and that the attorneys are to consult with the MIAM Officer to find a suitable date for the MIAM. Mediation can, of course, be used to help the parties reach agreement in relation to interim as well as the long term issues.

13. *“Divorce and child”* proceedings were also initiated by F in California in December 2019. F states that he brought the divorce proceedings in California as there was no jurisdiction to enable him to do so under the Matrimonial Causes Act here. He states that



he was not applying for custody of the child and that the relevant box in the Californian Court pleadings had been ticked in error. F said that the position in relation to any custody application was made very clear to M's attorneys in California. M states that she was served with these proceedings on 27 December 2019 when she was in California. She highlights that these actions taken by F illustrated why she had reservations about F taking the child to California at that time, and why she then feared that the child may not be returned to the Cayman Islands. M highlights that the California proceedings wrongly alleged that F and the child were at the time residents of California. F says that the issue of residency in California is not straightforward and that is why he indicated that the child and himself had been resident there for the requisite period of time. In September 2020, the Californian Court dismissed F's application on the basis that it did not have jurisdiction and found that the appropriate forum to determine child and divorce matters was the Court in the Cayman Islands. F was ordered to pay US\$9,000 towards M's legal costs, and I note that M's fees for legal representation in the Californian proceedings amounted to US\$30,000. I do not believe that F's approach to and actions relating to the Californian proceedings can lead to a conclusion that he would not comply with orders made and with any conditions imposed by this Court if leave to temporarily remove was granted today.

Background – Events leading up to the present application

14. On 7 and 9 March 2022, F wrote to M asking her whether the child could spend part of the "*Spring Break*" with him in California. As M did not reply to his request, F again



asked in writing on 10 March 2022. M replied indicating that she would not consent to the child travelling to California unless he had one dose of the Covid-19 vaccination.

15. In February 2022, the child contracted Covid-19 in the Cayman Islands. Fortunately, the symptoms he suffered were mild. The parties agree that, as a result, the child will have antibodies in his system, although M rightly says the level of them will reduce as time passes. I note that in the USA, international entry is permitted without taking a test if the passenger has proof of his recovery from the virus within 90 days of his arrival in the country. This is an indication that during that period, antibodies remain in one's system and would seem to show that the child would still have the same in his body over the Easter holidays.
16. M's position was and remains that she still wishes the child to be vaccinated, but although F states that he is "*not per se opposed to (the child) receiving the Covid-19 vaccine*" his position at the time was that as the child would have had antibodies in his system that "*it did not seem pragmatic*" to vaccinate him.
17. The parents and the child attended before a general practitioner to discuss the vaccinations issue. It appears that the doctor shared with them the merits of the child being vaccinated, but that she also made it clear that there was no right or wrong in the discussion. The parties agreed that the doctor explained that different doctors may give differing views. The doctor was not asked about whether the child should travel to California and what the risks of that would be.



18. Following the appointment with the doctor, F made enquiries with the Health Service Authority and was informed that the child would have to wait 12 weeks after his first positive PCR test to receive his first vaccination. As the positive test result was received on 3 February 2022, the child will not be eligible to receive the first vaccination until around 28 April 2022 and the second one on or around 21 July 2022.
19. On 15 March 2022, M firmed up that she did not agree with the unvaccinated child travelling to California. On 17 March 2022, F’s attorneys wrote a letter before action formally seeking consent to the proposed trip. M’s attorneys replied on 21 March 2022 reiterating that consent to travel was not agreed and set out a number of reasons why she did not. Those reasons were:
- (i) that F appeared to have booked the flights to California without advising M and without seeking her consent;
 - (ii) that F’s parents had travelled to the Cayman Islands on at least three occasions over the past three months and that the child had been able to have contact with them without interference from herself. In addition, that F’s family members, including his brother, had the financial resources and flexibility in their schedules to enable them to travel here;
 - (iii) that M was “*adamant*” that the child be vaccinated before travelling and that this was a “*fundamental issue between the parties*”;
 - (iv) that F does not agree to the child being vaccinated;
 - (v) that, in light of the current regulations, there is a risk of delay of travel/quarantine should F test positive before or on his return to the Cayman Islands;



(vi) that California, unlike the Cayman Islands, has lifted all of the Covid-19 protection mandates and there are no masks, vaccine or Covid-19 isolation mandates currently in place there. This concern is coupled with the opportunities in the area to go to crowded amusement parks and crowded sporting events, heightening the probability of the child being re-infected with Covid -19;

(vii) that, although the child has some antibodies remaining his system resulting from his recent infection, it is still possible for him to contract the virus multiple times. The concern is that with multiple infections there is a greater risk of long-term complications and that the side-effects for the child would be significantly higher because he has not been vaccinated; and

(viii) that, as M is a teacher, her leave dates coincide with the child's school holidays and therefore her time with the child would be impinged upon if the child is permitted to travel to California with F.

20. On 22 March 2022, F's attorneys replied to the email from M's attorneys. They stated that (i) the flights to California had not been purchased; (ii) the financial circumstances of F's family were irrelevant; and (iii) F was not opposed to the child being vaccinated per se, but that it was not possible for that to take place due to the timing of the departure and the timing of the child's prior infection. The letter highlighted that the Cayman Islands is now open to global tourism, contending that the risk of contracting Covid-19 here or in California is now "*broadly equal*". M was informed that, "*in the unlikely event*" that F was to test positive upon his return, then he would make up the lost days that the child should have spent with M. M was also informed that the proposed holiday would impact



only two days of M's designated time with him and that those lost days would be made up.

21. This background has been set out to try to contextualize the present application. However, it is important to stress that this is not a hearing to determine whether or not the child should be vaccinated. The issue is a narrow one and concerns whether F should be permitted to take the child with him to California for a holiday. It is generally said to be the right of the child to see and have a relationship with both parents, as well as with wider family members. Generally speaking, a holiday overseas with a parent is regarded by the Courts as being in the best interests of the child. This is particularly so where the child's wider family lives in the location where the proposed holiday is to take place and is in the country from where the child and family derive. There is nothing before the Court to support any contention (and one is not made by M) that the child would not be returned to the Cayman Islands after the holiday. Therefore, ordinarily, for a family such as the one before me, this would be a fairly straightforward application. However, due to Covid-19 this case does raise issues to be considered in the absence of parental consent about travel. The core issue that this Court must consider is the balancing of the benefits of the child taking a holiday to his home country and seeing his wider relatives with F against any increased risk of the child contracting Covid-19 during his travels and the detrimental effect that might have on the child.



The Law - Temporary Removal from the Jurisdiction

22. As this is not an application which involves any concerns about potential abduction, the Court need not concern itself with much of the guidance given in *R (A Child)* [2013] EWCA Civ 1115 and in *AB v TB (Temporary Removal to Jordan)* [2014] EWHC 4663 (Fam). The application before me is for a s.10 of the Act Specific Issue Order. Pursuant to s.3(1) of the Act, the child's welfare is my paramount consideration. As Lord Fraser said in *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 at 170:

"...parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child."

The 'Welfare Checklist'

23. In exercising my broad discretion when determining what orders are in the child's best interests, I must consider the factors contained in what has become known as "*the welfare checklist*" found at s.3 (3) of the Act.²

24. In relation to the **wishes and feelings of the child**, I must have regard to the same in light of the child's understanding and the fact that he is now only 7 years old. It appears that the child is aware that F wishes to take him to California. From the material before me, it is evident that the paternal grandparents and wider paternal family members are important figures in the child's life. I have little doubt the child would express a wish to

² See from paragraph 101 below.



travel to visit his family in California. However, I also acknowledge that he is not in a position to understand the complexity of the medical issues raised.

25. In relation to **the child's physical, educational and emotional needs**, these can be met by both parents who have a Shared Residence Order with child arrangements which means that the child spends equal time with them. I am satisfied that the child's physical and emotional needs would be met by F on a visit to California as well as they are met by either parent when the child is with them in the Cayman Islands.
26. **The effect of any change in his circumstances** during a short holiday to California would be a positive one for the child. The child has not been off island for over two years. An important part of a child's development is experiencing the wider world. In this case, the temporary and brief change of circumstances would involve the child spending time with his paternal wider family in their home setting. This more natural arrangement has greater benefit for the child than can be derived from the child simply meeting with them when they visit the Cayman Islands. It is important for children to be able to maintain their roots and their relationships with wider family members. With this in mind, F has indicated that if the maternal grandparents were to ask to see the child during the visit, he would try to facilitate that.
27. I have regard to the **child's age, sex and religious persuasion**. Although F mentions his family's Catholic roots and that Easter is a time the family like to spend together, I do not elevate that beyond noting that it is one of the enjoyable events that may occur and is a factor which F relies upon. There is nothing about the child's age or sex that hinders him



travelling; in fact at his age, visiting family members and his country of origin is to be encouraged.

28. I have considered **any harm he has suffered or is at risk of suffering**. He has not suffered any harm as a result of the care of either parent. However, I am conscious he has recently recovered from a mild bout of Covid-19. I have very carefully considered the risk of harm that he may suffer if he travels. There is a slightly elevated risk of contracting Covid-19 that comes with travel on public transport and transiting at airports. This can to a degree be mitigated by taking precautions, for example such as wearing a mask (which is still mandatory on aircraft and in most airports) and sanitising. Although M contends that there is a greater risk of contracting Covid-19 in California than there is in the Cayman Islands, there is insufficient evidence before me for me make such a finding. When travel into and out of the Cayman Islands was heavily restricted, there would have been great force in such a submission. However, the Cayman Islands have now opened up being frequented by tourists coming in via the airport and fairly large numbers of cruise ship passengers disembarking. The local regulations are not strict and now include primarily fairly basic measures such as the wearing of masks when indoors in a public place. The level of Covid-19 within the community, when one considers the size of the population, is not insignificant. There is a risk of contracting Covid-19 in Cayman Islands and there is a risk of contracting the same in California. However, as mentioned, the risk can be mitigated by persons or parents taking the right precautions.



29. I note M's concerns expressed today and in her affidavit about F attending with the child at a school function without masks on and about F and the child leaving the isolation

property before receiving formal negative exit test results. F said that he and the child had had negative informal lateral test results before leaving the property. I do not in any way seek to countenance F's actions, but having had the opportunity to see and hear him in Court, I am satisfied that, if he is permitted to travel, he understands the Covid-19 risk and he will take all the necessary precautions.

30. I have considered **how capable each of the child's parents are in relation to meeting his needs**. As they have both clearly illustrated by their operation of the terms of the shared residence order and shared care arrangements, they are both capable of doing so.

Conclusion

31. Having considered the welfare checklist, I am satisfied that it is in the child's best interest to travel to California with F for the short holiday at this time. I have carefully considered M's concerns about any potential risk of the child contracting Covid-19 during the trip. I am not satisfied that the level of risk is as elevated as M argues it to be. It is evident that her 'radar' in relation to the risk of Covid -19 is highly sensitive and this may have been heightened because of the responsibilities and duty of care that she has and clearly admirably discharges as a kindergarten teacher. When considering the risk, I am conscious that the child has not been vaccinated against the virus and about what the medical benefits of the vaccination may be for a 7 year old child, but I am also aware that the child has antibodies from a recent infection which would give some added protection.
32. Conducting the necessary risk balancing exercise, I make a Specific Issue Order granting F permission to temporarily remove the child to California for the period of 15 April



2022 up to and including 23 April 2022. I also make a Specific Issue Order requiring M to deliver up the child's passport to F forthwith and for him to return it to M within 24 hours of his and the child's return to the Cayman Islands.

33. In his oral evidence, F indicated that, if permitted to take the child, he would accede to M's wish that he not take the child to Disneyland. There is a concern that the child will be disappointed to hear that news and may blame M. Having regard to the concerns raised by M, I will remove that decision from the parents and I will make a Prohibited Steps Order preventing F from taking the child to Disneyland on this trip. I understand that the parents wish to both sit down with the child to discuss the trip and, if the Disneyland issue is raised, they may feel it appropriate to indicate to the child that it was someone else's decision that Disneyland can wait until a later family holiday to California.

Costs

34. I am satisfied that the application was properly brought and that M was entitled to argue her position and to require the Court to make a decision on the issue. In private law children cases, pursuant to the 'no order principle' set out at s.3(5) of the Act, the expectation is that the Court should not get involved and make orders unless it is necessary to do so in the best interests of the child. The thinking is that the parents know what is best for their child and they should be the ones making the decisions about their child. This is one of those cases where the Court understands why agreement could not be reached, as both parents (like many separated parents in the community) have different



approaches to the concerns surrounding Covid-19 and different views about the risk presented in each of the two countries at issue. Therefore, this is not one of the children cases where one should be making a costs order against one of the parties. Accordingly, I make no order as to costs.

Footnote

35. As set out in Children Act Form C41 and provided for at s.15 of the Act, a parent who has a residence order made in their favour is not prevented from removing a child for a period of less than one month if they do not have the written consent of every person with parental responsibility for the child or the leave of the court. In the matter before me, it was suggested that F need not have made the application and that if his proposals were not agreed then M should have made an application for a prohibited steps order. However, I do not agree that is the appropriate approach to cases where there is a shared residence order. In such cases, as occurred in this case, the parent who is seeking to remove the child should apply for a specific issue order permitting him to remove if consent has been withheld by the other parent who shares the residence order. In cases where there is a sole residence order and where the temporary removal would in effect amount to a variation of a court order (for instance if contact is due to take place with the other parent during the period of the child's proposed absence), then in the absence of agreement, the parent intending to remove should make an application for a specific issue order. In fact, in the absence of consent, especially if the removal is one communicated to the other engaged parent on short notice, it would be good practice to bring an application for a specific issue. Section 15 of the Act should not be read as granting a

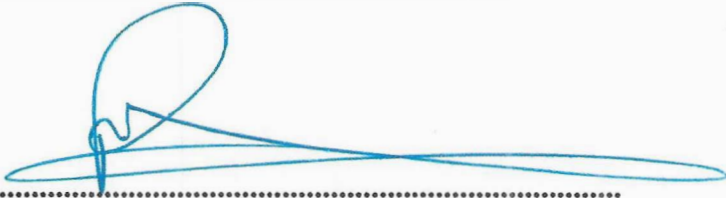


parent with a residence order a licence to act unilaterally, that parent must always communicate in a timely manner to any other person with parental responsibility that they intend to temporarily remove the relevant child from the Cayman Islands for any period of time.

36. The timing of communicating to the other parent a request to temporarily remove a child and for the making of applications of the related specific issue order also requires comment in this footnote. In the present matter, it appears that F only first made his request on 7 March 2022, just under 6 weeks prior to the proposed date of travel. F's attorneys filed the relevant Summons on 28 March 2022. These dates are both too close to the proposed departure date. A request should be made to the other parent well in advance of the requested departure date. This request should be coupled with as much information as possible including about (i) the travel arrangements; (ii) where the child will be staying whilst away; (iii) how to contact them parent and child when they are away, (iv) proposed arrangements for indirect contact for the other with the child whilst he is away; and general details about what the child may be doing whilst away. A timely provision of the request/details would provide the other parent with sufficient time to consider the request and to reply. It may then, in turn, leave sufficient time for the applying parent to finalise the travel arrangements without leaving that to the last minute. If agreement is not reached, the above would enable the applicant parent to then apply for the listing of a specific issue order in the normal way, rather than over-pressurising the Court to find a space in its full lists on too short notice. Parents should be aware that if they do not apply for a specific issue order permitting them to temporarily remove the



child well before the proposed departure date, then the Courts may well not be able to accommodate the hearing of a contested application in the period prior to the proposed departure.



.....
The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT