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

7 **CAUSE NO: FAM 35 OF 2014**

8
9 **BETWEEN:** **DW**
10 **PETITIONER**

11 **AND:**
12 **WW**
13 **RESPONDENT**

14
15 **Appearances:** **Mr. Phillip Ebanks of Premier Solutions Group for the**
16 **Petitioner**

17 **Mrs. Sheridan Brooks Q.C. of Brooks & Brooks for the**
18 **Respondent**

19 **Before:** **The Hon. Justice Cheryll Richards Q.C.**

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21 **Heard:** **7th – 8th June 2021, 10th June 2021, 9th and 11th October 2021**

22
23 **Draft Judgment:** **7th February 2022**

24
25 **HEADNOTE**

26 *Family Law – Sections 13, 19 and 21 of the Matrimonial Causes Act (2005*
27 *Revision) Sections 10 and 12 of the Children Act (2012 Revision) - Welfare of*
28 *children of paramount consideration - Assessment of circumstances where issue*
29 *of risk to children arises.*
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31 **JUDGMENT**



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1. This is a final ancillary hearing following upon the filing of a Petition for divorce. The first and primary issue is the future residence arrangements for the two children of the marriage. They are A.N., a daughter who was born on the 13th November 2007 and is now 14 years old and A.X. a son, who was born on the 16th July 2010 and is now 11 years old. By s.12 of the *Children Act* (2012 Revision) the Court may in these family proceedings under the *Matrimonial Causes Act* (2005 Revision) make a residence order pursuant to s.10 of the *Children Act*.
2. The Petitioner DW (“the father”) is 43 years old. The Respondent WC (“the mother”) is 42 years old. Their relationship began in November 2001. They were married on the 30th April 2009. The father has dual nationality, Caymanian and Honduran. The mother is a Honduran national with rights of residence and employment granted to her on the basis that she is the spouse of a Caymanian. The relationship produced three children. In addition to the two children above named, the eldest child, a daughter A.J. was born on the 22nd November 2003. She passed away in September 2020 following a serious illness.
3. Prior to their marriage and until October 2011 the parties lived together at a property in Cayman Brac, which was owned by the family of the father. In October 2011, the mother moved out of the property at the request of the father. She took the children to reside with her in rented accommodation which she shared with her sister. In 2012, by way of an Attachment of Earnings Order, the father was ordered by the Summary Court to pay spousal and child maintenance of \$525.00 per month.
4. In 2013 the mother’s sister returned to live in Honduras and the mother could not afford to pay for the rented accommodation on her own. Consequently in mid-2013, the children went to live with the father in his family property.
5. On the 7th March 2014, the father filed a Petition for divorce on the basis that the parties had lived separately for 2 years. The Petition was ordered proved on the 30th June 2014.



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5 6. In the same month of June 2014, the father with the assistance of a bank mortgage
6 completed construction of a small two bedroom house in Cayman Brac, the former
7 matrimonial home (“FMH”). He moved into the FMH with the children who have to
8 date resided in that home for 7 years.
- 9 7. In 2015, the mother, at the invitation of the father moved into the FMH and the parties
10 attempted to reconcile after a separation of about three years. By Court Order made 26th
11 February 2015, the Petition was ordered stayed pending the further action of the parties.
- 12
13 8. The attempt at reconciliation failed. The parties to date have continued to reside in the
14 home in separate rooms. The father has been engaged in another relationship with his
15 partner “Y” and has fathered another child which was due in September 2021.
- 16
17 9. In April 2018, a Notice of Intention to Proceed was issued by Counsel on behalf of the
18 father. In preparation for the hearing the Court made various orders including for a
19 welfare report as to the children and subsequently for an updated report following the
20 rescheduling of the matter. The illness of the eldest child in 2019 led to further delay.
- 21
22 10. The matter came before the Court for hearing on the 7th June 2021. Evidence was heard
23 over 3 days at the end of which submissions on the primary aspect of the residence of
24 the children were to be provided by the 17th June 2021. Prior to the 17th June 2021,
25 Counsel on behalf of the father sought to introduce new evidence. The application was
26 opposed by Counsel for the mother.
- 27
28 11. By Summons dated 17th June 2021, Counsel on behalf of the father formally sought the
29 leave of the Court to file a supplementary Affidavit in the matter. The mother then sought
30 to file a responsive Affidavit. The matter was set down for further hearing on the 9th
31 October 2021 for the issue of whether the evidence was to be re-opened, to be argued
32 and determined. In light of the objection to new evidence, this Court did not and has not
33 read the proposed new evidence from either side. On the hearing date of the 9th October
34 2021, both parties were advised of this.



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4 12. On the 11th October 2021, the father withdrew his application to re-open the evidence.
5 The withdrawal was not opposed by the mother. The father gave additional evidence as
6 to the value of the Honduran property on its purchase.
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8 13. In addition to oral evidence, the material before the Court in respect of this matter is as
9 follows:

- 10 i. Verifying Affidavit of the father dated 3rd March 2014.
11 ii. Second Affidavit of the father dated 29th July 2014.
12 iii. Affidavit of the father dated 15th January 2020.
13 iv. Updating Affidavit of the father dated 22nd January 2021.
14 v. Mother's Affidavit of Means dated 19th August 2014.
15 vi. Mother's updating Affidavit dated 4th February 2021.
16 vii. Affidavit of B.S. dated 31st May 2021.
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18 14. There are also three welfare reports from a Social Work Supervisor of the Office of the
19 Department of Children and Family Services. These are dated 21st October 2014, 14th
20 June 2019 and 9th March 2021.

21 **THE POSITIONS OF THE PARTIES**

22 15. Both parties are agreed that a shared residence order would be in the best interests of the
23 children. The father states that a shared residence order would allow the children "to
24 grow up in the knowledge that they were equally supported by each parent and would
25 allow for them as parents to share in the major decisions for the welfare of the children".
26

27 16. There is disagreement as to how the days should be shared and as to which parent is best
28 placed to have the day to day care of the children. The father's position is that he is the
29 parent best placed to offer them day to day care and that they should remain living with
30 him in the FMH. He raises a concern with what he says are the alcohol dependency
31 issues of the mother. He says that these issues have led to various incidents in the past
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4 when the mother left the children unattended or was too intoxicated to look after them.
5 He puts himself forward as the most stable and consistent parent.

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7 17. The mother's position is that the children's primary residence should be with her in the
8 FMH and the father could have regular and flexible contact. She points out that she is
9 presently enrolled in Alcoholic Anonymous (AA) and that her alcohol consumption is
10 much reduced since April and May 2021. Additionally she is now in employment which
11 finishes for the day at 3 o'clock in the afternoon with one week off per month. This
12 would allow her to care for the children from the end of their school day. She states that
13 she would need to remain in the FMH with the children as unlike the father she would
14 not be able to afford an alternative residence which could comfortably accommodate the
15 children.

16 **PROPERTIES**

17 18. While the property issues do not arise for detailed consideration at this first stage,
18 because of the issue as to where the children will live and who will live with them, the
19 property issue is closely intertwined. There are two properties to be considered. The first
20 is the FMH which is in their joint names. The mortgage payment is \$977.00 per month.
21 The outstanding mortgage is approximately \$130,000.00. The father estimates that the
22 equity is about \$16,000.00. A recent valuation is pending. There is also a house in
23 Honduras which is in the sole name of the father. It was purchased in August 2008 by
24 way of a down payment of lempiras 110,000.00 and a loan of lempiras 440,000.00 to be
25 repaid over a 15 year mortgage. At the time it was valued at lempiras 550,000.00.

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27 19. The father proposes that if he is the one to remain in the FMH with the children, he
28 would pay the mother slightly over one half of the equity in the FMH which could be
29 used by her to pay a deposit on a home of her own or as rental income for some 18
30 months.



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20. The mother’s proposal is that the father should vacate the FMH but continue to pay the mortgage on this until A.X. reaches the age of 18 years or completes full time education. Thereafter the house can be sold and the net proceeds can be divided between them. She also seeks monthly maintenance for the children. She proposes that the house in Honduras be sold or rented as no one is resident in it.

THE LAW

21. The Application before the Court is made under the *Matrimonial Causes Act*. By s.21(a) of the *Matrimonial Causes Act*, at the time of pronouncing a decree under the Act, the Court shall, as appropriate, make orders for the custody, care and control of the children of the marriage.
22. Section 19 of the said *Act* provides that in dealing with all ancillary matters arising thereunder, the Court shall have regard first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties.
23. Section 13 of the *Act* provides that in any proceedings for a decree of divorce, the court shall consider whether there are any children of the marriage to whom the section applies or if they are over the age of 16 years, in relation to whom the court directs that the section should apply. If there are such children, the court shall consider whether in light of the existing or proposed arrangements for their upbringing and welfare it should exercise any of its powers under the *Children Act* with respect to any of them. Where the section applies the court may where the circumstances require or are likely to require it, and where there are exceptional circumstances which make it desirable in the interests of the children, direct that a decree of divorce is not to be made absolute until the court has exercised its powers and given directions under the *Children Act*.
24. The *Children Act* provides the power to make residence orders including in family proceedings. By s.10(4) of the *Children Act*, family proceedings are defined as including



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4 proceedings under the *Matrimonial Causes Act*. By s.10. (1) of the *Children Act*, “a
5 *residence order*” means an order settling the arrangements to be made as to the person
6 with whom a child is to live.

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8 25. Section 12 of the *Children Act* provides as follows:

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10 *(1) In any family proceedings in which a question arises with respect to the welfare*
11 *of any child, the court may make a section 10 order with respect to the child if—*

12
13 *(a) an application for the order has been made by a person who —*

14 *(i) is entitled to apply for a section 10 order with respect to the child; or*

15 *(ii) has obtained the leave of the court to make the application; or*

16
17 *(b) the court considers that the order should be made even though no such*
18 *application has been made.*

19 ...

20 *(5) The following persons are entitled to apply for a residence or contact order with*
21 *respect to a child —*

22 *(a) any party to a marriage (whether or not subsisting) in relation to whom the child*
23 *is a child of the family;”*

24
25 26. I propose in this case to exercise the powers of the Court under the *Children Act* with
26 respect to the making of residence orders prior to consideration of the grant of any decree
27 absolute.

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29 27. By s.3 (1) of the *Children Act*, in considering any question with respect to a child, the
30 welfare of the child shall be the paramount consideration. The *Act* provides that the
31 Court shall have regard to certain particular circumstances. It states:

32 3. (1) *Where a court determines any question with respect to —*



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4 (a) *the upbringing of a child; or*
5 (b) *the administration of a child's property or the application*
6 *of any income from it, the child's welfare shall be the*
7 *court's paramount consideration.*
- 8 (2) *In any proceedings in which any question with respect to the*
9 *upbringing of a child arises, the court shall have regard to the*
10 *general principle that any delay in determining the question is likely*
11 *to prejudice the welfare of the child.*
- 12 (3) *In the circumstances mentioned in subsection (4) a court shall have*
13 *regard in particular to —*
- 14 (a) *the ascertainable wishes and feelings of the child*
15 *concerned (considered in the light of his age and*
16 *understanding);*
- 17 (b) *his physical, educational and emotional needs;*
- 18 (c) *the likely effect on him of any change in his circumstances;*
- 19 (d) *his age, sex, religious persuasion, background and any*
20 *characteristic of his which the court considers relevant;*
- 21 (e) *any harm which he has suffered or is at risk of suffering;*
- 22 (f) *how capable each of his parents, and any other person in*
23 *relation to whom the court considers the question to be*
24 *relevant, is of meeting his needs; and*
- 25 (g) *the range of powers available to the court under this Law*
26 *in the proceedings in question.*
- 27 (4) *The circumstances are that —*
- 28 (a) *the court is considering whether to make, vary or discharge*
29 *a section 10 order, and the making, variation or discharge*
30 *of the order is opposed by any party to the proceedings; or*
- 31 (b) *the court is considering whether to make, vary or discharge*
32 *an order under Part IV.*
- 33 (5) *Where a court is considering whether or not to make one or more*
34 *orders under this Law with respect to a child, it shall not make the*
35 *order or any of the orders unless it considers that doing so would*
36 *be better for the child than making no order at all."*

37 APPLICABLE PRINCIPLES

- 38 28. In the case of *KP v. JB*¹, Williams J. reviewed a number of English authorities and
39 provides helpful guidance on the philosophy underpinning the *Children Act* and the
40 approach of a court when considering the making of a residence order. Such an order is
41 not necessarily an exceptional order. It may properly be made where this is reflective of
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¹ [2012] (2) CILR 249



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4 the reality of the lives of the children and where given the facts of the particular case it
5 is demonstrated that it is in their best interest.

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7 29. The learned Judge stated:-

8 “53 *The long-term best interests of a child are invariably best protected if, despite*
9 *the breakdown of the parents’ relationship, both parents are able to continue*
10 *to play an equal role in making the important decisions that will determine*
11 *the child’s upbringing.*

12 ...

13 56 *The philosophy of the 1989 Act and our Children Law is to promote the*
14 *family so far as it is consistent with the welfare of the child, in the belief that*
15 *children are generally best looked after within the family with both parents*
16 *playing a full part in their upbringing and without resort to legal*
17 *proceedings.*

18 ...

19 62 *The dictum of Wall, J. (as he then was) in A v. A (Shared Residence) (3)*
20 *([2004] 1 FLR 1195, at para. 119), which has been approved and adopted*
21 *in a number of Court of Appeal judgments, highlights the developing*
22 *approach to such orders when he stated:*

23 “... [A] *shared residence order is an order that children live with*
24 *both parents. It must, therefore, reflect the reality of the children’s*
25 *lives. Where children are living with one parent and are either not*
26 *seeing the other parent or the amount of time to be spent with the*
27 *other parent is limited or undecided, there cannot be a shared*
28 *residence order. However, where children are spending a*
29 *substantial amount of time with both their parents, a shared*

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residence order reflects the reality of the children’s lives. It is not necessarily to be considered an exceptional order and should be made if it is in the best interests of the children concerned.”

63 *As the case-law has developed, it has become clear that the failure of parents to co-operate does not prevent the court making a joint residence order. On the other hand, the inability of the parents to work together is not by itself a reason for making the order. It is clear that the time spent in each household does not have to be spread evenly or even close to equally for an order to be made. It is not necessary to show that exceptional or unusual circumstances exist before a joint custody order may be granted. What is required is, as in all cases involving children, to demonstrate that the order is in the best interest of the children having regard to the particular facts of the case.”*

THE EVIDENCE

- 30. The three children were born in Honduras where they were initially cared for by their maternal grandmother while their parents were in the Cayman Islands. When they were each very young the eldest daughter at age 7 years and the other two were some months old, they came to live with their parents in Cayman Brac. Initially they lived at a house owned by the father’s uncle. During at least a part of this time, their maternal grandmother was also resident on Island and assisted in their care. There came a time when grandmother became ill and returned to Honduras.
- 31. Following the separation of the parents in 2011, for about one year and a half to 2013 they lived with the mother in rented accommodation. Thereafter their primary residence was with the father at his family property and from mid-June 2014 in the FMH. Over that period there was regular contact with the mother. The father described the FMH as the only stable and quality accommodation available to the children. Both children attend public school in Cayman Brac.



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ALCOHOL ISSUES

32. The father placed significant emphasis on the mother’s alcohol issues as supportive of his assertion that he is the more stable and reliable parent. The mother in response sought to portray the father as someone who also drinks and his new partner, “Y” as being of the same drinking group as herself. While by no means the only issue in this case, alcohol use and any attendant risks for the care and stability of the lives of the children is an important issue on this aspect of the application. The evidence which is broadly accepted is that alcohol has been a long standing part of the mother’s life style. What is disputed is the extent to which it has been, whether any role is played by the father in her increasing levels of consumption over the years and any risks to the children arising therefrom.
33. The father’s evidence is that between six months to a year after the attempted reconciliation, the marriage was again in difficulty. He says that through the years and continuing, the problem has been the mother’s drinking. He says that alcohol is more important to the mother than anything else and that she will leave the children by themselves to go out drinking. Sometimes he is at work and he receives calls from the children asking for food when the mother is absent from the home because she is out drinking. He says that alcohol is the reason that she has been unable to find a good job and has been unable to progress as others have done.
34. He says also that he has had and continues to have “real concerns about the [mother] being able to care for the children on a day to day basis”. He has concerns about the stability that the mother could give the children and does not believe that she has her alcohol issues under control. He also states that while he accepts that she did more around the house in the summer of 2020, once the Welfare Officer had completed her inquiries the mother reverted to her old ways. These included going out drinking three times per week and coming home intoxicated in the early hours of the morning. This



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3 would be followed by disturbances at that time and ill effects upon her the following
4 day.

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6 35. His evidence is that she would cause disturbance by banging on his door trying to get
7 into his room in the early hours of the morning after a night out. In response to cross
8 examination, in which Counsel sought to suggest that there was a good reason for the
9 mother seeking to enter the room because her clothes were in the room, he accepted that
10 some of her clothing is in that room but said that her clothing is also in other areas of the
11 house, in the dryer, the other room, the sofa and all over the house. He said that 2 am is
12 not the time for her to come to his room for clothes.

13
14 36. He gave details of having to call the Police in 2020 when she returned home one night
15 from drinking and was seeking admission to his room. When he opened the door, she
16 had a knife which she used to cut him to his side. He also received a wound to his arm
17 from a bite and some scratches.

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19 37. He describes two incidents when the mother was out with the children and had been
20 drinking. He was called and had to go to the locations to take the children home. He
21 states:

22 *“There have been two very recent incidents of her heavy drinking. In or*
23 *around December 2020, the Respondent took the children to a hotel bar on*
24 *the Brac. I now know that the children wanted to come home, but she*
25 *continued to drink and told them they had to stay. The children were also*
26 *with my niece who is 14 years old. She called her brother to come and take*
27 *them all home. My brother telephoned me and I went and collected the*
28 *children immediately... This incident occurred at approximately 9pm at*
29 *night, which even though it was Christmas, was too late for [A.X]. to be up,*
30 *and certainly too late to be in [a] bar, which they really should not be in the*
31 *first place.*



1 *On the Sunday the 17th January 2021, there was another incident. The*
2 *Respondent had taken the children to her sisters. Later on that evening at*
3 *approximately 8pm, her sister called me to say that the respondent was*
4 *drunk and could I collect the children. I, of course, said yes and went*
5 *immediately around again. These incidents are typical examples of the*
6 *effects of her drinking.”*

7 38. He said that he was not aware that the mother was involved in AA until he saw the
8 Affidavit of Ms. BS filed in these proceedings. He disputed the recent evidence that the
9 mother was no longer drinking and introduced in evidence as Exhibit 1, a picture which
10 he had taken of her. The picture is time stamped as having been taken on the 21st May
11 2021 at 2:21 am. The mother accepts that she is the person shown in the picture slumped
12 over and asleep in the drivers’ seat of her car with the car door open. The father’s
13 evidence is that she was drunk. He woke her up and tried to take her out of the car. She
14 said that she wanted to vomit. He describes the aftermath and says that in the course of
15 this she said that her phone was missing and describes the search for her phone.

16
17 39. The mother’s evidence is that she was not drunk. She had been tired that night having
18 worked multiple jobs that day. She had been to her regular job from 7am to 3pm, then
19 worked in the afternoon at a part time job delivering food. After she finished work at
20 11pm, she and her co-worker went to a local Bar. They were there until about 1am when
21 the Bar closed.

22
23 40. The father said that he has noticed some positive change in her and that it would be good
24 for her to keep it up. However in his experience, when there is any Court hearing the
25 mother tries to do her best then after that she goes right back to the same routine. He
26 would like her to continue and to have a better life.

27
28 41. He denies wanting the children because of the FMH. He said that, it is because over the
29 years he has been working hard and he thinks that he deserves something. He said that
30 he does not believe that the children’s welfare would be best served by having the mother
31 remain in the house.



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3 42. He said that the children wish to spend equal time with both parents and wish that it
4 could be different in relation to her drinking. They are worried about this. The daughter
5 A. N. is afraid that she will lose her mother. His proposal is that the children stay with
6 the mother during the week and as she drinks on the weekends, the children should stay
7 with him from Wednesday or Thursday through to Sunday. He would have no difficulty
8 if over the weekend the mother wishes to have the children for dinner or lunch or to take
9 them for activities.

10
11 43. He maintained in his oral evidence his position that if he is awarded day to day care of
12 the children he would be able to continue to be their stable care giver. He would not be
13 seeking any kind of contribution of maintenance from the mother.

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15 44. In her evidence the mother in response sought to portray the father as a heavy drinker
16 also and to suggest that his treatment of her over the years led to her increased alcohol
17 consumption. In her oral evidence she described herself as a "*hang out drinker while the*
18 *father is a home drinker*". She says that he drinks a lot at home. He used to drink beer
19 and now drinks heavy liquor, a bottle of Bacardi every week.

20
21 45. In 2014 she attested to the unwholesome state of the marriage, that nothing seemed to
22 work despite her conciliatory efforts, that the father got angry easily, was unfaithful and
23 drank excessively.

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25 46. The father was cross examined over what was suggested to be his ill treatment of the
26 mother over the years which treatment is said to have caused her to drink more. He said
27 that he was aware that she drinks but this started increasing over the years. He denied
28 doing anything to cause her to drink and said that he did not allow her to take a job as a
29 bartender. It was what she liked to do. A number of suggestions were put to him as to
30 his motives and conduct which he denied. It was put to him that in effect he is on a
31 concerted campaign because he does not want the mother to spend time with the children
32 in the home. That part of this campaign included a plan to have a new child, an intention
33 which he expressed while in Miami, Florida when the elder daughter was in treatment
34 there. It was also suggested to him that having made up his mind to keep the FMH he
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2 has done everything to upset the mother so that she can go back to drinking. It was
3 suggested that this included affairs with co-workers and dating the best friend of the
4 mother. That his concern is not for the children but the retention of the house. The
5 father responded by denying the suggestions and stating that the house was built for the
6 children.

7
8 47. The father accepted that he had caused his uncle to evict her from the family home in
9 which they initially resided. There were issues with her lack of care of the son and
10 attempts to care for him while drunk when he was then just four months old. There was
11 an incident when she broke the windshield of his car. His uncle resided in front of the
12 house and witnessed what was happening. He said that the eviction notice was to her
13 only but she took the children with her and other members of her family. He supported
14 her and the children by taking food weekly for them but the mother wanted cash and so
15 took him to Court.

16
17 48. The mother produced a video, said to have been taken on a Saturday night or in the early
18 hours of a Sunday morning in July 2019. This showed the father on the floor in a supine
19 position, apparently passed out, with his clothing in some disarray. The father accepted
20 that he had been drinking on that occasion but said that this was the only occasion when
21 he had drank to the point of passing out. He had been to a party and had had a lot to
22 drink. He said that he knows himself and will not put himself in that situation again. That
23 was the first and last time.

24
25 49. Not surprisingly, it was suggested to him that he was only admitting to a single occasion
26 having been confronted with that evidence. It was also suggested to him that he had been
27 in the habit of sexually assaulting the mother when the mother was drunk and that on
28 this occasion there was physical evidence of assault which could be seen on his clothing
29 in the video. He denied the suggestion.

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31 50. He said that he first became aware of the video a few days after it had been recorded
32 when the mother sent it to him. She also sent a screen shot of it to his partner, "Y". He
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3 questioned why it was that the mother had not reported the incident to the police if it had
4 genuinely occurred.

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6 51. The mother's response is that she did report the incident in relation to the video to the
7 police but her daughter became ill shortly thereafter and she sent the screen shot to the
8 new partner because someone told her that she had been visiting the FMH. It was not
9 taken for that purpose but as proof to the police of what the father had been doing. She
10 did not pursue it as she did not want to lose her children or wish for him to lose his job.
11

12 52. In cross-examination the mother agreed that she does drink but does not agree that she
13 suffers from alcoholism. It was put to her that the 2014 welfare report recorded that
14 issues of drinking and partying had been raised with her then. She agreed that from 2014
15 alcohol has been a part of her life. She said that the reason that she is being sponsored at
16 AA is because she got into trouble with the father and the Court ordered that she has to
17 go.
18

19 53. There were two incidents which involved alcohol. The first was on the 29th January 2019.
20 She had not been arrested in relation to that incident. She had recently returned from
21 Florida with her elder daughter the first time that she was ill. She found out that a friend
22 of hers had been talking about her daughter. She was drinking, saw the friend in the Bar,
23 was angry at what had been said and had a fight with her. She had only had 3 drinks.
24 She said that she went to Court because although her friend did not pursue charges
25 against her the police were involved because the incident occurred in liquor license
26 premises. She said that she recognizes that this is not an appropriate model of behavior
27 for her children.
28

29 54. The second case was in February of that same year in relation to the father. She had
30 returned home about 2am one Sunday night and was trying to get into the room to get
31 her clothes. She had a knife with her to open the door which was locked. She was arrested
32 by the police on the Monday.
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5 55. She said that she entered pleas of guilty in respect of both cases. She received a
6 probation order and in addition to being sent by the Court to AA, she was also banned
7 from the Bar for 6 months.

8
9 56. She said that May 20, 2021 the day that Exhibit 1, the picture of her in the car was taken,
10 was the last time that she had been drinking. By that time her ban from liquor license
11 establishments had ended. Since that time she has not been drinking.

12
13 57. The mother gave evidence that she started to attend AA in November 2020. However,
14 she was not able to attend continuously as one week after she started the pandemic issues
15 began and the country went into lockdown. She said that during 2020, she had phone
16 conferences with the Probation Officer. She was still on probation when her daughter
17 fell ill. She testified:

18 *“I felt I was getting crazy I just want to be myself. I went to search for help.*
19 *I went to the Doctor, It is not that I didn’t search for help. My hair was*
20 *falling out. I was getting too nervous.*

21 *Because I want to do better I called Ms. B.*

22 *November was her [A.J.’s] birthday, December was first time without*
23 *children. It is just too much.*

24 *Not that I have been drinking more.*

25 *Since April 2021 I have not been drinking as I used to. Because I spoke to*
26 *my children and I asked them to help me to do better because since*
27 *December, I had no counselling either. That is when I called Mr. Jason.”*

28 58. Counsel for the father suggested to her that there are circumstances where she craves
29 and requires further counselling and that given her alcohol dependency that father is
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4 really better placed to take care of the children. She did not agree that father was better
5 placed but did agree that she “craves counselling”.

6
7 59. She said that she did attempt suicide once before her daughter died. She felt that she had
8 been ill-treated when the father’s new partner was at the nursing home to visit with her
9 daughter and she, the mother was asked to leave the nursing home.

10
11
12 60. She said that normally on the weekend about 10pm or 11pm she would go to parties with
13 her friend or sister and would drink about 12 beers. She agreed with Counsel’s
14 suggestion that this was quite a bit more than she really should drink. She said that if she
15 is not drinking beer she would have vodka and would have about 5 drinks of vodka. She
16 would start to feel intoxicated if she has 4 or 5 such drinks. She can drink 10 beers and
17 still not feel intoxicated. She says that her problem is not being intoxicated when she
18 drinks, it is that she falls asleep when drinking. Falling asleep was the cause of her first
19 car accident in 2011. She had smashed her car into private property. She had not been
20 drinking but had been working three jobs and was tired.

21 **EVIDENCE OF BS**

22 61. Ms. BS is the sponsor for the mother at AA since March 2021. BS is a recovering
23 alcoholic who has been sober for 27 years. Since 2006 she started and oversees an AA
24 programme in Cayman Brac. She has helped a number of alcoholics achieve a sober life
25 and has experience in this area. BS testified that the mother was referred to AA and first
26 came to a meeting in November 2020 but that they did not commence meetings and a
27 regular sponsor/sponsee relationship until sometime in March 2021.

28
29 62. She first met the mother in 2007 from having lunches or early supper at the restaurant
30 where the mother worked as a bartender. They became friends. BS states that this
31 occupation which involved being around alcohol with some frequency, would have
32 made it difficult for the mother not to succumb to it. From her assessment of the



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4 personality of the mother which she described as gregarious and people pleasing, mother
5 would have found it difficult to say no when pressed to drink. Bartending and waiting
6 tables is one of the few jobs available in Cayman Brac for women.

7
8 63. She said that the mother has stayed in regular communication with her and to her
9 knowledge has been abstaining from alcohol for the past two months. BS expressed the
10 fear that taking the children away from the mother would have a negative effect upon
11 her and compound her grief.

12
13 64. BS was cross-examined about the photograph Exhibit 1. She said that she did not
14 recognise the car or the person inside. The mother had told her about a time when she
15 fell asleep in her car after she came home from work but that she had not been drinking.
16 BS said that she had not known the time of day that this had occurred and had not been
17 told that it was after 2 o'clock in the early morning.

18
19 65. BS said that before the referral was made by the Probation Officer in November 2020,
20 she had not known that the mother had a problem with alcohol. She had seen her many
21 times but had never seen her drinking. She had only seen her at work or with her children
22 and was not aware of incidents occurring. Over the years that she has seen the mother
23 with the children, they appeared to her to have a close relationship.

24
25 66. BS also said that in the initial phases of recovery the work is on 'today,' getting through
26 one hour or one day at a time. The mother is just beginning alcohol recovery and is in
27 the early stages of the AA programme.

28
29 67. Counsel for the father asked her how difficult is the process to go to being sober on a
30 consistent basis. The witness replied that this varies depending on the individual and the
31 type of problems that there are. The witness further said that while no one can tell, there
32 is a good probability of success if a person is committed. She gave her opinion that if
33 the mother is committed and works with her, the mother is going to make a recovery.



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4 68. In response to a question from the Court, the witness said that the mother has been
5 consistent in attending meetings since being referred. The meetings began during the
6 first part of May. There was a break while the witness was off Island and in quarantine
7 but this has been consistent since the 21st May 2021. They meet once a week usually on
8 a Wednesday.

9
10 69. Counsel on behalf of the mother asked her about the success rate of AA meetings. Her
11 response:

12 *“If they come to meetings, follow direction, have a sponsor they have a very good*
13 *chance of becoming sober, succeeding, but most people don’t do that, so that they*
14 *don’t succeed.*

15 *Based on my experience, her change at this stage, I think her chance of success is*
16 *very good based on her commitment to stay in touch with me, to come to meetings*
17 *and based on what she told me about wanting to change.”*

18 **CHANGE IN FATHER’S CIRCUMSTANCES**

19 70. The father’s personal circumstances have now changed. He will have a third child to
20 support. His financial situation will be even more strained until “Y” completes maternity
21 leave and is able to work again. The father would wish for “Y” and new child to live
22 with him in the FMH and for the two children to become part of this family unit. He says
23 that the children have spent time in “Y’s” company and have no difficulty with her. His
24 view is that he will still be able to provide for all his children and meet the necessary
25 mortgage payments.

26
27 71. Two issues arising from father’s changed circumstances were raised as casting doubt on
28 whether it would be in the best interest of the children for him to be the one to remain in
29 the FMH with them.
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5 72. The first is as to the fact that “Y” is relatively unknown to the children. While the
6 children have expressed a liking for her, they have not been able to spend much time
7 with her. The mother has been reluctant for them to do so. As to “Y’s” capacity to care
8 for the children and her parenting skills, this is unknown.

9
10 73. Additionally, “Y” is a relative of the mother’s best friend. Mother’s evidence is that “Y”
11 would go partying with the group of them and drinks like they all do. It was put to the
12 father that “Y” like the mother has a history of alcohol use which is recorded in the 2019
13 welfare report. He denied this and said that “Y” does have drinks but does not have a
14 problem with alcohol. He said that he had spoken to her and that from the time they
15 spoke, she has proved to him that she has reduced her intake and changed. There is
16 nothing to support his account.

17
18 **LIVING ARRANGEMENTS**

19
20 74. Counsel for the mother suggested to the father in cross examination that the small
21 physical space of the FMH would be challenging with the two children, new baby and
22 partner. Thus that it would be better for the mother to be the one to remain in the home
23 with the two children. The father appeared to accept that there would be space limitations
24 but did not agree that these could not be overcome such that it would be better for the
25 mother to remain in the FMH.

26
27 75. The father also did not agree that a new baby in the home would be disruptive for the
28 son who would be in his first term of high school. He did agree that there would be
29 disruption for the son because he would not have his mother in the home.

30 **TIME FOR CHILDREN/WEEKEND WORK**

31
32 76. The father agreed in cross-examination that he sometimes has to work on weekends –
33 Thursday to Sunday. He said that this would not affect his care of the children as his
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3 brother and sister in law live next door to him and they are always willing assist.
4 Alternatively, he would make arrangements with the mother.
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6 77. In her most recent Affidavit of 2021 the mother states that in the past she was always
7 made to feel that because of the greater earning capacity of the father and the fact that
8 he has family in Cayman Brac that the Court would decide that the children's' primary
9 residence should be with him. She expresses deep regret that she tried to hide the hurt,
10 humiliation and helplessness as it relates to the children by excessive drinking of alcohol.
11

12 78. She is presently employed by a government Department doing work on the roads. She
13 earns CI \$10.00 per hour with work hours from 7am to 3pm for a total of \$1400.00 per
14 month. The employment is not permanent in nature and does not offer pension or health
15 insurance. She supplements her income by making craft items for sale and working at
16 part-time jobs.
17

18 79. It is her evidence that given her flexible working hours she can take better care of the
19 children. She states that at her level of income she would not be able to find rental
20 accommodation which would be comfortable for the children to reside with her. She
21 has no family on Island from which she could receive assistance. This is in contrast she
22 says to the father who in her view could easily find alternative accommodation as he has
23 family on Island and earns significantly more than she does.

24 **THE WELFARE REPORTS**

25 80. The Welfare Officer provided three welfare reports and gave evidence on oath at the end
26 of the hearing. The three welfare reports detail concerns as to the mother's use of alcohol
27 over the years, the impact of this on the children, concern as to the new partner's alcohol
28 use, and set out the wishes of the children.

29 **FIRST WELFARE REPORT- 2014**

30 81. In the Report of 2014, the Welfare Officer records the mother as describing her use of
31 alcohol to deal with her pain and two attempts at suicide. The mother was said to be open



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3 to sharing the parenting of the children and the Officer notes that to her credit she
4 expressed awareness that screaming at the children which she was doing when her stress
5 level was high was not an effective way to change a child's behaviour. Mother indicated
6 that with reduced levels of stress she was screaming less.

7
8 82. With respect to the father the Officer stated that he "presented as someone who possesses
9 an understanding of the children's present and future needs." The Report further states
10 that:

11 *"29... He spoke openly of the challenges of raising two daughters, having been*
12 *raised in a home with predominantly males. Nevertheless, he has learnt to*
13 *comb his daughter's hair, use resources such as the computer to research*
14 *developmental issues as well as he effectively utilized his interview session*
15 *to discuss parenting issues, addressing such matters as puberty.*

16 30. *It was observed that the children spoke freely in the presence of their father,*
17 *indicating that they share a close relationship with him. During the*
18 *assessment process, this worker observed that the applicant incorporated*
19 *equality in his parenting in that the children all expressed feeling loved. It*
20 *was also clear that the father honoured their desires and wishes which could*
21 *be seen in the colour scheme that he selected for the girls room which is*
22 *painted pink and purple as these are their favorite colors."*

23 83. With respect to the wishes of the children A.N. then aged six years was observed as
24 interacting well with both parents. She expressed her wish to spend equal time with both
25 parents.

26
27 84. The Officer's assessment included the observation that the father and mother were both
28 experiencing financial difficulties. The mother was then employed as a bartender, a job
29 which she had for four years and in the August of that year she had started additional
30 work at a clothing store. She earned minimum wage. The father was said to have a secure
31 job which provides benefits such as health insurance for the children.



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4 85. While the Officer identified a need for counselling as to effective co-parenting skills,
5 both parents were said to possess a general understanding of the task of parenting and of
6 relating to the needs of the children. The Officer recommended a shared residence order
7 in keeping with the wishes of the children.

8 **SECOND WELFARE REPORT - 2019**

9 86. In the 2019 report, the Officer noted that the FMH is next door to the residence of the
10 father's brother. The sister-in-law is a housewife who is unemployed. Both family
11 members provide support to the father. The children confirmed the father's information
12 that when they are left alone and unsupervised by the mother, this couple next door
13 would check on them and would provide a meal until the father returned home from
14 work.

15
16 87. The Officer expressed concern that the father's new partner is said to have a history of
17 alcohol use, this given the problem that alcohol has created in the present marriage.

18
19 88. The Officer also noted that the father was able to discuss the personality of each child,
20 their feelings and responses to events as well as their favorite activities, needs and health
21 concerns. This said the Officer reflects that he has a relationship with the children and
22 had knowledge of their care.

23
24 89. The father's statement as to drinking beers at home on a Saturday night was supported
25 by the children who said that they have seen him drink beers. The youngest child A.X.
26 has said that he has seen him drink two beers.

27
28 90. The Officer states:-

29 "20. *Additionally, fathers play a central role in the emotional well-being of their*
30 *children and from all accounts the children reported feeling loved by both*
31 *parents, but reported the applicant is the parent who shows them more*
32 *affection."*



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91. The mother told the Officer that the father is of a calmer disposition than herself which enabled him to deal better with the children.

92. The Officers' inquiries with the police identified seven reports involving the parties between 2nd April 2013 and 4th February 2019. All the reports refer to the father as the person seeking intervention. All refer to the mother being under the influence of alcohol or displaying aggressive behaviour.

93. Under the heading, the wishes of the children, A.N. is reported to have an understanding of the meaning of divorce. The report states:-

“45. ...[A] shared feeling sad about her parent’s decision to divorce as it means that she would not have a ‘full family.’ She indicated that she wanted to spend equal time with each parent, but voiced that her father should be allowed to stay in the house with them because he provides for them and does not intentionally leave them unsupervised. [A] also shared that she was fearful of losing her father after the divorce and recalled that he left the family’s home following an argument with her mother for three days before returning. This experience obviously promoted feelings of insecurity in [A] who shared that she cried when her father left the house. Additionally, [A] remarked that she felt that her father left to shield them from being subjected to further conflict.”

94. A.N. also spoke of her mother asking her [A.N.] to complete a task that mother herself could do when she is not busy. One example was mother asking her [A.N.] to iron the shirt of her brother when A.N. was getting ready for school and had to catch the school bus. According to A.N., her father helped more than her mother to do the chores in the house. A.N. told the Officer that mother leaves them unsupervised at times to socialize with her friends and that they would not know where she is. Their father did not leave



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3 them unsupervised and would arrange for his brother and sister-in-law to watch them
4 when he leaves for work if their mother was not home.

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6 95. The Report further states:-

7 *“47...[A.N.] reported that both parents are guilty of engaging in name*
8 *calling and using of profanity. She explained that her mother was the parent*
9 *that mostly cursed and called names when she is upset. [A.N.] remarked that*
10 *her mother called her father names such as idiot whereas her father talked*
11 *about her mother leaving them unsupervised which she found upsetting*
12 *because her father was telling the truth which hurts.”*

13 96. A.X. was then 8 years old. He described to the Officer his worry about his parents
14 fighting and drinking alcohol. He told the Officer that he had seen his mother drunk,
15 and his father drinking two beers but had not seen his father drunk. He understood that
16 his parents would no longer be living in the same house upon divorce. He shared his
17 worry that his father would be the parent that had to leave the house after divorce². He
18 is also worried that he would not get to spend quality time with each parent.

19
20 97. All parties are agreed that A.X. has a close relationship with his mother and that he will
21 be the most affected by the divorce. There was seen to be a change in his school work
22 and behaviour in school and he was displaying more negative attitudes towards academic
23 studies.

24
25 98. Under the heading Assessment and Recommendation, the Officer noted that alcohol
26 continued to be a concern as it appeared that it continued to be used as a coping
27 mechanism by the mother. While she does have a support system on Island in the person
28 of her sister, the sister works on shifts and there will be times when she will not be able
29 to help mother with the children.

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² Paragraph 53 of Report



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3 99. The Officer refers to the work hours of the mother and that given these hours, mother
4 would be readily available to care for the children after school before giving this
5 conclusion:

6 *“59 ... the fact that the children [have] made reference to their mother leaving*
7 *them unattended and father only leaving them when he has to work with*
8 *arrangements in place for the aunt and uncle to watch over them [until]*
9 *mother arrives suggests that they are not confident in the [mother’s] ability*
10 *to properly supervise them at all times.”*

11 100. The Officer noted that the children will need patience and understanding to guide them
12 through the aftermath of the divorce and that the information provided as to the
13 disposition of the father suggested that he would be best suited to assist the children. The
14 concluding recommendation is for a shared residence order to be made with the
15 condition attached for the father to be given the day to day care and control of the
16 children with the mother having reasonable access.

17
18 **THIRD WELFARE REPORT – 2021**
19

20 101. In the third Welfare Report the Officer records making inquiries as to possible alternative
21 accommodation for the father should he be the one to leave the FMH. His family
22 accommodations are no longer available and “Y” resides in a one-bedroom apartment
23 which would be too small to have both children stay overnight.

24
25 102. The Officer carried out a detailed review of the parenting undertaken in the months
26 leading up to the death of the eldest child. This period is said by her to provide evidence
27 of the father’s ability to care for the children:

28 *“18. The requested updated Welfare Report should be addressing the*
29 *desires of the younger children and it should make reference to the parent’s*
30 *ability to care for their children. However, [A J’s] experience in her final*
31 *days paints a picture of the applicant being the parent who will do a better*



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job at meeting on an ongoing basis the children’s physical, social, cognitive and intellectual needs on a consistent basis.”

103. The Officer observed that while the mother reported assisting with the care of the children, helping with their physical care, buying clothes for them and food from restaurants when she does not cook, there were occasions when the Officer visited the home and found that the house needed cleaning and that organisation in the home was needed.

104. The Officer recommends that given the significant events which have impacted the children by the passing of their sister that they should be allowed to remain living in the FMH.

105. Both children then 13 years and 10 years old are said to understand the process of divorce and to have expressed the desire to share both parents and to live between them. The Officer states:-

“39 *...Regarding [A.X.] he remarked that his mother drank too much and that he felt that life would be better living between them. He noted that he had no objections to living with his father’s [new partner] whom he liked. ... [A.N.] on the other had expressed that she wanted to spend three days with her mother and four with her father. She stated that it was her opinion that visits with her mother should occur during the week rather than on weekends because mother tended to drink on a weekend. [A.N.] is a sensitive young lady, however she remarked that she felt a strong sense to protect her mother whom she was fearful of losing to alcohol. She made reference to the fact that she had lost a sister and didn’t want to lose a mother, but in the same time she did not want to live with alcohol.”*

106. The Officer conducted a number of interviews of persons in the community, including the nurse who treated A.J. in the final days of her illness, school personnel and the mother’s sister. The Officer concludes that the father is seen as the parent who is most



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3 consistent in the parenting of the children which is reflective in the care of the eldest
4 child.

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6 107. The recommendation is again for a shared residence order with a view to allowing the
7 children to have access to the mother during the week on “least activities dates given the
8 concern raised by [A.N.] and the children’s desires”. The Officer states that to take all
9 responsibility from the mother would promote further depression.

10 **EVIDENCE OF WELFARE OFFICER**

11 108. The 2021 report was completed in March 2021. The Officer gave evidence that in April
12 2021 the mother had expressed to her the intention to stop drinking and that having
13 spoken shortly before the hearing to A.N. there is an indication that mother has not been
14 drinking so much. A. N. has now expressed the desire to visit mother on the weekends
15 but wants the flexibility to change if mother is still drinking.

16
17 109. The Officer testified that the children “*are seeing Dad to be the most consistent and we*
18 *are hearing that from the teachers as well.*” She said that the children have never
19 indicated that they have seen their father drunk. She said that the children should not
20 have to leave the FMH and they do not want to do so.

21
22 110. With respect to the relationship with father’s new partner, she said that she could see
23 problems arising from this if it is not planned and structured properly.

24
25 111. She said that having heard all the evidence in the case her recommendations remains as
26 in her last report. In her view it should be four days with father and three days with
27 mother subject to some flexibility on weekends.

28
29 112. In cross-examination by Counsel on behalf of the mother, the Officer testified that A.N.
30 understands what divorce means and does have a proper understanding of what is going
31 on and has always expressed and made very clear a desire to live with the father.



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3 113. Counsel asked her probing questions about the dynamics of bringing a new partner into
4 a small house with a new baby. The Officer indicated that the father's desire in the past
5 was to add a new bedroom which the girls would share. The Officer said further that
6 while A.N. coming into puberty should be a consideration, another child did come into
7 puberty and it was handled. She sees both parents handling the situation.

8
9 114. With respect to whether the mother resuming excessive drinking would be readily
10 identifiable from regular monitoring by the Officer, the Officer gave the following
11 responses:

12 *"The children would let me know about her drinking. I do intend to monitor children.*

13 *How I would find out is if Dad tells me and I would ask the children. Not children*
14 *telling me willingly.*

15 *If in different homes, where I am monitoring situation, I will be asking if drinking.*

16 *Q - don't you think you would find out immediately?*

17 *ANS: [A.N.] is also caught between the two parents, sometimes it takes a little*
18 *probing and hoping that she will tell me. It usually comes from father telling me. She*
19 *is afraid of hurting the mother.*

20 *She is a child who is likely to please."*

21 115. It appeared to me from this answer that if father is not in the home, the Officer anticipates
22 that it would take some probing to find out if mother is drinking and that her experience
23 is that at least one child would not readily tell her.

24
25 116. The Officer agreed with Counsel's suggestion that certain distractions are to be expected
26 when father has to deal with a new child. She agreed that she did not know how father
27 would deal with the new circumstances but said that she thinks that the father has the
28 ability to balance things because he had shown strengths when the older child was ill.



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3 She said that she *“feels Dad has the ability to balance those ... I refer back to when he*
4 *was dealing with sick child”*.

5
6 117. She said that the change has to be phased in, it is not an overnight situation. She said that
7 based on dealing with him over the years, she has confidence that father will honour his
8 word that the process of introducing his new partner into the family setting would be a
9 gradual one.

10
11 118. With respect to the small size of the home and its ability to accommodate a larger family,
12 the Officer testified that while the father may have some challenges financially to add a
13 room as he has planned for some time, he does have the ability to do much of the
14 construction work himself. She said that the father’s plan for the additional room was
15 before A.J. died and that the children are used to living in a room with each other from
16 day one.

17
18 119. When asked whether she would say that it is in best interest of the children that they
19 reside in a home where there is a relative stranger, new baby and son starting a new
20 school, she replied that this can work if all parties are counselled and things are put in
21 place.

22
23 120. Counsel asked the Officer directly:

24 *“Q - Wouldn’t it be better if they [the children] are in home [FMH] with*
25 *mother and she and her daughter can share one room?”*

26 *ANS - The children’s voices spoke very clearly in all reports, who they see*
27 *as the parent who gives them most stability. Representations very clear.”*

28 121. The Officer said that A.N. has some understanding of what the situation involves and
29 has enough trust in the father to say she wants to stay with him.

30
31 122. Counsel suggested to the Officer that as a short term option the children could reside in
32 the FMH with the mother and there be a review period to monitor the mother’s drinking.



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4 The Officer responded that the children are like the parents that “*this has been dragging*
5 *on since 2014, they want it to come to an end they are tired of it.*”

6
7 123. The Officer said that the children see father as the most consistent parent and that also
8 comes from everyone that she had spoken to. Although people have not seen the father
9 with a new baby and the possible distraction of that, they have seen the kind of father
10 that he has been over thirteen years which is a long time for someone to be observed.

11
12 124. It was put to the Officer that the mother’s circumstances seem to have changed. In reply
13 the Officer cautioned that it cannot be overlooked that it is very early for the mother. She
14 agreed that she had said that the mother has started trying as of April 2021 and that her
15 drinking is reduced. She said that this change is for a very short period.

16
17 125. In answer to questions from Counsel on behalf of the father she said that having observed
18 the father over a seven-year period that she has been reviewing this particular case, father
19 has been the most consistent parent, any changes with mother has come over the last two
20 months.

21
22 126. She produced a brief report from Counselor Jason Dunkley which states that the mother
23 has attended and engaged meaningfully in four telehealth session since the 10th May
24 2021. It is anticipated that once the divorce is resolved that mother will be in a more
25 stable place to start working through her grief.

26 **SUBMISSIONS ON BEHALF OF THE FATHER**

27 127. Counsel on behalf of the father referred to a number of leading cases including *Re F*
28 (*Shared Residence Order*³ in support of the submission that “the de facto position of the
29 law is that in cases where a shared residence order is in the interests of the child it should
30 be made” and that this is one such case.

31
32 128.

³ [2003] EWCA Civ. 592



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3 On the factual matters Counsel highlighted the alcohol issues as outlined in the three
4 Reports and what is said to be the mothers' limited acceptance in her oral evidence that
5 she has a problem. Counsel argues that there is every indication that the mother does not
6 appreciate the impact of her alcohol dependence on the children. It is also said that she
7 appears to have failed to communicate truthfully with her sponsor that she had been
8 drinking as recently as May 21 2021. Counsel said that the mother is the only witness in
9 the case who suggests that her alcohol dependency is in control and that she is the parent
10 who is the more fit to care for the children.

11
12 129. Counsel submitted that the incidents of violence which were reported to the Police
13 appear to have involved alcohol and that they:

14 *“...paint a picture of a woman, who fails to cope with stress, turns to drink and in*
15 *doing so is aggressive and demonstrates extremely poor judgment. The incident with*
16 *the knife is particularly troubling given it occurred in the former matrimonial home*
17 *and while the children were present.”*

18 130. Counsel submits that the mother's anger toward the father indicates that she would be
19 incapable of supporting long term contact with him, should he be the non-resident parent.
20 The mother has also expressed the position to the Welfare Officer that she does not wish
21 to have the new baby around her children and would seek to deny them the right to form
22 a loving relationship with their new sibling.

23 **SUBMISSIONS ON BEHALF OF THE MOTHER**

24 131. Counsel on behalf of the mother referred to the factual circumstances in some detail
25 including the following:

- 26 - The absence of medical evidence to prove that the mother is
27 dependent on alcohol and the absence of evidence to show that she
28 is a danger to the children or that they are at risk while in her care.
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- A. N.'s changed position since the 2021 Report where she states that a positive change has been noticed in the mother's drinking habits and that she wanted to spend more time with her mother.
- The father indicated in oral evidence that he would have no difficulty with the children spending additional days with the mother including over the weekend.
- The strong recommendation of the Welfare Officer that the children should remain in the FMH to avoid any further trauma and upheaval.

132. Against this background Counsel submitted that the children should remain in the FMH with the mother and spend four days per week with her initially and three days with the father. This is to be monitored by the Welfare Officer and the days spent with mother to be increased thereafter.

133. The reasons for this submission are said to be as follows:

- (i) The living arrangements proposed by the father would mean that his partner and new baby would reside in the FMH together with the two children. This would give rise to the following issues:
 - a) The size of the home - the two children would have to continue sharing a room which is not healthy at their age.
 - b) The new baby in the home would possibly be disruptive for the children in particular the son who is just entering high school.
 - c) The partner's parenting style is unknown, the children have only spent short periods of time with her.
 - d) The partners' ability to care for the two children while caring for a new born is unknown.



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(ii) It is also argued that conversely the mother remaining with the children in the FMH would provide stability for the children in familiar surroundings because:

- a) the children are already accustomed to their father sleeping outside the home for 2-3 nights per week.
- b) the situation will be monitored by the Welfare Officer so that if the mother resumes drinking this could be dealt with almost immediately.
- c) given the matters put forward in the *Act*, the children would be safer, there would be more stability and less risk with these living arrangements as there is no indication that the mother has abused the children.

134. It is also submitted that if the father is unable to find alternative accommodation where the children could visit him overnight he could spend the three nights with the children at the FMH.

ASSESSMENT

135. The Welfare Officer recommends and there is broad agreement between the parties that there should be a shared residence order. The Officer also recommends and the parties are agreed that the children should remain living in the FMH. This Court concludes that it would be in the best interests of the children for them to remain living in the FMH which would ensure some stability in their lives which have already been disrupted by the death of their sister and divorce.

136. The disputed issue is which parent remains living with them in the FMH. It is a narrow one but it has significant implications for the welfare of the children. This should not be seen as a contest between the parents. It is not. Neither should it be seen as one parent winning above the other. I accept from all that I have seen and heard that both parents love their children dearly and want the best for them. The resolution of this issue must



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4 be looked at first and foremost from the perspective of the children, as to what is in their
5 best interests.

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7 137. I have considered all of the evidence and submissions made in light of the welfare
8 checklist:

9
10 ***a) The ascertainable wishes and feelings of the child concerned (considered in the light of***
11 ***his age and understanding);***

12
13 138. The children are 14 years and 11 years old. They are both at an age where they are able
14 to understand the implications of divorce and the separation of the family. This is
15 confirmed by the Welfare Officer. They appear to be at a level of understanding where
16 their wishes can be taken into account.

17
18 139. A.X. wishes to spend equal time with both parents. He will be the most affected as he is
19 very close to his mother.

20
21 140. A.N. is said to be neutral. She initially asked to spend 4 days with father and 3 days with
22 mother and that the days with mother not be on the weekend because of her drinking. In
23 the 2 months leading up to the hearing, mother was said to be drinking less and A.N. has
24 now said that she would wish to see the mother on the weekend. Significantly she asks
25 for flexibility to change in case the mother starts drinking again.

26
27 141. As to which parent the children would wish to remain living with them in the FMH, the
28 Welfare Officer says that the children are clear in their wish that father should be the one
29 to stay in the home with them. The children see father as the more consistent, reliable
30 and stable parent.

31
32 142. I am mindful that the children would be impacted by the departure of either of the two
33 parents but it appears from the Welfare Reports and evidence of the Officer that the
34 impact of the departure of the father from the home would be greater from the children's
35 perspective as they appear to view the father as stable and consistent and to derive much



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3 of their sense of constancy and security from his presence. From the accounts given by
4 the children to the Welfare Officer there is distress when father leaves the home and fear
5 that mother will leave them unattended if they are left in her care.

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7 143. Counsel for the mother points to the children being accustomed to their father sleeping
8 out of the home on some nights per week, however it was significant that A.N. spoke of
9 father returning home in the mornings as he promised.

10
11 144. While noting that this is only one of a number of elements, I do consider that the wishes,
12 fears and concerns of the children must be given some weight.

13
14 ***b) Physical, Educational and Emotional Needs***

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16 145. The children require to be housed, fed, educated and cared for. If the children remain in
17 the FMH with mother, mother's income from her temporary and part-time jobs would
18 not allow her to meet the mortgage payments on the home without significant assistance.
19 Her earnings are at the level of minimum wage. Mother's position is that father would
20 have to pay the mortgage on the home and maintenance for the children. She estimates
21 that she would be able to pay the utility bills and some food for the household. Over the
22 years mother's contribution to the expenses of the home was limited to a period of 6
23 months in 2014 when she paid one half the electricity bill and six months thereafter when
24 she paid the full bill. Prior to and thereafter, all the household expenses have been met
25 by the father. Effectively the mother's proposal would require father to maintain this
26 household in addition to paying rent and maintaining a second household with his new
27 partner and child.

28
29 146. The father is in steady employment which also provides health insurance for the children.
30 Presently his income in the absence of overtime payments is insufficient to meet his
31 expenses. It appears to be the case that to maintain an additional household and pay rent
32 on a second home will be a financial strain on him and will likely reduce the amount of
33 funding which will be available to meet the needs of the two children.



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3 147. Given the level of the mother's earnings, it is also doubtful whether she would be able
4 to afford the rental cost of alternative accommodation for more than herself without
5 assistance.

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7 148. Both parents are capable of meeting the day to day needs of the children. The children
8 speak of father doing the household chores and there is mention in the Reports of his
9 assisting his daughter with hair grooming and other such matters. Mother is also said to
10 assist with the chores of the home and to care for the children. Her assistance with the
11 chores is said to have improved.

12
13 149. Both children attend public school which they would continue to do. There are no costs
14 issues which would affect the consideration of this aspect.

15
16 150. Both children require emotional support, particularly during this stage of divorce and
17 transition. They also do need to develop a relationship and to bond with their new sibling.

18
19 ***c) The likely effect on the children of any change in his circumstances;***
20

21
22 151. If the children are to remain in the FMH for the reasons stated above, the change in
23 circumstances will be firstly the absence of one of the parents. The children will be
24 adversely affected by this and will need counselling and adjustment whichever parent
25 leaves the home. Given A.X's close relationship with his mother, he will need more
26 counselling and assistance with the change if it is the mother who leaves the home.

27
28 152. If the mother is the one to remain in the home, the children's perceptions and fears are
29 as stated above. This would require the Welfare Officer to monitor the situation more
30 closely.

31
32 153. If the father is the one to remain in the home, the children will be impacted by having a
33 new and different family unit with a baby in an already small physical space. While the
34 introduction of the new partner into the home would be a change for the children and her
35 parenting skills are unknown, the children would have the constancy of the father in the
36 home.



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2 ***d) His age, sex, religious persuasion, background and any characteristic of his which the court***
3 ***considers relevant;***

4 154. Counsel for the mother raised the issue of A.N. the daughter approaching puberty
5 whether she would be better in the care of the mother. The evidence of the Welfare
6 Officer referred to the care by the father of the older daughter. In the case of ***KP v. JB***
7 ***Williams J.*** noted that the approach that there is a presumption that a female of tender
8 years should live with the mother is no longer the correct one for a court to take. Both
9 parents must be assessed as carers and there should not be a pre-conceived approach that
10 young girls should reside with their mother. I would add that neither should there be a
11 pre-conception that young boys should live with their fathers. All the circumstances need
12 to be considered. The learned Judge stated:

13
14 “32 *I accept that there is neither a presumption nor a principle that a child of*
15 *this age should necessarily reside with the mother. It is a consideration:*
16 *see Re S (A Minor) (Custody) (18) and Re A (A Minor) (Custody) (1). I*
17 *accept that the importance of whether a child should live with the mother*
18 *will vary according to the age of the child and to the particular*
19 *circumstances of each individual case. Factors such as whether the child*
20 *has been living with or apart from the mother and whether she is or is not*
21 *capable of providing proper care are relevant. However, where the child is*
22 *a very young child and has been with the mother since birth and there is no*
23 *concern as to her ability to care, the traditional advantage of a very small*
24 *child being with the mother is a consideration which the court should take*
25 *into account when considering where her best interests lie. The welfare of J*
26 *is paramount and I must assess both parents as carers and not have a*
27 *preconceived approach that young girls should reside with their mother.”*

28
29 155. In this case, A.N. is 14 years old, she has been in the care of both parents from a young
30 age. With the exception of three years, about half of which she lived with mother and
31 half with father she has been resident with both. In 2014 the mother stated that the
32 decision to return the children to the father was due to financial difficulties. She said that



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3 the father refused to provide additional support other than that which was ordered by the
4 Court. She said that she remained actively involved in the life of the children. They
5 would spend time with her 3-4 days per week. At the time she expressed the preference
6 for the children to live primarily with her because of their ages.
7

8 156. Father has proven his ability to care for a daughter by his care of his elder daughter. The
9 Welfare Officer records that he has dealt with puberty in the past. There is nothing in the
10 circumstances with A.N. approaching puberty which would lead to a finding that she
11 would be best cared for by her mother.
12

13 157. A.X. is 11 years old. He has been in the care of both except for the period mentioned
14 above. While noting that he is very attached to his mother, there is nothing in his age or
15 characteristics which suggests that he would be better off with one rather than the other.

16 ***e) Any harm which he has suffered or is at risk of suffering;***

17 158. Counsel for the mother points out that there is no medical evidence as to the mother's
18 drinking and no evidence that she is or has been a danger to the children. This is accepted.
19 There is however evidence which is suggestive of neglect of the children on occasion as
20 result of her drinking. While I considered the father's evidence with some care,
21 conscious that there may well be a self-serving aspect to his accounts, the overall
22 impression with which I was left was that he is an honest witness who was trying his
23 best to tell the truth. I found him to be a more credible witness than the mother on this
24 and most aspects. The mother appeared at times to downplay her own conduct where the
25 attempt to do so was inconsistent with other evidence in the matter. Understandably, she
26 was clearly anxious to present herself in the best possible light.
27

28 159. Much of what the father said about the mother's alcohol use over the years is consistent
29 with other information in the matter. There is also the mother's own acceptance of her
30 involvement in altercations, the charges in the Summary Court to which she pleaded
31 guilty, the mother being banned from liquor license establishments for six months and
32 the concerns of the children as to her drinking. All these evidence that the mother has a

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3 serious alcohol problem which has been ongoing since at least 2014 and which has
4 increased over time.

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6 160. The father gave evidence as to the mother leaving the children unattended and of them
7 being left on occasion without food. He spoke of having to retrieve the children from a
8 bar where the mother had taken them and from the home of her sister as the mother was
9 too intoxicated to drive them home. There was no direct challenge to the latter two
10 accounts except to say that mother had not had as much to drink as portrayed.

11
12 161. In addition to my own assessment as to the father's credibility, it is also noted that the
13 Welfare Officer's Reports as to her interviews with the children support his accounts as
14 to the mother's inconsistency of care. Thus I accept that the father is being truthful about
15 the instability of the mother and the fact that she has left the children unsupervised and
16 unattended on occasions.

17
18 162. Counsel for the mother highlighted the change in her drinking habits. While the mother
19 is to be commended for her recent efforts to attain sobriety and to deal with the
20 underlying grief and pain which has fueled the desire to drink, her own sponsor gave
21 evidence that she is at level 1 of the 12-stage process. On any view this must be the
22 earliest of stages. Ms. BS's evidence was also that this is a lengthy process which
23 requires long term commitment.

24
25 163. The father's evidence is that changes in the mother, decreases in drinking or increased
26 assistance with the chores around the home are usually as a result of a forthcoming Court
27 date or a pending Welfare Officer's assessment. His concern which appeared to be
28 genuine is that any change is Court induced and that she will revert to her old ways and
29 habits once matters are finalised. He has seen this over a period of time where there is a
30 reversion once a report is completed or a Court matter is over. He expressed what
31 appeared to be the earnest hope that the mother would change. He seemed genuinely
32 weary of these changes and reversals as well as skeptical of the reality of any change.



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3 164. The mother's evidence of being sent to AA by the Court rather than going of her own
4 volition and the timing of her recent change in drinking habits, only two months before
5 this hearing are some of the matters which appear to support the father's account.

6
7 165. Additionally and regrettably the evidence of the father suggests that while the two
8 months before the hearing were presented by the mother as a period during which she
9 had not drank much alcohol, she had at least one night of drinking which resulted at 2am
10 in her passing out in her motor car until assisted by the father. The mother sought to
11 explain the photograph, Exhibit 1 which the father produced, by saying that she was
12 merely tired from working multiple jobs. Even on her own account after completing her
13 part time delivery work, she went to a bar and stayed there until closing time rather than
14 going home to rest which would have been expected if she was tired. The father describes
15 her state in graphic detail, her resulting illness, the remedial efforts and her confusion as
16 to the whereabouts of her phone. My impression on this aspect is that the father gives a
17 truthful account of her state that night. The unfortunate conclusion is that she was being
18 less than truthful to the Court rather than admit a relapse. It was also of note that the
19 mother sought to say in her evidence that she does not have a problem with alcohol as is
20 being suggested and appeared to try to minimize the issue.

21
22 166. While the mother raised the issue of the level of drinking of the father, there is nothing
23 to support the implication which she sought to make that this is an ongoing problem.
24 The video which she produced is two years old. The father accepted this and said that he
25 has never allowed himself to get into that state again. The accounts of the children do
26 not support the assertions of the mother as to the level of the father's drinking.

27
28 167. The mother's evidence as to the level of "Y's" drinking is supported by the fact that the
29 father himself expressed concern to the Welfare Officer about it. In his evidence he
30 accepted doing so but claimed that "Y" has since proven to him that she has reduced her
31 drinking. I approach his claim with some caution but do accept as a truthful account, his
32 determination not to live through another relationship where there is heavy drinking by
33 his partner. The impression with which I was left is that he will put an early end to any
34 such relationship rather than as he said "*live through that again.*"



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3 168. Having considered all the circumstances, the conclusions on this aspect are as follows.
4 Given the fragility and recency of the mother's efforts to reduce her drinking, it is
5 difficult not to conclude that there is a risk of neglect of the children as has occurred in
6 the past. The risk is said to be greater on the weekend days. The father's level of drinking
7 appears to pose no risks to the children. It also appears that the father will seek to ensure
8 that his new partner does not pose such a risk.

9
10 169. I have considered the submission of the mother that with the Welfare Officer making
11 weekly checks on the household if the mother were to remain in the FMH, any risk as to
12 mother's drinking would be mitigated. The Officer's concern as to whether the children
13 would immediately tell her is detailed above.

14
15 170. I do not consider that it would be in the best interests of the children to propose a short-
16 term interim arrangement subject to review. The fact is that there is a risk to the children.
17 Implicit in this submission of Counsel on behalf of the mother is the recognition of this
18 risk. I consider that it would be in the best interests of the children for a decision to be
19 made which brings some level of resolution to the matter.
20

21 ***f) How capable each of his parents, and any other person in relation to whom the court considers***
22 ***the question to be relevant, is of meeting his needs;***

23 171. The father has been the stable financial provider for the children. The mother has limited
24 financial circumstances. Having lost her job at the local establishment, she is dependent
25 on the road work programme and part time jobs for employment. She accepts that she
26 cannot meet the children's housing needs and maintenance on her own.
27

28 172. Of benefit to the children, is the fact that the flexibility of mother's work hours means
29 that she will have afternoons to be able to care for the children at the end of their school
30 days. The father will not have this flexibility. He is sometimes on shift employment.
31 However he does have the support of his family who reside next door to the FMH. It is
32 said that the mother is not on close terms with this couple and she does not contact them
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3 when assistance is needed. Her sister may be able to assist her depending on her work
4 hours.

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6 173. Both parents would be able to meet the emotional needs of the children although the
7 Officer's assessment is that the father is more capable of doing so than the mother.
8 Mother herself has said that the father is better able to deal with the children. It is also
9 of note that the mother seems inclined to use the children as a crutch. She gave evidence
10 of asking the children to help her to do better. A. N. is described as being very protective
11 of her mother.

12 **CONCLUSION**

13 174. Having considered all the circumstances I am satisfied that it is better to make an order
14 in this matter rather than no order at all. I am also satisfied that the future residence
15 arrangements of the children must in their best interests include time with both parents
16 and that a shared residence order should be made.

17
18 175. The recommendations of the Welfare Officer and her interactions with the family are of
19 note. It is of import that because of the protracted nature of these proceedings she has
20 had the opportunity to observe and interact with the family over an extended period of
21 more than seven years. The wishes and concerns of the children are important but are
22 not the only matters which inform the decision to be made.

23
24 176. I have considered all the welfare factors. While there are some neutral factors, on the
25 whole of the evidence I am satisfied that the father will provide the children with greater
26 stability and constancy of care, both physically and emotionally. I am also satisfied that
27 significantly, there will be with him, the absence of the kind of risk which is attendant
28 upon the mother's present circumstances as detailed above.

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30 177. While the mother will have time in the afternoons, if she is not engaged in part-time
31 work to care for the children, the father will have assistance from his relatives who live
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next door to the FMH when and if he has to work on shift hours. The children are accustomed to being cared for by these relatives.

178. It would be desirable for the children to interact with their new sibling and develop a family relationship. Mother is not presently supportive of this.

179. While the small size of the home and the possible presence of a third child are noted, as the Welfare Officer points out, there were three children living in the home prior to the passing of A.J. The children have been accustomed to living in a small shared space.

180. The imposition on the father of the financial strain of maintaining two separate households is not without negative implications for the welfare of the children. I accept that it will be necessary to ensure that arrangements are put in place as best as is possible for the mother to have her own accommodation.

181. I conclude that it would be in the best interests of the children for them to remain in the FMH and for them to be cared for in that home by the father.

182. Consequently a shared residence order is made. The children are to reside in the FMH with the father, Thursdays through to Sundays. For the reasons highlighted above, they are to reside with the mother on Mondays through to Wednesdays. The father will have the flexibility to allow the children to visit with the mother on the weekends.

24 **Dated this 7th day of April 2022**



25
26 **Honourable Justice Cheryll Richards Q.C.**
27 **Judge of the Grand Court**