IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM 228 of 2020
CAUSE NO. FAM 158 of 2019

BETWEEN:

F

Applicant

AND

M

Respondent

Appearances:	**Mrs. Cherry Bridges of Ritch & Connolly for the Applicant** **Ms. Lynne Mooney of Broadhurst LLC for the Respondent**
Before:	**Hon. Justice Richard Williams**
Heard:	**23-26 March 2021, 29 March-1April 2021, 6-7 April 2021, 12-13 April 2021, 20-21 April 2021**
Closing Written Submissions:	**Applicant 2 June 2021, Respondent 1 June 2021**
Draft Judgment circulated:	**16 August 2021**
Date of Judgment:	**20 August 2021**

HEADNOTE

Family Law - Children - s.15 Children Act application for leave to permanently remove child from jurisdiction – father wishing the child relocate to Canada - s.3 Children Act paramountcy principle and application of the 'welfare checklist' to s.15 applications - relevant considerations to be applied to relocation - applicability of Article 7 and Article 9 Bill of Rights to removal cases ***arrangements for the child under section.10 Children Act***

JUDGMENT

1. The Court is concerned with the welfare of one child, "N", a 6 year old girl born in St John's, Newfoundland and Labrador, Canada. N is the only child of the parties - respectively F "the father" aged 40 and M "the mother" aged 41. N and the parents are all Canadian citizens[1]. At the

[1] The parents were both born in St John's, Newfoundland, Canada

time of the hearing there had been no previous s.10 Children Act (2012 Revision) ("the Act") orders made in relation to N.

Application and the Parties' Positions

2. The application before the Court is the father's application dated 8 October 2019 made by Form C1 in Fam 228/2020 for leave for N to permanently relocate from the Cayman Islands and to live with him in St John's, Newfoundland and Labrador, Canada. That application is opposed by the mother.

3. The mother has informed the Court that if the Court ordered that N should live in Canada, then she would terminate her employment here and return to Canada to continue to care for N. The father has stated that if the Court were to order that N live in Canada and if the mother were to move back to Canada, then there should be a shared residence order with N spending equal time with each parent, possibly on a two week on/two week off cycle. The mother also opposes this suggestion and states that if she was to return to Canada, then N should primarily reside with her under a sole residence order. The mother contends that she would unlikely be able to find employment in St John's upon her return and that, due to her resultant financial position, she and N would have to initially live with her parents in Renews in Newfoundland. She contends that, due to the distance and travel time from there to St. John's, (i) it would not be feasible for N to spend equal time with each parent and (ii) N would not be able to attend Vanier School in St John's.

4. If an order is not made for N to relocate to Canada then the father naturally seeks more frequent contact.

5. The mother, by an Amended Summons dated 22 October 2020, issued in the divorce proceedings Fam 158 of 2019, applies for a sole residence order to be made in her favour in relation to N[2][3]. Whatever the status of that application made in that Amended Summons in those proceedings, when carefully considering the s.10 of the Act orders being sought by each parent, I am also conscious that, pursuant to s.3 (3) (g) of the Act, I must have regard to the range of powers available to the Court under the Act in the current proceedings.

The Hearing

6. Voluminous written evidence has been filed (especially by the father) and the parties and their various witnesses have given oral evidence over a number of days. Due to the COVID travel restrictions, the father joined the hearing (and his witnesses gave their evidence) remotely by Zoom. His and their remote attendance was agreed by both parties and approved by the Court. Thankfully there were minimal connectivity issues. I am satisfied that I did hear all of the evidence that each witness had to give, and that I was able to assess the evidence of the various witnesses properly.

7. I have heard the oral evidence from and read the report prepared and filed by the Court appointed Welfare Officer, Melissa Alexander, on 12 March 2021. Included in the welfare report is the written "Parent Assessment" prepared by Ms. Lorna Piercey, a registered psychologist, who gave insight into the father, his family and the circumstances that exist and which could be put in place for N in Canada. As well as hearing from family members of the parents, I have also received oral evidence from Ms. Philecia Clarke (a teacher at N's School), Ms. Brianna Bergstrom (a teacher from N's previous school), Ms. Teena Saunders (speech language pathologist and counselling

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[2] Also sought a child maintenance order and a prohibited steps order preventing either party form the removing N from the Cayman Islands without consent of the other parent or an order of the Court
[3] Paragraph 4 Closing Submissions on behalf of the mother

psychologist with Achieve Cayman) and Ms. Anousha Pal (Operations Manager & Case Manager at ABA) who attended by subpoena issued by the mother.

8. Also before the Court is a report from a clinical psychologist, Dr. Laurence Van Hanswijck de Jonge ("Dr De Jonge") which the parties received on 22 March 2021. This report was not prepared by Dr De Jonge for use in these Court proceedings, but as an assessment evaluation after N was referred to her *"due to hyperactivity and struggling to focus, as well as being behind academically"*. Dr. de Jonge wrote in a disclaimer set out at the start of the report "*This report **is not** "A forensic child custody evaluation, which is an in-depth analysis and report from a licensed mental health professional that provides detailed psychological information about **each member of the family** as it relates to their respective roles in the parent/**child** relationship."* Dr. de Jonge concluded the report by saying *"I now look forward to discussing the outcome of this assessment with (N's) parents and remain at your service should further elaboration or clarification be necessary."*

9. Both the parents sought, and the Court felt it would be helpful, for there to be further elaboration upon and clarification about the content of Dr. de Jonge's report. Regrettably, despite (i) the various requests made by the parties, (ii) the sharing of the Court's observation that her attendance may greatly assist the Court when seeking to determine what is in the best interests of N and (iii) the Court's expressed willingness to work around Dr. de Jonge's availability to facilitate her attendance at her convenience, Dr. de Jonge felt unable to attend Court or even to provide written answers to written questions concerning her report sent to her by the parties. This is disappointing as it means that the Court has been unable to gain a greater insight into her diagnosis and her important observations including those about the assistance N should receive and about its availability in the Cayman Islands.

10. At the end of the hearing on 21 April 2021, the matter was adjourned to enable the Court to review the evidence and submissions. The time for the parties to submit their written closing submissions was, upon request from Counsel, extended on more than one occasion. The submissions were eventually filed on 1 and 2 June 2021. This is my reserved judgment delivered, having had the opportunity to conduct that further review.

The volume of evidence and size of bundles

11. Before I move away from the hearing itself and turn my attention to the background, I must comment upon the nature and the volume of the written material placed before this Court. Parties should take great care to file affidavits that are not excessive in length and repetitive. Parties should not file voluminous documentary exhibits/evidence and should limit the same to what is really necessary. In this case it is apparent from the formatting and nature of the father's documentary evidence that it has been greatly driven by him and his attorney appears to have felt compelled to submit such a large amount of the material presented to her by the father on to the Court. There are a number of repetitive chronologies covering the same period of time and summaries as already set out in exhibits. These are clearly prepared by the father due to their formatting and content, in which injudicious and emotional language is on occasion used by the father to vent his concerns and unguarded comments about witnesses and experts. They have the character of the type of material that litigants might send to their attorney if they are trying to provide them with their unfiltered views and can give the impression of someone being overtaken by their emotions. Prime examples of this are the summaries and comments made therein which can be found in the Education Bundle at GEW19. The summaries which too frequently contain his opinion expressed in overly emotional language are an example of unhelpful evidential documents. The father seeks to elevate these often rambling summaries to the status of affidavit evidence. The above having been said, I accept that the father's attorneys have clearly worked commendably studiously to organise the bundles into different subject areas with detailed

pagination and cross referencing as per the relevant parts of ***Practice Direction No. 11/2014 Court Bundles in Family Proceedings in the Family Division of the Grand Court*** ("PD 11/2014"). This must have taken them an extraordinary amount of time to do. Despite that hard work, it is still important that attorneys carefully review the material put into the bundles and then only submit what is truly required to put the Judge in a position to carry out the task outlined by Thorpe J[4].

12. I accept that a party would wish to ensure that the evidence is before the Court to support the arguments he raises and that it 'covers the necessary ground', but the view that the more information one inundates the Court with the stronger the case for that individual will be is not one with merit. In fact, it can on occasion have a detrimental effect. If a Judge, as I have had to do, has to wade through pages and pages of often irrelevant and overly repetitive material when preparing for a hearing or judgment writing, the risk a party runs is that the real gems in that party's evidence which really relates to the important core issues may be cloaked and not jump to the fore as they would have done in bundles that do not ramble but hone in on the issue. Another consequence of an excessive amount of documents being submitted is that inevitably the trial length is considerably extended as the participants stop and start and go from one bundle to the next to try to find the relevant page. The time that is required to enable a judgment to be written will be extended as the Judge has to trawl through the submitted documentation. It is evident that the attorneys required considerable time to prepare their closing written submissions, as shown by the lengthy extensions they sought and were given to submit the same, also no doubt due to the quantity of material they had to review.

13. No family case requires thousands of pages in fourteen lever arch files to be presented to the judge at a Family Division hearing. In fact, the exhibits file filed with material that was belatedly

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[4] See reference to ***Re F*** (Shared Residence Order) **at paragraph 105 herein**

submitted in an ad hoc fashion during the hearing contains more pages than one would expect to be filed in most children cases and likely exceeds the permitted size of bundles in any family proceedings in England and Wales. The length of the hearing was significantly extended and the ability to draft a timely judgment has been hindered by the volume of unnecessary documents submitted.

14. In previous unrelated family proceedings I have highlighted my concerns about bundles which are being filed in the Family Division being too large and containing irrelevant and repetitive material, most of which is not referred to. I noted, although not applicable in the present case, it often appears like an attorney has simply photocopied their file, then placed those copies in lever arch files which they present to the Court (often after the deadline for filing) without any thought as to whether the content is relevant or not or to the requirements of PD 11/2014. In the past I opined that the time had come for this to be addressed, otherwise the excessive costs wasted by the photocopying and time wasted by judges having to pre-read the same would continue unabated.

15. The present case heightens my concerns, as it provides a vivid illustration as to why the time has come for me to recommend to the Chief Justice that consideration be given to issue a rigorously enforced Grand Court Practice Direction along the lines of those introduced by the President of the Family Division in England and Wales to limit the size of the bundle in family cases. The English Practice Direction provides that *"Unless the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, the bundle (if a paper bundle) shall be contained in one A4 size ring binder or lever arch file limited to no more than 350 sheets of A4 paper and 350 sides of text and (if an electronic bundle) shall be limited to 350 pages of text."* [My emphasis]

This paragraph could be inserted to replace the current paragraph 5.1 of PD 11/2014

16. The President, Sir James Munby, clarified what is meant by "*necessary*" stating in ***re H-L (A Child) (Care Proceedings: Expert Evidence)*** *[2013] EWCA Civ 655, [2014] 1 WLR 1160, [2013] 2 FLR 1434, para 3*:

> *"Necessary" means necessary. It has "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." It is essential, and I wish to emphasise this, that the test of what is "necessary" is not watered down in practice. Judges must be astute to ensure, whatever the context, whether in directing expert evidence or, as here, directing translations, that what they say is necessary really is necessary. It is vital that the currency is not debased."*

17. When referring to what is meant by "*the bundle*" Mostyn J clarified in ***J v J*** *[2014] EWHC 3654 (Fam)* at *para 51:*

> *"It is possible, of course, that, unexpectedly, further documents may be need to be deployed at the final hearing; but the starting point, and the usual finishing point must be that all the relevant documents should be in the single bundle. To describe the single bundle as the "core" bundle suggests that there will inevitably be other documents in further bundles outlying the core. That is the wrong approach. There should only be one single bundle unless prior permission to use more than one has been obtained."*

General background and procedural background

18. The parents were married on 3 August 2013 in Newfoundland, Canada.

19. The mother and N have resided in the Cayman Islands since 1 November 2016, which is when the family moved here from Nunavut, Canada to enable the mother to take up her post as a speech therapist on a twenty-month fixed term contract with the Cayman Islands Government that expired on 6 July 2018. The mother has since renewed that contract twice.

20. The father resigned from his post as a Corrections Officer in Nanavut in October 2016 to support the mother's employment move. There is a dispute between the parties as to whether the father made any genuine attempts to find local employment during his period of residence in the Cayman Islands. Although the father may not have been as motivated as the mother wished, he did explore certain employment options. In any event, both parties were aware that he had started the process (with the approval of the mother) for him to commence the training for a career with the Border Control Services Agency in Canada. Despite the disproportionate amount of time it occupied during the hearing, the determination of the issue about the father's employment in Cayman, which I accept may have been a factor in the breakdown of the marriage, is not relevant to my consideration of what is in the best interest of N at this time.

21. Post separation, due to his immigration status as a dependent of a Government employee, if the father remained in the jurisdiction post separation, it is possible that he may have encountered issues with the Immigration Department unless he regularized his immigration status by, for example, obtaining a work permit. It was not a realistic option, as suggested by the mother, for the father to find meaningful and sufficiently remunerated employment in Grand Cayman to enable him to remain and be able to undertake the integral role he genuinely seeks to play in N's upbringing.

22. The parties separated in August/September 2017. The father says that on 22 August 2017, whilst he was still in Canada after the family's summer break there, the mother informed him over the

telephone that she wanted their marriage to end. The mother informed the Court that she was unhappy at the time with the father's drinking, historically and recently when they went on a trip together that summer to New York. She contended that the father was an excessive drinker and she has exhibited some photographs of the father appearing to depict him being in an inebriated state. Although the father is a musician and plays music at drinking venues, I am satisfied that his consumption of alcohol is now not beyond what is acceptable and that it would not impinge on his ability to care for N. In fact, it is evident from her own text messages, that the mother also enjoys a social life which, on occasion, involves her drinking to excess. Parents are entitled to have a social life as long as it does not endanger a child in their care and the historic drinking habits of the parties, although the issue occupied quite some time at the hearing, is not beyond the norm and is not a factor that has a bearing when determining the issues in this case.

23. There is a dispute between the parties as to how their marriage fared with the mother saying that the father was controlling. He denies that and says that he thought that the marriage was a happy one, although he suspects that the mother already had or was thinking of having relationships with other men around the time that she told him that the marriage was over.

24. The father returned to the Cayman Islands in September 2017 with the paternal grandfather. He said this was to attempt a reconciliation. That was not successful and it is evident, from text messages between them, that the mother was already in the early stage of a relationship with a man ("EY") who was a bartender in Grand Cayman. On 1 October 2017, the father finally left the Cayman Islands to live in Canada. The mother acknowledged in a message to EY that N was sad after the father's departure, yet she still concentrated on meeting up with EY that evening and rather insensitively had him stay that night at her home whilst N was there. It seems that N was struggling at that time as the mother informed EY that N "*is having a hard time. Very cranky and she's been hitting me. I've been letting it go and focusing on her positive behaviour because I*

know she is trying to deal with everything ... I do try to get down and look at her while I tell her and she scratches my face."

25. Since his return to Canada, the father has lived and worked in various places in Canada. He is now a Border Control Officer employed by the Canada Border Services Agency. After qualifying, the father was posted to and resided in Calgary, Alberta from July 2018 to July 2019. In around September 2019 the father was and remains technically posted to Gander, but he has applied for a transfer to St John's where he commenced a relationship with his fiancée ("AF") in July 2019. Since the Covid pandemic, the father appears to have predominantly been living in St John's. The mother contends that the father's ability to remain living in St John's is questionable because his official posting base is still Gander. However, I am satisfied from his evidence that the father's employer would likely be sympathetic to his situation if N was living with him or spending significant time with him in St. John's.

26. The mother's right to reside and work in the Cayman Islands presently only persists whilst she remains in the employ of the Government. Therefore, it is dependent upon her contract being further renewed. The mother's contracts include a provision that her employment does not establish a presumption or expectation that further future employment will be offered. The mother informed the Court that she felt that her contracts would continue to be renewed. There is no formal evidence before the Court as to whether a new contract will be granted when the current one expires in June 2022. N's right to reside in the Cayman Islands derives from her being dependent of the mother who is a Government employee. The mother would have the ability to apply for permanent residence for herself (but not for N) after residing here for eight years, but it cannot be presumed that she will be able to get sufficient points for that to be granted due to her lack of assets and long term ties to the community.

27. The father claims that the agreement had always been that the move to Cayman was to be a temporary one, as the family would leave Grand Cayman at the end of the mother's contract in July 2018 to return to Canada. He highlights that, when the family was in Newfoundland for the Christmas holidays in late 2016/early 2017, he began the interview process with the Canada Border Services Agency with 'one eye' being on the mother's end of contract date in July 2018.[5] I accept the father's evidence that he would not have agreed to the family relocating to the Cayman Islands at the time if he had been aware that the mother's intention was to renew her initial contract of employment and for N to become habitually resident here, especially to his exclusion.

28. On 1 June 2017 the father informed the mother that his residence training for the post could commence in August 2017. The mother's reply was consistent with the father's view that she supported his career aspirations for the time post her contract ending and that it would be good for the family when she replied "*OMG!. This is so important but the time sucks!!! Can you see if you would be included in the next round and when the next round of training would be? What if they don't offer for a long time? What if they don't include you because you turned down the first invitation? It's so important to set us up for the rest of our lives!!!*" [My Emphasis]

29. Even after the parties had separated, in the Fall of 2017 the mother was still giving the father the impression that she would be returning to Canada at the end of her contract in 2018. In a text message exchange she replied "*yes*" when asked whether she still planned "*moving home next summer.*" The father then replied that it would be nice to have her and N around and she replied "*We need to figure out the best arrangement for (N) and (the father) to continue with as little impact as possible so it would be best if we are all home.*" [My emphasis]

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[5] The father graduated Border Services training and became a Border Officer on 18 May 2018

30. Around the time of the separation, the mother was also giving the father the impression that the child arrangement with her being the custodial parent would only be for the time being. In an email concerning family finances that she sent to the father on 25 September 2017, the mother stated that "*I retain full custody until you have completed your training and have settled at work.*"

31. The father continued to believe that the intention was that mother and N would be returning to Canada at the end of her contract in June/July 2018, especially as that would coincide with the end of the his Border Control Officer training programme in Quebec. The father contends that the mother has reneged on that agreement. His letter to the mother dated 8 February 2018 is consistent with that position and with what he has genuinely believed throughout. The content of the letter foretold what the future might hold if the mother chose not to actively investigate her options in Canada. The father stated therein:

> *"I fully understand, acknowledge and accept that how the separation was initiated, the time line for my training have factored in (N) and I being apart up to now. This has been largely unavoidable. You must complete your contract, I must finish my training and accept my Offer of Employment at my first posting. When we reach the milestones, we can and should choose to live in a reasonable vicinity of each other. A necessary means to make this happen is that you need to be applying for Canadian positions now and in the immediate future or elsewhere that time comes, it will be too late....*
>
> *The termination of your contract and the start of my first posting is an ideal and unmissable opportunity to ensure we both relocate to an area where we can both have our jobs in our respective fields. The best time for (N) to return to Canada is now..."*

In the letter he elaborates on his work situation and made suggestions about possible employment opportunities in Canada for the mother.

32. On 15 November 2017 the mother's relationship with EY came to an end and, around that same time, she introduced another man into N's life, NO, with whom she also developed a relationship a month or so later. Despite the signals that she had been giving to the father about returning to Canada with N, it is evident that the mother was putting her independent roots down here. She was enjoying her employment, as well as the lifestyle she was able to have and share with N in the Cayman Islands.

33. The mother informed the father on 20 March 2018 that she and N were happy in the Cayman Islands, that she did not know how long they would stay and that she did not have any plans for leaving in the near foreseeable future. In fact, the mother had already been provided with a second employment contract which was dated 12 January 2018. It was signed by the Appointing Officer on 14 January 2018 and by the mother on 26 January 2018. By this agreement the mother, without seeking the father's input, would be extending N's residence in the Cayman Islands from 9 July 2018 to 8 July 2020.

34. I note that this was at the same time that the mother was negotiating in correspondence with the father's Canadian attorney to try to agree the terms of an interim settlement agreement[6] until the end of her initial contract and that, regrettably, she chose to not disclose the new contract agreement being executed. In fact, not to her credit, in her communications with the father's Canadian attorney, the mother sought to mislead him about the status of her employment situation - it appears to gain favour or not prejudice her position in the negotiations. On 25 January 2018 (eleven days after the Appointing Officer had signed the employment agreement and only one

[6] The mother's email to the father's Canadian attorneys 25 January 2018 at 10:52AM made clear that the *"agreement is for the interim up until (the father's) training ends and my current contract is up..."*

day prior to the mother signing it), the attorney wrote stating that the father had reported to him that the mother had told him that she intended to stay in the Cayman Islands and to sign a new contract. On the same day the mother replied in an email stating:

> *"I cannot confirm that as it is not official. I do not currently have a signed contract and I am unsure if/when this would happen. As I told (the father), as well as you and Sarah, at that meeting, I am thinking about his (sic) seriously, But I am not able to confirm anything."*

The attorneys wrote back on the same day stating:

> *"We recall and understand your (position) with respect to the (continuation) of your contract as it was presented at the meeting. However, we have now been informed by our client that you have informed him that your (position) has now changed to one of certainty. As we explained at the (meeting) and through previous email correspondences, your decision to remain in the Cayman Islands is going to decrease our client's access to (N) and increase the cost of that access. These negotiations began with our client under the understanding that it was your intention to return to Canada at the expiry of your contract. The decision as whether or not to stay in the Cayman Islands is yours alone but we require that you confirm the same for us so we can properly advise our client."*

The mother almost immediately replied to that email stating

> *"As I stated explicitly in my email this morning, I am not able to say with certainty that I will be staying. This is also information that (the father) has been told. This agreement is for the interim until June when it will be revisited, and changes can be made when more information is available for both myself and (the father). Please proceed as agreed."* [My emphasis by underlining]

35. In the months following January 2018 there was a series of conversations in which the father was trying to get the mother's input into his decision about which city he should ask to be posted to for his employment. He did this as he wanted the mother and N to return to Canada and he would try to tailor the location of his positing to the place that the mother felt would be the best fit for her. The mother was of the view that he should decide based on what is best for him and informed him, when he tried to highlight possible job opportunities for her in Canada, that she would not relocate for a temporary post. The mother added that, because she could not see any permanent jobs being available in Newfoundland, it was "*discussion over.*"

36. The father was eventually posted to and resided in Calgary, Alberta in July 2018. He said that he sought legal advice about making an application for child arrangements orders in Canada. He stated that he was advised that he must live for twelve months in a jurisdiction before being able to make an application there.

37. It appears that NO became a close male figure for N and the mother accepts that she had told N that she had a loving relationship with NO. In fact, NO resided in their home in January/February 2018 for about a month. However, in late March 2018 the mother's relationship with NO came to an end after they had been on a trip with each other to Columbia. They still remain good friends. The father's belief is that the mother prioritised her social life and promoted N's relationship with NO while at the same time stifling his own relationship with N by restricting the amount of indirect contact he had with N. From the evidence, NO has offered positive support for the mother and, despite the father's views, it appears that N has built up an appropriate and healthy rapport with him.

38. The father contends that in February 2018 the mother was willing to consider leaving her employment in the Cayman Islands as he says she contacted him seeking his permission to

permanently relocate to England with N to enable her to live with NO. Upon the reviewing the evidence, I am satisfied that the mother did not have an immediate intention to move to England at that time. I am unable to find whether the mother asked the father for permission to move there, although I accept that a move to London may have been something raised by her in a discussion. If asked by her, it would be understandable if the father declined to consent. I am satisfied that a move to London is something that the mother might have considered doing at the time if it meant that her relationship with NO would continue. It is clear from her own evidence that a move was something that was to a degree in her mind, as she had inquired with her Newfoundland attorney about the feasibility of this happening. The fact that the mother was even considering this as being an option when the relationship with NO was still a relatively short one shows, at least, a willingness on her behalf to a possible move for her and N from the Cayman Islands and her employment.

39. The father contends that he did not consent for N to remain in the Cayman Islands after 8 July 2018. Although the mother had at the very least indicated to him that she was seriously thinking of extending her contract[7], it was only in August 2018 when she was seeking a letter from the father for his consent for N to travel that she provided him with a copy of the new contract expiring in July 2020. The mother's view, repeated by her more than once during the hearing, is that she believes, despite there being a need to give full disclosure in the negotiations to settle financial and child terms in a proposed separation agreement, that the fact she had had signed a new contract and the content of terms therein were and remain none of the father's business. In such circumstances, where the father had believed that they had both agreed that the mother and N would return to Canada in July 2018 as the end of the first contract, he, when understandably upset, declined to sign a consent letter produced by the wife permitting N to travel back to the Cayman Islands from Canada in August 2018.

[7] **See paragraph 33 above**

40. In January 2019 the mother met and started a relationship with another man, RG. The father also had concerns about this relationship, partly because it included RG staying at the mother's property when N was there, as well as the fact that in April 2019 N referred to RG as being a part of the family. The father carried out an exercise of surreptitiously gaining access to the mother's friends' (and in fact even some of N's therapists') social media to try to gather evidence to discredit them and to create a narrative for his application. When he reviews some of that material in relation to RG, the father attempted on more than one occasion to interpret what may be regarded as being juvenile sexual chat exchanges between adults written at the infancy of a relationship as being evidence supporting his belief that they conducted sexual or inappropriate intimate activity in the presence of N. The father felt he was qualified to question N about RG due to his training and he felt he was conducting a risk assessment. The type of questioning an experienced border control officer might importantly utilise to assess a child coming through border control to check for a red flag/warning sign of, for example, an abduction or child trafficking is not the same as the very sensitive indirect methods that a social worker or member of a child protection agency would adopt based on extensive training in cases of possible child abuse.

41. The father also has concerns about another man, SG, who is the mother's present partner, primarily based on the content of dated articles written by him. I agree with the father to the extent that the content of SG's articles produced by the father does not go to the credit of SG's mindset and maturity at the time he wrote them.

42. The father believes that the mother "*continually selects men who are non-committal, interested in casual sex and heavy drinking, and some are dangerous and should not be around a young child, let alone staying in the home with her.* He adds that the mother "*hungers for a lavish lifestyle that*

some of these men can provide." The father states that the introduction of the mother's various partners into N's life, especially RG, caused N to be traumatised, and that this would manifest itself by N having aggressive outbursts at school. The expert evidence does not support this contention, although I do accept that there was upset caused to N due to the separation of the parents and her picking up on the tensions emanating from their dysfunctional parental interaction. N has been recently diagnosed and as having ADHD and this is the likely cause of her outbursts as she becomes frustrated, rather than father's view that the mother's private and home life is a major contributory factor to N's behavioral and educational issues.

43. Although the father may be right to conclude that the mother's various relationships may have some bearing on her desire to remain in the Cayman Islands and not return to Canada where she would be living in closer proximity to him, the intrusive methods adopted by him to delve into and monitor her private life is unattractive. This may be something the father recognised because, when asked about the various methods that it seemed that he had adopted to acquire the personal material, he was initially evasive and contradictory. It was only after some exploration in cross examination that he eventually confirmed that he had set up a fake wellness Instagram account to 'draw in' people who knew the mother (including therapists and teachers) with friend requests to enable him to then obtain posts containing images and details about the mother and her social circle that only online 'friends' would have access to. It is evident that the father also used the mother's private access passwords, for example her Instagram account. The father's interference with the mother's online privacy commenced shortly after the separation, which was likely done out of a desire to intrude into his former partner's private life upon separation as well as to gather information to raise questions about her ability to parent in later court proceedings. Both parents are entitled to move on with their lives and form new intimate relationships (as they both have done) without having to endure overly intrusive scrutiny and microscopic dissection of the same by the other.

44. The father is aggrieved that the mother chose not to disclose the relationships that she has had with persons who N has been exposed to, and that he was only able to find out about them by his independent research. Ordinarily, at the appropriate stage of a developing new relationship with someone who is coming into regular contact with the other parent's child, someone in the mother and the father's position should inform the other parent. However, the mother's concerns about the father's inevitable negative reaction to almost anybody she socialises with and his over inquisitive intrusion into her and their lives no doubt greatly contributes to her expressed reticence in providing him with information about her private life.

45. Despite the father's desire for this Court to carry out an in depth and historical review of the nature of the mother's relationships post-break down of their marriage, that is not something that is necessary to enable it to determine the issues. The father has formed an incorrect view that most, if not all, of her relationships (friends as well as partners) are damaging to N's welfare. This is a view which he unfortunately shared with medical/therapeutic professionals and teachers involved in N's welfare and something he asked them intrusive questions about.[8]

46. Before I move away from the issue of the intrusive means of obtaining material from the mother and others by the father, the father covertly recorded meetings he had with Ms. Philecia Clarke (a teacher) and Ms. Anoush Pal (behavioural analyst) who were both professionals seeking to assist N. Although the adoption of such methods is not illegal, one would expect there to be an acknowledgement that such a course of conduct was at best discourteous and could well break down the confidence a professional has with that parent when they found out about it. Not only did the father do that, but in relation to another professional, Ms. Bergstrom, he scoured the

[8] Although I note that he stated to Ms. Teena Saunders that he and she may well feel awkward (as she is a 'friend of the mother') if she remains assisting N and that she might want to reconsider her position because he felt the experts needed to know about his concerns about the mother's lifestyle.

internet and then produced to the Court photographs of her in social settings (including of her dancing at Carnival in costume) in a comment filled summary prepared by him about N's education. There was also a photograph of Ms. Bergstrom holding a glass in hand on the school premises which the father said was inappropriate, but she explained in her oral evidence that she lives on the school property. When referring to the pictures in his summary the father stated "*Her photos lead to doubt about Ms. Bergstrom's judgment and qualifications to make declarations regarding the best interests for the life of well-being of a five year old child. One photo even shows alcohol consumption on school premises at the Montessori School.*" Ms. Bergstrom understandably was disturbed by the manner of the usage by a parent of a former pupil of these images of her and she found the father's statement to be "*very upsetting*". Even though the father eventually withdrew his remarks after I highlighted to him that they lacked merit, this is another example of him searching social media for images of persons linked to the mother and then placing his own always negative spin on what he sees in an attempt to discredit that person and the mother.

47. I have considered the father's conduct set out in **paragraphs 40 - 46** above when determining whether N should relocate to St. John's/Canada (the mother has said that she too would leave to Canada to continue her care for N) as the mother fears that the father is controlling and that this will worsen if they live in the same area or country.

48. Following the breakdown of the marriage, the mother may have wished to 'spread her wings' and embark upon new relationships to a greater extent than the father did, he being initially focused on his new career, but it is evident that her social life is now more settled and within the norms for a single mother in her situation and I am satisfied that there are no risks to N as a consequence. In fact, it is evident that N has been included in a number of appropriate social events (including celebrating Canadian festivals) and that at such events and other social

occasions the mother's adult friends provide welcome social support for N and her mother. The fact that there may be alcohol being consumed at some of the social settings is again not something out of the norm. I note from photographs, produced by the father to illustrate the bond N has with him and the enjoyable life she has with him when she is Canada, that N and the father enjoy a healthy social relationship which sometimes revolves around the father's Celtic musical interests, which often involves them being at venues where alcohol is being sold and consumed by the father and his friends.

49. On 27 June 2019[9], the mother filed a Petition for Divorce. On the same day, the husband also issued divorce proceedings in Alberta, Canada.[10] The mother submitted to the jurisdiction of the Alberta Court when she filed her Statement of Defence on 23 July 2019. The parties have agreed that the divorce proceedings will proceed in Canada and that those issued in the Cayman Islands will be discontinued. The Canadian divorce proceedings do not appear to be moving forward in a timely fashion and the father states that the mother has failed to properly engage and that she has set certain conditions before she is willing to do so.

50. Before the wife's second contract of employment expired she renewed her current contract which runs from 9 July 2020 to 8 July 2022, again only informing the father after she had committed to it. The Agreement is dated 20 January 2020 and it was signed by the Appointing Officer on 29 January 2020 and by the mother on 10 February 2020. Again the mother sought to mislead the father about the status of this contract. On the same day that she signed the contract the mother sought the father's written consent for N to enroll at her present school and the father asked her "*So you have signed another contract? Please send it asap.*" To which the mother replied "*should have the new contract soon.*" The mother then did not then reply to the father's next

[9] Fam 158 of 2019
[10] Alberta Court of Queen's Bench File No. 4801-181-3987 – served on the wife in the Cayman Islands on 3 July 2019 and in Canada on 16 July 2019

question in which he asked her whether she had signed the contract yet. Again the mother delayed informing the father that she had actually signed the contract until 22 April 2020 and she only did so after the father had (i) told her on 19 April 2020 that she did not have his consent to keep N in "*a foreign country*" and reminded her that her contract was ending on 30 June , in 72 days and (ii) asked her on 22 April 2020 "*what issue do you have with (N) coming home to Canada while you finish your contract? We only have 46 working days left until June 30.*" She told the father in a reply text message "*my contract has been extended. I have never said I was coming home after the contract.*" The father asked her for a copy of the contract on 22 April and she did not provide it. The mother did not respond to the father's question on 29 April 2020 seeking confirmation that she had a new contract and about the terms of the contract. She did not provide him with a copy again after he again asked for a copy on 19 May 2020 and 22 July 2020. The contract is, of course, not only relevant to the arrangements for N, but also to the still to be determined financial matters in the divorce proceedings in Canada. It was not until late August 2020, during the child proceedings heard in Newfoundland, that the mother disclosed any meaningful details about her contract expiring on 8 July 2022 to the father.

51. Unfortunately, events surrounding the summer 2020 contact arrangements became highly problematic and the resultant issues were such that they required the intervention of the Canadian Court. What happened during the months leading up to the Summer school holidays and the manner in which the parents conducted themselves during the school holidays provides a vivid example of their inability to consistently communicate in a way that is in the best interests of N. One can see their problematic co-parenting from the chain of written communications from March 2020 onwards. One minute they are being co-operative and courteous, then 'in a flash' any sensible dialogue that they appear to be having is derailed due to one parent becoming defensive due to a comment made by the other.

52. Hitherto the mother believes that, as N's primary carer and due to the father living in a different country, she is the parent who in the end makes the decisions concerning matters relating to N's upbringing. One can see from the written communications that on occasion the father tries to placate the mother, being pleasant and friendly. However, if he does not get the answers he wants, he in the same chat changes to being over inquisitive with over intrusive questions put in a rather demanding manner. The consequence is the mother becomes defensive and terse. If the mother does not like the direction in which a conversation between them is going or feels that the father is trying to take on a more dominant role in the decision making concerning N, as a consequence of handling mechanisms she has been taught during her personal counselling, she often simply gives abrupt answers or threatens to, or actually, terminates the chat. For example, the mother feels frustrated when she seeks information from the father, for instance about child support or choice of school, when she thinks that the father changes the topic to the subject about their return to Canada. However, it is also understandable that, at a time when the father is trying to ascertain whether the mother is extending her contract of employment and trying to persuade her to return to live with N to Canada, the father does not want to be give the impression that he is content for the status quo to remain by agreeing arrangements to be put place in Cayman for the period after an existing employment contract expires.

53. This and other instances illustrate the unfortunate dynamics which exist between the parties. It is evident that the father dearly loves his daughter and is desperate to play a significant role in her life. He understandably feels that he is not able to play that role and he is aggrieved by how and why this has come about. He genuinely believed that the mother and N would be returning to Canada after the mother's initial employment contract ended. It is clear that this desperation has led to him acting rather intrusively, as illustrated by the earlier detailed questionable methods he has felt it appropriate to adopt to monitor the mother and some of the witnesses' private day to day lives, and to obtain evidence for these proceedings. His conduct has in turn caused the mother

to become guarded and disgruntled and have concerns about the potential of inappropriate interference by the father in her personal life if she had to live in closer proximity to the father.

54. In mid-March 2020, when concerns about the Covid pandemic started to be raised in the Cayman Islands, the parents initially discussed the possibility of N temporarily going to Canada and residing with the father and his fiancée if the mother had to remain in the Cayman Islands due to her employment obligations. From the earlier constructive written communications it appeared that the mother and the father at first agreed that this would be a good idea and in N's best interests at that time. The mother did express concerns about her not being able to fly out to join them in Canada or to collect N if the Cayman Airport was closed.

55. By Mid-April 2020, the discussion was about both the mother and N travelling to Canada on a special repatriation flight and about their quarantine arrangements in Canada. The mother suggested that N self-isolate with the father and, after that, she spend equal time with the parents. The father asked that N live with him due to his limited contact with N, but with visits with the mother. The discussion then broke down, with the mother saying that she was concerned about the length of time N might have to spend in Canada and also about the risk of infection during travel. The father then unilaterally made arrangements (seeking the assistance of a politician in Canada) for N to fly to Canada and the mother stated that she had not given her consent and that N would not be on a flight until the borders opened up for commercial travel between the countries.

56. Unfortunately, the communications totally broke down with the mother saying that she had spoken to her lawyer and been advised that N was a resident of the Cayman Islands and belatedly she disclosed that her contract of employment had been renewed. She said that the father should stop talking to her about such issues and that he should contact his lawyer.

57. The father contends that the mother's ongoing refusal to return to Canada with N amounts to a breach of their agreement and that N's continued residence in the Cayman Islands has been against his wishes since 2018. As a consequence of the mother's contract renewals, N has lived in the Cayman Islands for the vast majority of her life, from the early age of about nineteen months. The father contends that the mother has deliberately sought to create a situation whereby N is considered as being habitually resident in the Cayman Islands, which she feels will strengthen her case to continue to live with N in the Islands.

58. However, as common sense began to prevail, eventually they were able to arrange summer contact for N with the father. On 12 June 2020 the mother emailed the father telling him that she was conditionally "*open to*" N flying to Canada on 13 July 2020. The conditions she imposed were (i) that the father be in Toronto to meet N upon arrival; (ii) that the father make every effort possible to get N back before school begins (including on any private charters, airlines, routing through Miami or London if necessary); (iii) that the return flight be booked for N to get back to Grand Cayman on time to start the school year without delay (taking into account any quarantine), so by 12 August 2020; (iv) that the father agrees to quarantine with N at the facility in the Cayman Islands if that is a requirement; (v) that the father agrees that if the return arrangements are not in place by 13 July 2020 then the funds already expended on flights will be lost and N will not be flying to Canada; (vi) that the father agrees that these conditions for N's summer travel be reviewed by the parties' lawyers with an "*official agreement*" then being put in place before travel commences and: (vii) that financial arrangements will be made that are agreeable to both parties before 13 July 2020. The mother concluded the email by saying "*Failure for any of the above conditions will result in (N) not getting on the flight on July 13 and the financial loss will be split equally between us...*"

59. It is clear that the father was not entirely happy with the contact conditions insisted upon by the mother, as he stated in an email date 10 July 2020 to the mother "*In order to ensure (N) can have access with me and the rest of the family, and indeed, to the rest of your family – collectively (N's) extended family, as there is simply no alternative other than no access, I agree with these conditions*[11]*.*"

60. N flew to Canada on 13 July 2020. At that stage, no return flight had been booked. The mother inquired, for example by a message on 31 July 2020, whether flights had been booked. She stated that when she did so the father changed the subject to other issues such as child support, the divorce proceedings and especially N's schooling. The reason for his persistent questioning on the last issue may be because the father was seeking to gather evidence to support a child arrangement order that he would soon bring in the Newfoundland Supreme Court. The mother indicated to the father that there was the possibility of a charter flight on 25 August 2020 and, around 8 August 2020, text messages show that the father was still giving her the impression that he would put N on a WestJet flight to Toronto to facilitate that. The father says that he has to date not received any document from Cayman Travel Time approving N to enter the Cayman Islands on that charter flight.

61. Regrettably, whilst this uncertainty about flights and about N's previously agreed return prevailed, around 13 August 2020, it appears that the father inappropriately engaged with N concerning the issue about where she could live, thereby prompting confusion and an expectation in N's mind. In a text he mentioned that N had told him that she wanted both of her parents to live in the same place and that she had asked if she could stay in Newfoundland and so he told her that she could. He stated that when N then asked him *"what about mommy, she can't come because of*

[11] The conditions were set out in an email from the mother to the father sent on 12 June 2020, one of the conditions being that return flights would be booked for N to get back to the Cayman Islands on time for the start of her school year without delay and having regard to any quarantine requirements upon arrival.

her job" he replied that the mother could get a job in Canada if she wanted to. The father's justification involving N in these parenting issues was that the mother could not "*expect him to lie (to N)*"... "*to maintain (the mother's) fable*"[12] This was compounded by the fact that N knew that the father had wanted her to attend at Vanier School in St John's and that school equipment for that school had been purchased for her. I note that although the father stated that his mother told him that N was" *inconsolable*" when she found out that she was to go back to the Cayman Islands, the paternal grandmother did not mention that in any of her written or oral evidence. The father tried to give the impression that it is these exchanges that finally made him think about making that application. However, that is not the case. AF confirmed during cross examination that the father had already received legal advice about filing a parenting application in July, shortly after N had arrived in Canada. It, therefore, seems that the father had the intention to make such an application well before the date of filing of it.

62. For a period between 13 and 18 August 2020, the father was evasive in communications and failed to address the mother's request for confirmation that he was booking the flights. The mother asked him on 13 August 2020 to book the Toronto leg flights. The reason for his evasiveness became apparent when, on 18 August 2020, the father messaged the mother and told her that he was in the process of "*filing an application in the NL Court*" and he directed that any further communications concerning N should be made through their lawyers. The father gave no further information about the nature of the child application that he intended to make. The mother replied indicating that N was registered at school and that she needed to come back to the Cayman Islands pursuant to their agreement. On 19 August 2020, the father filed an originating application in the Supreme Court of Newfoundland and Labrador for the child arrangement order under which N's primary residence would be with him.

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[12] Text message 8/13/20

63. On or around 19 August 2020, the mother submitted a C53 Children Act Form seeking an order for the father to return N from Canada into her care in the Cayman Islands. Upon reviewing the Form, I had a number of concerns about the nature of the application being made and I directed the mother and her attorney to appear before me on 20 August 2020. At that ex parte hearing, I indicated that the appropriate procedure, if N was being wrongfully retained, was for the mother to contact the Cayman Islands Central Authority designated to discharge the duties that are imposed by the Convention On the Civil Aspects of International Convention ("the Hague Convention") and ask the Authority to make a report to and seek assistance from the Central Authority in Canada. I informed the mother that any application for a return order would need to be made in the relevant court in Canada and not by an application made to the Grand Court. However, I also noted that, when the matter came on before me, the Hague Convention was likely not yet engaged as N had not been wrongfully retained because the 25 August 2020 due/agreed date for N's return had not yet passed. I understand that an application for the return of N was received by the Central Authority of Newfoundland on 24 August 2020.

64. The mother informed the father on 23 August 2020 that she had booked a flight for N from Toronto on 25 September 2020 and for a chaperone to fly with her and asked him to ensure that she was put on the flight. It appears that she meant the 25 August 2020. By that time the father was aware that the mother was possibly travelling up to Canada, as he had read an email from N's swimming teacher wishing the mother good luck in Canada. Fortunately the flight organiser agreed that, if N was not put on the charter flight from Toronto, then the mother could instead use that ticket for the return leg of the flight back to Toronto on 25 August 2020. Therefore, the mother flew to Canada on that flight. The mother then had to quarantine in Canada for two weeks.

65. It is clear that, during her time with her father over the summer of 2020, N was able to spend significant and beneficial time reconnecting with her father, his partner and wider family members. From the copious amount of materials before me, I see that N has a very supportive and loving wider maternal and paternal family in Newfoundland and that she enjoys spending time with them. Despite that, whatever the reasoning was for the father to fail to return N to the Cayman Islands (and to belatedly communicate that decision to the mother) as agreed and to make the application in the Newfoundland Court in the manner in which he did, the presiding Judge there quite rightly found that his approach was wrong and unjustified.

66. The applications relating to N were considered by MacDonald J sitting in the Family Division of the Supreme Court of Newfoundland and Labrador on 4 September 2020. The parties were legally represented and they agreed that the hearing would proceed on the affidavit evidence that had already been filed and that there would be no cross examination. As the findings in the Newfoundland Court are relied upon by the mother in support of her contention that N should not relocate to Canada, I must now set out greater details about those proceedings than I would otherwise have felt necessary.

67. MacDonald J concisely set out his findings concerning the recent background in his ruling handed down on 10 September 2020 as follows:

> *"[3] (N), with the consent of her mother, travelled to St. John's on July 13, 2020 to spend some time with her father and his family. The parents agreed she would return to the Cayman Islands on August 25, 2020 so she could be back to attend school Year One, the Canadian equivalent of kindergarten.*
>
> *[4] Her father did not return her as scheduled but took an Originating Application seeking primary parenting of his daughter. He filed his*

Originating Application on August 20, 2015 (sic.) when the Court was aware that (the mother) was taking this Originating Application for the Return of a Child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Hague XXVIII (the "Hague Convention"). She subsequently filed it on August 21, 2020."

68. MacDonald J appropriately indicated that his role at the hearing was not to make a parenting order or to determine where or with whom N should ultimately live. He added, when correctly applying Article 16 of the Hague Convention, that he "*was not to decide whether, as suggested by the father, she could benefit from living near her extended family in Newfoundland and Labrador*" but he was "*to decide whether (N) will return to the Cayman Islands under the provisions of the Hague Convention designed to return the child to the court in the jurisdiction that is most appropriate to resolve the issues of custody.*"

69. MacDonald J. rightly set out the four issues requiring his consideration, namely:

(i) whether N was habitually resident in the Cayman Islands, and if she was then,

(ii) whether the father had wrongfully retained N in breach of the mother's custody rights attributed to her under the laws of the Cayman Islands, and if he had then,

(iii) whether the mother would exercise of custody rights if the father had not wrongfully retained his daughter, and if she would have then,

(iv) whether any of the exceptions under Article 13 of Hague Convention applied.

70. When dealing with the issue of habitual residence, the "*hybrid approach*" that the Learned Judge adopted for his inquiries is consistent with the approach taken by the Cayman Islands Grand Court. MacDonald J, whilst recognising that a child's habitual residence could change whilst staying with a parent under a limited time consent agreement, considered (i) N's family and social circumstances immediately prior to the retention; (ii) N's links and circumstances in the Cayman

Islands; (iii) the circumstances of N's move from the Cayman Islands to St John's; (iv) N's links and circumstances in Newfoundland; (v) the duration, regularity, conditions and reasons for N's stays in Newfoundland; (vi) the circumstances of N's parents and their intentions, having regard to her age; (vii) all of the relevant circumstances surrounding N's parenting; and (viii) the intention of the parents that the move for N would be temporary and the reasons for that agreement.

71. In reaching his correct decision that N was habitually resident in the Cayman Islands, MacDonald J set out the following findings on the evidence before him at paragraph 17 in his judgment:

a) That N and the parents are Canadian citizens.

b) That N had primarily lived with her mother since the parents separated in 2017.

c) That N had attended a Montessori preschool in the Cayman Islands since she was 19 months old.

d) That both parents registered N at her new School starting in late August 2020.

e) That N's family doctor, therapist, medical and dental care professionals were located in the Cayman Islands.

f) That N had lived in the Cayman Islands for most of her short life, since the parents moved to the Islands in the Fall of 2016.

g) That the father had visited N twice in the Cayman Islands in 2018.

h) That N had visited Canada six times between December 2017 and August 2020[13] and that, other than the summer of 2020 visit, the mother had accompanied N on her visits to see the father.

[13] The Learned Judge also noted that N had spent over 130 days in Canada with the mother, including possibly a week in Calgary and that she is scheduled to be in Newfoundland and Labrador that Summer for more than 40 days. The Learned Judge calculated that N has spent less than 20 percent of the time since the parents' separation in Newfoundland.

i) That when N visited St John's in Canada, she spent time with both her maternal and paternal extended family.

j) That, other than the time spent with her extended family, there was no evidence that N developed any significant connections with Newfoundland in her visits.

k) That it is unlikely that N made any significant connections with Newfoundland when she visited her father in Alberta and when he visited to see her in the Cayman Islands.

l) That the father had not lived in St John's during most of the previous three years and that any move there has been a very recent one.

m) That since the parents' separation N had lived almost exclusively with the mother.

n) That the parents agreed on the terms of N's 2020 summer visit and that she would return to the Cayman Islands on 25 August 2020.

I am satisfied that at the time of the hearing before me, N remains habitually resident in the Cayman Islands. However, when I do so, I see some force in the father's contention that the habitual residence has come about due to the mother's unilateral decision, against his wishes, for N to reside in the Cayman Islands post the end of her first contract of employment, so it is, to a degree, a state of affairs that she has "*engineered*."

72. MacDonald J understandably went on to find that the father wrongfully retained N at that time, despite the mother's *"numerous inquiries by text and telephone"*, thereby preventing the mother from exercising her parental rights.

73. MacDonald J did not accept the father's submission that he had no practical or legal ability to enforce his parenting rights in the Cayman Islands or that at that time he was legally restricted from living in the Cayman Islands. In fact, the father was and has remained entitled to (i) make any relevant application in the Family Division of the Grand Court; (ii) to seek legal representation; and (iii) to attend court hearings remotely with his consent if unable to travel here.

The father has had the option of making an application for a specific issue order relocating N to Canada at any time, especially after 8 July 2018 when he contends that his express consent for N to remain the Cayman Islands had ceased. He did not take up that option in the past (possibly because it was only in 2020 that his long term employment situation/posting location appeared to me more stable, coupled with the cementing of his relationship with AF) and instead he chose to retain N in Canada and bring proceedings there. When I say this, I recognise the practical difficulties and potential great financial cost for the father to bring and engage in such proceedings in this jurisdiction, especially at a time when he was trying to establish himself in a new career whilst being posted to various locations in Canada. The Learned Judge's finding about the father's immigration status may not have been correct as the parents had been separated for almost three years and divorce proceedings issued. The Cayman Immigration authorities may form a view that the father was no longer a dependent of the mother.

74. When making the return order, MacDonald J considered the father's contention that the parents did not have a parenting agreement that N would live in the Cayman Islands for more than two years and that they had agreed that habitual residence be for about two years. He also considered the father's evidence that the parents moved to the Cayman Islands in 2017 under a two-year plan to enable the wife to pursue professional opportunities before a return to Canada to enable him to pursue his wish to become a Canadian Border Services employee. The Learned Judge also considered the evidence of the father that he had only agreed to the conditional time limited visit to St John's in July 2020 under duress. The Learned Judge noted the father's submission that he felt that he could unilaterally change N's habitual residence, which he felt he did when he refused to return her to the Cayman Islands.

75. MacDonald J found that the conduct of the parents was not consistent with there being an agreement that the parties would only live in the Cayman Islands for two years. However, on the

more detailed evidence before me which was for good reason not before MacDonald J, I differ from the Learned Judge's finding concerning the two year agreement. The parties, when living in Nunavut, were looking for a change to the environment found in that northernmost territory in Canada. One of the options was for the mother to apply for the post she now holds in the Cayman Islands, which she did. They did not hear back and thought that the post had been filled. They were pleasantly surprised when, months later, the mother was approached about whether she still had an interest in the post. The mother was offered the post after completing the recruitment process. I am satisfied that the intention was to try it out, it being a good time with N being so young, and have a break from Canada for the two years, and that they would likely return to Canada where they both knew that the father had an ambition to join the Canadian Border Force. Consistent with that is the fact that they both knew that the father was applying to be a Border Officer when they were living in Grand Cayman as well the mother's later comment made in a communication in June 2017 after being told that he had been accepted to the training programme that "*This is so important .... It's so important to set us up for the rest of our lives!!!*"

76. MacDonald J found that the parties' conduct was consistent with an agreement that N would live primarily with the mother in the Cayman Islands and have periodic vacation visits with her father. The Judge said that such an arrangement was "*not surprising*", as the father had only settled his residence recently, having moved around and living in three separate locations since the parties' separation. Again, on the evidence before me, although the primary residence/visitation arrangement is what had fallen into place since separation, the conclusion is not as simple as that expressed by the Learned Judge. I am satisfied that throughout the father has been consistent in his belief that it was agreed that N was to return to reside in Canada when the mother's initial employment contract came to an end in July 2018 and again thereafter after her second contract had expired. Although there may not have been a written agreement, some of the mother's communications (despite her later expressed view about lack of acceptable employment

opportunities for her in Canada) understandably led the father to form that view. I accept that her position has hardened about staying in the Cayman Islands, especially after the first renewal of contract. Of course, while the mother remained in the Cayman Islands, the father expected arrangements to be put in place for vacation visits in place. However, his conduct to put in place vacation visitation for N to see him should not be misconstrued as being an agreement with the situation that N's future was not to be in Canada. It is fair to say, as highlighted by MacDonald J, that the father recognised in the very early stage of his new career that he may not have a settled residence However, as soon as he had advanced to a stage where he could make representations to the Force about the location of his postings, he made it abundantly clear to the mother that he wanted to try to arrange that around the city or area which the mother felt would be best for her, so that he could forge a more hands on relationship with N. That is why the father asked the mother many times where she felt she could find suitable employment in Canada and where she would be happy moving to in Canada. In any event, the position now is that the father's employment is even more settled, and I have regard to that.

77. MacDonald J also found, when reaching his conclusion that the agreed arrangement was that that the mother and N would live in Cayman Islands, that the father had given his written agreement to enroll N in "*Year One, or kindergarten*" in the Cayman Islands in the Fall of 2020. Again, I differ from the Learned Judge's interpretation of the education "consent". The father correctly contends that his consent about schooling in the Fall was given under duress. The evidence clearly shows that the father has been throughout very uncomfortable with the mother's choice of school due to the standard of education he felt that it provided, the school's lack of ability to properly address N's needs and its underpinning religious ethos. The father only succumbed to the wife's choice of school under pressure from her then attorney who had written to him in March 2020 stating:

"I'm instructed there is an issue registering your child for primary school. If this issue cannot be resolved in the next 3 days, I will have the matter listed in the Summary Court, seeking an order which will dispense your requirement to consent. I will seek costs against you..." [My emphasis]

78. I note that, on 2 October 2021, the father withdrew his consent for N to attend the school citing his previous concerns and he only relented on an interim basis enabling her to attend that school pending the outcome of these proceedings as N had to attend a school and they could not afford a private school. He forcefully, with some justification, reiterated concerns about the management at and education provided at that school at the hearing on 18 May 2021.[14]

79. MacDonald J found that N visited her father in Newfoundland in July 2020 and unaccompanied by her mother and that the agreement was that she would travel to St John's on 30 July 2020, returning to the Cayman Islands on 25 August 2020. This is correct, although the father may say that when the arrangements were made there was uncertainty about the precise return date. The Learned Judge does not go on to say, as found by me in **paragraph 59** above, the father was not happy with the conditions which the mother said had to be attached to the contact arrangement.[15]

80. Finally, MacDonald J correctly did not accept the father's contention that the exceptions under Article 13 of the Hague Convention had been triggered because there existed *"a grave risk"* that N's return would expose her to *"psychological and physiological harm, or otherwise place the child in an intolerable position."* In support of his submission the father relied upon the fact that a speech-language therapist had stated that N had an *"adjustment disorder with mixed disturbance of emotions and conduct."* The Judge accepted that N may likely be suffering from separation anxiety, but also that N was making progress under the guidance of her therapist in the Cayman

[14] **See paragraph 194 below**
[15] In the end the mother did not require some of the conditions to be put in place.

Islands. The Judge rightly did not find that her return would place her in an intolerable position, but instead he felt that any separation anxiety would worsen if her mother abruptly ceased to be her primary parent. The evidence about N's present health concerns and educational capacity has been more comprehensive and raises questions not before MacDonald J about what N's needs may be, particularly longer term.

81. Having made these findings, reached on the more limited evidence before him than is before me, MacDonald J correctly made a return order, with the possible return to the Cayman Islands being on 17 September 2020.[16] The Learned Judge gave directions as to how the order should operate. The Learned Judge rightly highlighted that the return of N would enable issues of custody to be determined in this jurisdiction, being the appropriate forum as the wrongfully retained child was (and remains) habitually resident here.

82. What is clear from the proceedings in Canada and MacDonald J's astute handling of the matter on the evidence before him, is that this Court can be satisfied that, if I ordered relocation of N to Newfoundland and Labrador, the Court system there is well equipped to efficiently address any future issues concerning N's welfare and best interests which it may be required to determine.

83. I am not fettered by the findings of fact made by MacDonald J. The evidence before me is far greater and the submission made more detailed than that produced to the Court in the Newfoundland proceedings. I have also had the advantage of hearing live evidence from the various witnesses (most of whom were cross examined). Accordingly, I make my determination on the evidence presented to me during this hearing.

[16] The mother and N actually flew back to the Cayman Islands on 18 September 2021 on a private chartered plane.

84. As the mother had previously indicated that she would need funds to set up a practice in Canada and to meet her initial living expenses, the father reached out to the mother to see whether she would be willing to return to Canada if he offered her financial assistance[17] to help her with that transition with the start-up of her own practice in St John's. The mother remained steadfast and sure that it was in her and N's best interests for them to remain in the Cayman Islands and therefore did not engage in any such settlement discussions.

85. The impression given to the Court during the hearing is that the mother now sees her and N's longer term future to be in the Cayman Islands. It seems that even if her present employment contract is not renewed, she would prefer to remain and explore opportunities in the private sector here and she is not particularly driven or interested in exploring employment opportunities in Newfoundland or elsewhere in Canada.

86. Following the conclusion of this hearing, but prior to the filing of the Closing Submissions, the parties again came before me pursuant to a Summons filed by the father filed on 11 May 2021. Orders were sought by the father for N to be immediately removed from her present school (due to the recent serious events at the school leading to the headmistress and another member of her staff being suspended[18]) and either attend a private school in the Cayman Islands or preferably finish the academic year residing with her father and attending Vanier Elementary School in St John's, Canada. Directions were also sought in relation to the contact arrangements for the period over the summer 2021 school holidays.

87. At that hearing on 18 May 2021, following receipt of Counsel's Submissions, I gave an *ex tempore* ruling. I concluded that N's basic educational needs could, until the end of the Summer

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[17] C$50,000 which he would borrow and give to her

[18] The details of the events are contained in the perfected transcript of the extempore ruling which was provided to the parties on the day after the hearing of the Summons. **See also paragraph 194 herein**.

term, be met at her present school and that it would not be beneficial for her education to be moved in the middle of that term initially into quarantine[19] in Canada and then on to a new school with a different educational system. Accordingly, I made a specific issue order that, pending the handing down of the relocation judgment, unless the parents agreed to an alternative schooling arrangement, N was to remain at her present school. I was informed that it was agreed that N would leave for Canada on 2 July 2021 and that N would have to fly back to the Cayman Islands on 19 August 2021. The factual background and the reasons for my decision in relation to that Summons are set out in the transcript of an ex tempore ruling, a copy of which was provided to the parties on 19 May 2021. I do not intend to repeat that detail herein as that transcript may be read in conjunction with this Judgment.

88. On 4 June 2021, I approved a detailed consent contact order submitted by the parties. Pursuant to that order N would have contact with the father from (i) 23 June 2021 to noon on 24 July 2021, (ii) from noon 28 July 2021 to noon 2 August 2021 and (iii) the period with the father post 8 August 2021 to be agreed or as determined by the Court.

The Nature of Relocation Applications

89. When I review the evidence, apply the law and strive to reach a decision having regard to the welfare of N, I remain acutely conscious of the deeply upsetting nature of these proceedings, as well as the effect of the outcome on these parents and the wider family members. If I were to order that N relocate to Canada, then the mother would, after living in the Cayman Islands for five years feel compelled to leave her employment and home here to enable her to care for N in Canada. She would then have to find new employment and a place to live in Canada. On the other hand, if I did not make an order that N should relocate to Canada, this would greatly restrict the amount of time that N would be able to spend with the father (and with wider maternal and

[19] Required due to Canadian Covid regulations

paternal family members in Canada) and limit the important parental role that he could play in her upbringing, particularly during the school term. As I have mentioned in my rulings in previous cases with a child relocation element, Thorpe L.J. in ***Re G (Leave to Remove)*** [2007] EWCA Civ. 1497 provided an insightful observation about the sensitive nature of relocation cases when he stated:

> *"[19] These cases are particularly traumatic for the parties, since each of them conceives so much as being at stake. They are very, very difficult cases for the trial judges. Often the balance is very fine between grant and refusal. The judge is only too aware of how heavily invested each of the parents is in the outcome for which they contend. The judges are very well aware of how profoundly the decision will affect the future lives of children and how difficult it will be for the disappointed parent to adjust to the outcome... ..."*

The Law - Permanent Relocation Applications

90. Unusually, in the present matter, the father, the parent who is making the relocation application, already resides in the country to which he seeks the relocation of the child. The father is not N's primary carer. This case does not fall neatly into the factual matrix and categories that one usually associates with relocation cases, where the relevant parent, usually the primary carer, is seeking to disturb the status quo by leaving with a child to another country away from the other parent.

91. The categories include the "going home" cases where a parent may feel unhappy in the present country after the marital breakdown and therefore wishes to return with the child to their home country where there is a supportive family network. Another category of relocation case is the "new partner" cases, where a parent wishes to relocate with the child to that partner's original home in another country. A further category is the "specific opportunity" cases, where the reason for relocation might be that the parent or her partner wishes to pursue new employment or other beneficial opportunity overseas. Another category is in "lifestyle" cases where for example the

parent may feel that there is a better quality of life in the other country. The final category may be termed the "get away" cases and that is when a parent desires to get away from the other parent where, for example, that parent poses a serious risk to the child or to the child caring parent.

92. The matter before me does not fit neatly into any of these categories, although there are arguments made by the mother in support of N remaining in the Cayman Islands which feature in the "lifestyle", "specific opportunity" and (to a lesser degree) in "get away" cases.

93. Having regard to the content of the submissions made by the father, they contain factors often considered in the "going home" cases. He has stressed the importance of the support for him and for N of living close to the support of family and friends. He has sought to explain how living in that environment benefits himself, but more importantly how he feels that move would benefit N. In this regard, he has provided a great amount of detail about the support network and identified members of his family and friends who live there who he says can give emotional and, if needed, financial support. He also relied heavily on his contention that, especially in light of N's needs highlighted by Dr. de Jonge and his concerns about N's school, the education and health provision is of a far superior quality in Canada than, he believes, that which exists in the Cayman Islands. The father raises employment which is a factor often considered in the "specific opportunity" cases when stating that he would be unable to reside in the Cayman Islands, and he points to his now more established and secure career path with the Canadian Border Service which he has found to be rewarding. A further factor relied upon by the father is often seen in "new partner" cases, as the father highlights the nature of his relationship and his future plans with AF in St John's.

94. Although it does not fall neatly into one of the above relocation categories, and although this is not a case where the parent is seeking to relocate themselves and bring the child along with them, it is clear from their oral and written submissions that the parties agree that there remains some

merit in giving some consideration to the relevant guidance given in the case law in the different circumstances of this application for a specific issue order.

95. In ***B v B***, I conducted a full review of and applied the authorities emanating from the Cayman Islands and from England and Wales in developing the approach to permanent relocation applications. The Court of Appeal approved this Court's approach to the applicable case law in their decision which is reported at ***B v B*** 2014 (2) CILR 234.

96. At paragraphs 74 and 79 in ***B v B***, I noted the trend was a moving away from a rigid application of the guidance given in ***Payne v Payne*** [2001] Fam 473; [2001] 2 W.L.R. 1826; [2001] 1 FLR 1052; [2001] 1 F.C.R 425; [2001] EWCA Civ166[20] and the reasons for that. ***Payne v Payne*** should now be read in the context of ***Re F (Child: Permission to Relocate)*** [2013] 1 FLR 645; [2012] 3 F.C.R 443; [2012] EWCA Civ 1364[21] and ***K v K***, the latter case now being regarded as the starting point instead of ***Payne***. The only principle to be extracted from ***Payne*** is that the welfare of the child is paramount, although the guidance in the case goes to the factors to be weighed when considering the welfare principle.

97. Unlike in ***B v B,*** the governing statute in relocation cases is now the Act and not the Guardianship and Custody of Children Law (1996 Revision). Section 15 of the Law is often the section that applies in relocation cases and it provides that:

> *"(1) Where a residence order is in force with respect to a child, no person may-*
>
> *(a) [...]*
>
> *(b) remove him permanently from the Islands; without either the written consent of every person who has parental responsibility for the child or the leave of the court.* [My Emphasis]
>
> *(2) .....*
>
> *(3) ....."*

[20] Hereafter referred to as ***Payne.***
[21] Hereafter referred to as ***Re F.***

However, there is no residence order in force in relation to N. Therefore, a s.10 specific issue order is the avenue to be used if seeking to relocate a child back to Canada on a permanent basis. With this in mind, I remind myself of the paramountcy of the welfare of N, as s.10 orders are governed by the welfare principle in s.3(1)(a) of the Law. By reason of s.3 (4) (a) of the Law, the 'welfare checklist' in s.3 (3) (which I will deal with in some detail at a later stage of this Judgment) is a necessary part of the Court's analysis on a specific issue application.

98. In ***Re F***, clarity was given to the type of approach that should now be taken. At paragraphs 79 to 84 in ***B v B*** I quoted extensively from the judgment of Munby L.J. in ***Re F***. Although I again have regard to that content, for the purposes of this Judgment, I restrict myself to reproducing the extract from Munby L.J.'s Ruling at paragraph 12 and my observations found at paragraph 13 of the Judgment of Chadwick, P in ***B v B*** where the President stated:

> *"12. The judge quoted extensively from the judgment of Munby, L.J. in Re F (Child: Permission to Relocate) (4) (a judgment with which the other members of the court, Pill and Toulson, L.JJ. had agreed). It is, I think, unnecessary for me to set out the whole of his quotation again in this judgment. It is enough to refer to the following paragraphs in the judgment in Re F*:
>
> *'[29] The starting point now must be* K *v.* K *(Relocation: Shared Care Arrangements) . . . Its central message is conveyed, succinctly and accurately, in the headnote in the Law Report:*
>
> *'That the only principle to be applied when determining an application to remove a child permanently from the jurisdiction was that the welfare of the child was paramount and overbore all other considerations however powerful and reasonable they might be; that guidance given by the Court of Appeal as to factors to be weighed in search of the welfare paramountcy and which directed the exercise of the welfare discretion was valuable in so far as it helped judges to identify which factors were likely to be the most important and the weight which should generally be attached to them and promoted consistency in decision-making; but that (*per *Moore-Bick and Black, L.JJ.), since the circumstances in which such decisions had to be made varied infinitely and the judge in each case had to be free to decide whatever was*

in the best interests of the child, such guidance should not be applied rigidly as if it contained principles from which no departure were permitted.'

I need quote only what Thorpe, L.J. said (at para. [39]):

'. . . the only principle to be extracted from Payne v. *Payne is the paramountcy principle. All the rest, whether in paras. [40] and [41] of my judgment or in paras. [85] and [86] of the President's judgment is guidance as to factors to be weighed in search of the welfare paramountcy.'*

[37] In K v. *K (Relocation: Shared Care Arrangement) there was a shared residence order. The mother sought to relocate to her country of origin. The importance of K* v. *K (Relocation: Shared Care Arrangements) for present purposes is its emphasis that even where the applicant is a primary carer there is no presumption in favour of the applicant. That, after all, was hardly new. As was pointed out in K* v. *K (Relocation: Shared Care Arrangements) both Thorpe, L.J. and the President had made this clear in Payne* v. *Payne. As Black, L.J. said (para. [143]):*

'. . . the effect of the guidance must not be overstated. Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may be expressed. Thorpe, L.J. said so in terms in Payne and it is not appropriate, therefore, to isolate other sentences from his judgment, such as the final sentence of para. 26 ("Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children") for re-elevation to a status akin to that of a determinative presumption.'

There can be no presumptions in a case governed by s.1 of the Children Act 1989. From beginning to end the child's welfare is paramount, and the evaluation of where the child's best interests truly lie is to be determined having regard to the 'welfare checklist' in s.1(3).

...

[40] Following a careful analysis of the authorities, Black, L.J. continued in this important passage (paras. [141]–[142]):

'[141] The first point that is quite clear is that . . . the principle—the only authentic principle—that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.

[142] Whilst this is the only truly inescapable principle in the jurisprudence, that does not mean that everything else—the valuable guidance—can be ignored. It must be heeded . . . but as guidance not as rigid principle or so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable.'

[41] She continued (para. [144]):

'Payne therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case. I do not see Hedley, J.'s decision in Re Y as representative of a different line of authority from Payne, applicable where the child's care is shared between the parents as opposed to undertaken by one primary carer; I see it as a decision within the framework of which Payne is part. It exemplifies how the weight attached to the relevant factors alters depending upon the facts of the case.'

...

[43] As I read his judgment, Moore-Bick, L.J., with whom Black, L.J. explicitly agreed on this part of the case, was of the same view as her: see in particular para. [86] where he said:

'Guidance of the kind provided in Payne v. *Payne is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also plays a valuable role in promoting consistency in decision-making. However, the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child.'*

[44] On this point, therefore, the correct approach is that of the majority, that is to say Moore-Bick, L.J. and Black, L.J.

...

[61] The focus from beginning to end must be on the child's best interests. The child's welfare is paramount. Every case must be determined having regard to the 'welfare checklist,' though of course also having regard, where relevant and helpful, to such guidance as may have been given by this court."

13. *After setting out those passages in the judgment of Munby, L.J. in Re F (Child: Permission to Relocate) (4) - which, themselves, contain extensive citation from the judgments of Moore-Bick and Black, L.JJ. in the earlier*

decision of the Court of Appeal in K v K (Relocation: Shared Care Arrangements) (5)—the judge said this (2013 (1) 271, at paras. 85 and 86):

> *"85 The clear message being sent out by Munby, L.J. is that the child's welfare is the paramount principle to be applied in applications for permanent relocation. To do this, the court should consider all the factors, whether they were or were not contained in the guidance in Payne v. Payne, in reaching a decision as to what is in the child's best interests. The decision appears to be advocating a single approach to all relocation cases, in which the Payne factors may apply to all cases, albeit with varying weight. Due to the very recent nature of this decision it may be too early, in the absence of what would be a most welcome ruling from the Supreme Court, to conclusively state that there exists in England and Wales an unquestionable single analytical framework for all relocation disputes. Munby, L.J. was rightly stressing that each case is different and that the court must not seek to categorize the case in the manner sought by Ms. Dowse [counsel for the mother].*
>
> *86 I am satisfied that Munby, L.J.'s approach, in a judgment in which he summarized the entire jurisprudence, is timely and shows the right way forward."*

99. I accept that each case depends on the facts in that case, but I again adopt the above guidance given by Munby L.J. as being the appropriate approach. In ***B v B*** I went on to address what principles had emerged under the relevant case law and the questions the Court should be considering, when I stated:

> *"87. I have considered carefully the guidance given in Payne, K v K and Re F. From those cases one can derive a number of principles which should be applied by a court in considering whether to make an order granting leave to permanently relocate. A number of the following principles were stated by Mostyn J in Re AR."*
>
> *88. The first, and overarching principle, must be that the child welfare is paramount. It takes precedent over any other consideration.*[22]
>
> *89. The next principle is that the Court should have regard to the guidance handed down in case law when considering what factors are to be weighed when determining what is in the child's best interests. It is important to note that the guidance should no longer be confined by labels given to the category of care. This means that a judge may consider the Payne guidance, to an extent that he may determine to be relevant to the particular facts of the*

[22] My emphasis

case, even in what might be termed a shared care case. Attorneys and judges should avoid detailed classification of relocation cases and hearings should not get bogged down in taxonomical arguments or preliminary skirmishes as to what characterisation should be applied to the case by virtue of the time spent with each parent or other aspects of the care arrangements.

90. When the Court considers the guidance the following questions, in a case such as this involving an application made by the mother, should ordinarily be raised and addressed:

(i) Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?

(ii) Is the father's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?

(iii) What would be the extent of the detriment to the father and his future relationship with the child were the application granted?

(iv) To what extent would the detriment to the father if the application were granted be offset by extension of the child's relationship with the maternal family and, if applicable, homeland?

(v) Is the mother's application realistic and founded on practical proposals both well researched and investigated?

(vi) What would be the impact on the mother of a refusal of her realistic proposal? The weight placed on this will increase if the child resides with the mother."

91. Another principle arises from the fact that the circumstances in each case vary infinitely and therefore the court should not be unduly fettered in its approach when deciding whatever is in the best interests of the child. The court should regard the guidance, which can promote consistency, as helpful in determining the best interests of the child, but not feel that it has to be applied rigidly.

92. Finally, there is no legal principle, or even legal or evidential presumption, in favour of an application to relocate by a primary carer."

Although the circumstances of this case are different to those seen where a primary carer is seeking to relocate and take the child with them usually away from the country of residence of the other parent, I still consider the above factors which may be relevant, but tailored to the situation now before me[23].

[23] My emphasis

100. Before I move away from the law, I recognise that specific issues orders relating to an international relocation engage Article 6 (right to a fair trial) and Article 9 of Part 1, Bill of Rights, Freedoms and Responsibilities, of the Cayman Islands Constitution Order 2009 ("the BOR").[24]

101. In a relocation case I am again guided by the following observations of Dame Butler – Sloss confirming the application of the ECHR to private law children proceedings when considering the interrelationship of the ECHR and the English Children Act 1989 in ***Payne:***

> *"81. The Human Rights Act 1998 came into force in October last year and all the previous decisions have to be scrutinised in the light of the European Convention on Human Rights. In anticipation of the Convention, on an application for permission to appeal Ward and Buxton LJJ in re A (permission to remove child from jurisdiction: human rights) [2000] 2 FLR 225, refused the father permission to appeal. In that case the mother had been given leave by the Recorder to remove a ten month old girl permanently from the jurisdiction to the United States in circumstances where the mother`s job prospects were better in New York than in England. The father, (in person) raised the question of a breach of his right under Article 8(1). The Court considered the effect of Article 8 but saw no reason to interfere with the established line of authority followed by the judge and which bound this Court. Buxton LJ doubted whether the difficult balancing exercise performed by the judge came within the purview of the Convention at all. The question whether the Convention applied to private proceedings would appear to me to have been settled by the decision of the European Court in Glaser v The United Kingdom, [2000] 3 FCR 193 in which a Chamber of the Court held that there were no violations of Article 8 and of Article 6 in a case where a father`s application related to failures in enforcing contact orders both in England and in Scotland. The Court rejected the application on its merits, see also the decision of this Court in*

[24] Any dispute about the applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("ECHR) were settled in ***Glaser v United Kingdom*** (Case No. 32346/96), [2001] 1 FLR 153 at (57 to 65)

Douglas, Zeta-Jones and Northern Shell plc v Hello plc [21st December, [2000] unreported].

82. *All those immediately affected by the proceedings, that is to say, the mother, the father and the child have rights under Article 8(1). Those rights inevitably in a case such as the present appeal are in conflict and, under Article 8(2), have to be balanced against the rights of the others. In addition and of the greatest significance is the welfare of the child which, according to European jurisprudence, is of crucial importance, and where in conflict with a parent is overriding (see Johansen v Norway [1996] 23 EHRR 33 at pp 67 and 72). Article 8(2) recognises that a public authority, in this case the court, may interfere with the right to family life where it does so in accordance with the law, and where it is necessary in a democratic society for, inter alia, the protection of the rights and freedoms of others and the decision is proportionate to the need demonstrated. That position appears to me to be similar to that which arises in all child-based family disputes and the European case law on children is in line with the principles set out in the Children Act. I do not, for my part, consider that the Convention has affected the principles the courts should apply in dealing with these difficult issues……"*

102. I am conscious that a decision to permit or a decision to refuse N relocating to Canada may result in an interference with the BOR Article 9 rights of the mother and the father respectively of N to respect their family life. Any such interference must be justified, reasonable, proportionate and in accordance with the law. There is a positive obligation on the State, and therefore on the Court, to take measures to maintain the relationship between parent and child. As stated in ***Gnahoré v France*** (Application No 40031/98) (2002) 34 EHRR 38):

> *"The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life."*

103. To this I add the following observation of Ryder L.J. in ***Re F (a Child) International Relocation Cases)*** 2015 EWCA Civ 882:

"... a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged requires that the parents' plans be scrutinised and evaluated by reference to the proportionality of the same."

104. In the circumstances that exist in the matter before me, I would add that the refusal to order that this Canadian child relocate to Canada, the land where the Canadian father lives, arguably amounts to a fundamental interference with the relationship between him and N, so the same scrutiny and evaluation must be conducted. This is important when considering whether the preferred option arrived at following a welfare analysis of both parents' proposed arrangements represents a proportionate interference in the BOR Article 9 rights of those involved. When I consider this, I also have regard to the fact that the mother has indicated that, if a specific issue order is made requiring N to relocate to Canada, she will also relocate there as she seeks to continue her role as N's primary carer. I therefore approach the case on the basis that, if the Court were to make a specific issue order for N to reside in Canada, this mother would not become an absent parent.

The Factual Background

The approach to the evidence, submissions and fact finding

105. Much ground has been traversed and many issues addressed. It is not necessary nor would it be proportionate to deal with them all. I shall therefore deal with those which seem to me to be the most important, although I have in mind everything which has been presented to me for consideration. Therefore, in a case of this nature, where the Court has been presented with such an extraordinary amount of evidence, a great deal of which is historical, irrelevant, repetitive and unhelpful, I remind myself that when conducting a review of the evidence I should do so in a manner consistent with the approach advocated by Thorpe L.J. in ***Re F (Shared Residence***

Order) [2003] EWCA Civ 592, [2003] 2 FLR 397[25]. Thorpe L.J noted that a function of the judge is to make findings and that another function is to be selective and to make findings that are relevant and necessary for the disposal of the issue. Therefore, when considering what orders would be in the best interests of N at this time, I am not required to make findings on every area or issue that has been presented to me for determination or which have become apparent during the hearing. I must determine the factual issues that have implications for the decisions that I have to take in relation to N. To put it simply, the essential question for me when reviewing the relevant facts remains the issue of N's welfare, which is paramount. If I am satisfied that N's welfare now favours her relocating to Canada where her father lives, then that should be the outcome. If, on the other hand, her best interests would be served by N remaining in this country to be primarily brought up by the mother, then that should be the outcome.

106. Similarly, in relation to Counsel's very lengthy written submissions, I bear in mind the view of Lewison LJ in ***Fage UK Ltd & Anor v Chobani Ul Ltd*** *[2014] EWCA Civ 5 at [115]*, echoed by the then President in ***Re F (Children)*** *[*2016] EWCA Civ 546 at [22]-[23], that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his or her case, nor to deal at a length of matters that are not disputed.

107. Tipping J provided some helpful general observations about the approach to be taken by Judges when reviewing the facts in relocation cases when giving the majority judgment in the New Zealand Supreme Court decision ***Kacem v Bashir*** *[2010] NZSC 112* **:**

> *"[23] At the highest level of generality the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served. Put in*

[25] See also ***B v B*** [2013] (1) CILR 271 at paragraph 10 and ***KP v JB*** 2012 (2) CILR 249.

that way, it is difficult to see how any presumptive weight can properly be given to either side of those competing but necessarily abstract contentions. To do so would risk begging the very question involved in what is necessarily a fact-specific inquiry.

[24] Everything will depend on an individualised assessment of how the competing contentions should be resolved in the particular circumstances affecting the particular children. If, on an examination of the particular facts of a relocation case, it is found that the present arrangements for the children are settled and working well, that factor will obviously carry weight in the evaluative exercise. All other relevant matters must, of course, be taken into account and given appropriate weight in determining what serves the child's welfare and best interests, as s 4(5) puts it. The key point is that there is no statutory presumption or policy pointing one way or the other. All this seems to us to follow from ss 4 and 5 of the Act as a matter of conventional statutory interpretation."

108. Therefore, the Court must make an assessment and a determination based on its evaluation of the evidence, and that includes the background. As Mostyn J., after commending the approach advocated in ***Kacem v Bashir***, expressed his view in ***NJ v OV*** [2014] EWHC 4130 (Fam) para 5 that:

> *".... a decision of this nature is not really discretionary at all, at least not in the sense of a judge making a decision from a range of legitimate solutions none of which can be said to be wrong. Rather the court makes an assessment and a decision based on an evaluation of the evidence. It is a factual evaluation followed by a value judgment. ."*

109. However, when carrying out such an exercise in the matter before me where an unlawful retention took place in August 2020, I also note Mostyn J.'s cautionary warning given in **Re *TC and JC (Children: Relocation)*** [2013] EWHC 292 (Fam) where, although he found that the mother's conduct was "*abysmal*" and "*an act of cruelty*" to the father and that her abduction of

the children to Australia was "*directly contrary to the interests of the children,*" he said at paragraph 52 that:

> "*The decision that I make is based from first to last on the interests of these children. I must shut out my strong feelings for sympathy for the father at the high-handed, selfish and autocratic way he has been treated by the mother, and I must eschew any temptation to punish the mother for that conduct.*"

Although I do not consider the father's conduct in August 2020 to equate to that of the mother's seen in ***TC and JC,*** it is still worth making clear that the decision I make must be based on an unemotional review of the evidence to determine what is in the best interests of N and not in any way to punish the father.

110. There is no presumption in favour of either party, even the mother who I have found is the primary carer of N. I will have to consider and weigh up all of the factors contained in the evidence before me. When reviewing that evidence, I have regard to the relevant principles emanating from the cases outlined above in this Judgment. When I do so, I again remind myself that the overreaching matter for determination is what is in the best interests of N. As Black L.J. stated in ***K v K*** at paragraph 141:

> "*Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.*"

When reviewing the evidence and then applying the paramountcy principle I must, of course, have regard to the factors mentioned in the 'welfare checklist'.

The approach to and the impressions gained of the parties during the hearing

111. It is always tempting to think that the impressions gained of the parties when they gave their evidence is a reliable pointer to how they are in the real world. Of course, this is not necessarily the case. Individuals may behave quite differently because of nerves or by being 'on best

behaviour' or because of the importance to them of getting the case across or for some other reason. The Court must also be cautious if a party is giving their evidence remotely rather than being physically present in Chambers. Impressions, therefore, have to be formed with caution and seen in the context of the overall evidence in the case.

112. Both parties presented during the hearing with a range of emotions. At times they became understandably visibly distressed. On the whole they gave their evidence calmly and thoughtfully in what came over as a child focused way. Although the father was clearly upset by how N had come to live in the Cayman Islands for so long, unlike the content of some of his written communications, he did not come over at the hearing as being full of anger and recrimination, but he was very (at times over) anxious to make sure that the Court received his views and concerns. Having regard to the mother's view that the father was controlling, I noted that when she gave her evidence she was able to be extremely firm in her replies and to counter any suggestions being made to her which she did not agree with. This is also the same impression I got from some of her text messages, especially if she felt the father was being too 'pushy' or was changing the subject and not dealing with issues she was raising. This is an approach the mother said she had been taught in counselling sessions. Both parties gave their evidence forcefully and there was a general sense that they both felt that they were right, regardless of other possibilities or other points of view.

The Mother and Father's Employment/ Financial Position, Immigration Status and Accommodation

113. The mother's immigration and employment status is dependent upon her present fixed term employment contract which ends on 8 July 2022. This is her third contract with the Cayman Government for the same post and her evidence is that she feels that, despite the no presumption of further employment clause at paragraph 13 of the contract, the contract will be renewed

without any issue. Although there is no indication that her contract will not again be renewed the mother does not have the same employment security that the father enjoys. The contractual salary is CI$61,680 tax free (CI$5,140/month) and there are the same CINICO free medical, dental and optical benefits enjoyed by all civil servants. The mother lives in rental property costing CI$1,450 and does not own property in Canada. The Financial Form dated 12 March 2021 completed by the mother for the Court Welfare Report shows, if the father pays CI$445/month maintenance, a disposable income of $798/month. However when one reviews the breakdown in the form it becomes evident that does not include the costs of clothes, entertainment, medical not covered by insurance, flight/travel costs and only provides for CI$600 per month for food. It does include CI$1,000 for legal fees and $420/month for loans. Presumably these two substantial expense will be ongoing. In reality the mother has limited disposable income and will struggle to finance travel to Canada for herself and/or N.

114. The Court Welfare Officer describes the mother's rented home as being a two and a half bedroom town house in George Town with all the necessities, including the internet. It has a back yard and a pool on the compound of 16 units and is clean, welcoming and child friendly. I find that this home, where the Welfare Officer reported that N has been living since December 2017, is suitable accommodation for the mother and N to reside in.

115. The father has no immigration issues working in Canada. The mother similarly would have no immigration issues working in Canada. His annual salary with the Canada Border Services Agency is equivalent to US$62,395. This is less than the mother's income, but the cost of living in Newfoundland is considerably lower than that encountered in the Cayman Islands. The father's job comes with medical insurance benefits pursuant to the Public Service Health Care Plan and there are flexible benefits in relation to child care arrangements. The father's Financial Form for the Welfare Report show his and AF's pooled monthly income totals Cn $8,434 with a disposable

income of Cn$2,341. It also shows a low food figure of only $400 per month. As a couple they clearly have a greater disposable income than the mother, especially when one has regard to the higher cost of living in the Cayman Islands.

116. AF, who the father met in July 2019 and became engaged to marry on 1 August 2020, has secure employment as a senior manager with the Canada Revenue Agency for the Canadian Federal Government with an annual salary equivalent to US$79,902 plus health benefits. AF's owns the property in St John's where the father now primarily lives (despite him being posted to Gander) due to the arrangements made with his employer as a result of the Covid pandemic. Although the mother inferred in her evidence that the father's relationship with AF should not be considered to be one with long-term certainty, I take a different view. Having heard from both the father and, in particular, AF, I find that relationship appears to be a stable and committed relationship. AF came across as (i) a very supportive partner, (ii) someone who fully supports the father's position in these proceedings, despite the resultant financial and emotional strain on them and (iii) someone who has great affection for N and wishes to play an appropriate parenting role when N is in her home. I am satisfied that AF would be able to well care for N as and when required.

117. In the parenting assessment carried out by Lorna Piercey, she reviewed the accommodation in which the father and AF reside. She confirmed that it is located across the road from Vanier School and is in a residential area full of families. She described the bungalow as "*clean and pleasant, with all amenities, and in great condition*" and with "*no safety issues.*" N has her own bedroom there, with another bedroom being used by her as a playroom. The house has a deck and a yard and is well stocked with toys and books for N. I find that it is a suitable property for N to live in.

118. When considering the parties' financial circumstances, I cannot disregard the devastating effect that these proceedings have had on their financial circumstances and the knock on effect that may well have on the ability to fund international contact arrangements in the future.

119. The father's Estimates of Costs Form A records that the father's disbursements to 31 December 2020 and attorneys costs from 1 January 2021 to 4 June 2021[26] total CI$158,520. Astonishingly this is just over the equivalent of three years of his salary. Although this financial commitment may illustrate the level of his commitment to having N returned to Canada and counter the mother's contention that he has brought this application to get back at her for remaining in Cayman, this quantum of financial liability for legal fees in a private law child case is disturbing and the financial consequences for this family are not in N's best interests.

120. The same concern can be expressed about the level of the mother's legal fees liability. Although it may be less than the father's, it is also extremely concerning. The mother's Estimates of Costs Form A records that the attorneys' costs and disbursements, as of 3 June 2021, total CI$120,943 (just under two years of salary for the mother).

121. The costs expended on these proceedings are astounding when one considers the primary issue to be determined in this case. I have grave concerns about the excessive costs of litigating this relocation application. I accept that this is not a big money case ancillary relief case, but as a great deal of money and time has been squandered on these proceedings, I yet again find myself compelled to share the sentiments of Munby J [as he was then] in ***KSO v MJO & Ors*** [2008] EWHC (Fam) 3031 when he stated:

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[26] Including costs and disbursements incurred by previous attorneys, whether privately instructed was signed by the director of legal aid

"The picture is deeply dispiriting. And it is not as if it is only the adults who suffer from the consequences of such folly. The luckless children do as well. The present case is a sobering, and for me deeply saddening, example. If, instead of spending – squandering – over £430,000 in costs, the wife and the husband had been able to resolve their differences at a more modest and, dare I say it, more seemly level of costs, there might very well have been enough left in the matrimonial 'pot' to house the wife and children and to enable the children to remain at their school, whilst still leaving something more than a mere consolation prize over for the husband. .....the mother and the father, for that is what they are – are faced now with the wretched and thankless task of trying to explain to their daughters how it has all come to this."

These parents still have to embark on the ancillary relief financial proceedings in Canada and costs will emanate from those proceedings. The reality is that there is no 'matrimonial pot' left to benefit this child in her formative years, just massive debts to meet. In addition, the ability of either parent to pay child maintenance will be affected by their levels of debt.

122. I also draw the parties' attention to the following remarks of Jackson J. in ***TF v FF*** [2013] EWHC (Fam):

"In my view, the court has a responsibility to discourage currently profligate wasted costs, particularly in a case with a track record like this. It is a matter for each party to decide what they want to spend, but they cannot expect it to be recoverable if it exceeds that threshold."

123. On the evidence before me, although I have regard to them, each party's financial circumstances are not a significant factor indicating which parent should care for the child. However, they are a factor when considering whether regular contact will take place if N remains in the Cayman Islands, as one must ask what funds would be available from either parent to enable N to regularly travel to and from Canada once the parties have to substantially discharge their outstanding legal fees.

124. The lack of a guarantee of security about the mother's long term employment situation in the Cayman Islands is a consideration. As are, on the other hand, the employment prospects and income levels in Newfoundland or elsewhere in Canada as the mother will require both to enable her to care for N, even if the father is successful in his application for a shared residence order. A great deal of time was expended going through job advertisements/employment opportunities which the father said were suitable for the mother having regard to her experience. Although I have again reviewed that material, it is not necessary nor is it proportionate for me to set out the same laborious review herein. Putting aside the fact that the mother had argued that the father should have taken on employment in the Cayman Islands in areas in which he did not have any experience (including some employment that might well be categorised as being menial work), the father attempted to suggest employment that he felt may be suitable to the mother's qualifications, a view not shared by the mother. The majority of the advertised jobs that the father has produced details about were not in the St John's locality or were of a more temporary/probationary nature. The mother felt that these were not suitable. She also felt that she would not be able to earn a sufficient living for quite some time if she were to try to start up and establish a client base in private practice in St John's.[27]

125. The father states that the mother made clear to him, when he was sending her job applications for possible posts in Canada that she could fill after leaving Grand Cayman, that the only area that she would only consider moving back to was Newfoundland (and then only for a permanent post). I noted that during cross examination, when talking about the applications she had made for posts in Canada as a speech pathologist at the time that they both wanted leave Nunavut, the mother said:

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[27] As already mentioned, the father had offered to give the mother $50,000 towards starting up her own practice

"I apply for jobs. I have a very employable career in most places. I applied for jobs throughout Canada – Speech Pathology and Audiology Canada website, job postings are listed there. We saw different jobs. I apply for several different ones. I got everyone that I applied to and we had options. I applied for one in Cayman, interview, but never heard from them. Narrow it to two options – (the father) wanted Alberta, I really wanted Marystown in Newfoundland. That is a three to three and half hour drive from St. John's- four and half miles from my family. Marystown was temporary as that gave me the opportunity for people to get to know me and possibly transfer closer to St. John's. .....We were in a major fight about Newfoundland or Alberta. Miraculously on the eve of making a decision, Cayman made a job offer." [My emphasis]

The mother also remarked in her evidence that it may be easier to find a post in Marystown in Newfoundland due to the way that the School board is set up and there are a lot of young families there. She said that private practice had been *"a dream"* that she had when she was with the father when there was his second income coming in.

126. When I consider the evidence that had been presented to the Court, there did not appear to be a presently available permanent post or one which the mother would find acceptable. It is evident that the mother has hitherto not been motivated to search for possible employment in Newfoundland or Canada, as she is adamantly resistant to the idea of moving back to St John's, although in earlier times she had made clear that she may consider that if the job was a suitable or permanent post. It is evident that she has not been willing to properly explore the opportunities that might arise from setting up in private practice in St John's or the area, again because she is settled in her view that she wishes to remain in the Cayman Islands.

127. As the mother has been the primary carer for N, an immediate relocation for N would not be feasible. When I find that, I pay particular regard to the mother's concerns set out at paragraphs 61 to 66 of her affidavit sworn on 17 March 2021. I have to balance the immediate detrimental effect on the mother's employment prospects against the benefits N would have of spending greater time with her father (even if the distance between where the mother finds employment (for example if that is in Marystown, Newfoundland) and St John's would not make the 50/50 time split that the father seeks feasible) and the better educational health services on offer to her in Newfoundland (or elsewhere in Canada). The date of any relocation may have regard to the mother's contractual obligations in the Cayman Islands and it must enable a reasonable period of time for the mother to not only recognise the need to but also embark upon a determined employment search in preferably Newfoundland. If she were still not able to find the precise employment she was searching for by then, she would have to consider other relevant temporary employment, whilst still continuing her search for a permanent post. It appears from the advertisements shown to the Court that many speech therapists/pathologists posts are not permanent but are either cover or temporary posts. The impression given is that one needs to establish oneself before that post may become a permanent one as the mother said for permanent posts they look "*internally before externally*". The mother's post is not a permanent post in the Cayman Islands

Contact arrangements

128. A considerable amount of time was occupied in the oral evidence and a lot of documentation submitted (summaries, chronologies and text messages), all of which I have reviewed, relating to the father's contention that the mother has caused there to be issues with direct and indirect contact arrangements between him and N. Although I accept that one of the matters for this Court to consider is what level of contact the father will have and how the mother would comply with any contact order/agreement if his relocation application is refused, an in-depth historical

exploration and dissection of contact herein sought by the father is not required. I intend to comment upon the same, but do not intend to go through every date when the father says that there was an issue and then make a finding upon the same.

129. It is evident that there were some periods when there were some gaps in the indirect (Facetime) contact. Sometimes this was caused by (i) the breakdown in communication between the parties as one may have annoyed the other (something that frequently happened as highlighted in the presented large amount of text messaging), (ii) the time when contact was being sought was not convenient to the mother and/or N because they may have been out of the house at the time or because the time was unreasonable and did not fit in with N's routine, (iii) the time offered or arranged clashed with the father's work commitments. In fact, when N was with the father in August /September 2020 and the mother asked for indirect contact, it was not facilitated with the father citing some of the above reasons as to why the timing not convenient.

130. It is important to recognise that indirect contact does not have to occur whenever an absent parent seeks it. There should not be an expectation that it will occur every day. On the other hand, the parent should try and facilitate it to such an extent that there are not extended breaks in between contact ensure that a child's relationship with the absent parent can be meaningfully retained. The level and type of the indirect contact should be what is reasonable having regard to the parents' responsibilities as well as to N's routine.

131. The father produced a seventy eight page exhibit (Exhibit 25) during the hearing. In that exhibit he provides lists of extracts of screen shots of text messages which he contends illustrate that the mother denied his Facetime calls with N. I have reviewed that exhibit but, as already mentioned, there is not a need to analyse each alleged denial. Some of the examples used to substantiate denials, when put into context with the wider texts do not in fact amount to denials and the

surrounding messages show that contact did take place or when it was requested there was a valid reason for it not taking place. That type of situation is not unique to this case and it happens in almost all cases where there is no agreed schedule or schedule contained in a Court order and parents do not possess sufficient insight to enable reasonable flexibility with arrangements.

132. I accept the father's concern that there have unfortunately been some periods when the level of indirect contact should have been greater than that facilitated by the mother. I recognise that it is very frustrating for the father who wishes to have as much Facetime contact as possible. However, the lack of contact has not been to the degree that the father pleads. The mother conceded that there were issues in early 2019 and she indicated that there had been an issue with her telephone. There were also times when it is evident that she did not want to have any contact with the father, partly due to her coping mechanism learnt from the counselling that she has received, as she felt that he had said something to upset her or make her feel under pressure. I accept the mother's evidence that she understands N must be able to have a relationship with the father and that means that she has to ensure that a reasonable level of indirect contact occurs.

133. A great deal of time at the hearing was also occupied concerning direct contact arrangements. The father contends that the mother has not facilitated contact to a level that meets N's needs and best interests and that this will continue if N does not relocate to Canada. I have reviewed the considerable amount of evidence and summaries filed by the father in relation to the contact issue. Schedule B to his skeleton argument, albeit a little misleading as it seems to purport that contact with the wider paternal family members should not be regarded as contact time with the father, illustrates the limited direct contact the father has had, particularly leading up to Summer 2020. Meaningful extended periods of contact did not occur in Canada until possibly the three weeks in the summer of 2019, but more so the summer of 2020. It is understandable that the father feels that if N is in the Cayman Islands then there needs be greater contact than before but,

of course, one must factor in the effect of Covid travel restrictions and, as observed by MacDonald J, to a degree the fact that the father did not really become settled until 2020 due to his employment postings/commitments when he was establishing his career in the Border Control Service. Although one cannot be sure, as the Covid vaccination programme rolls out in the Cayman Islands and in Canada, it is possible that travel restrictions will ease in the not too distant future, thereby increasing the availability and affordability of flights.

134. Since October 2017 the father has visited the Cayman Islands on three occasions to have contact. The first visit was between 27-30 March 2018, when the mother went on a trip to Columbia with NO. The second one was between 20-28 October 2018, when the mother travelled to Honduras with friends. The third occasion was between 17 to 28 April 2019, when the mother went to visit RG in Dallas. The parties were able to make these sensible arrangements which enabled the father to spend time with N and which were convenient to the mother as she was then able to take a relaxed break from the child care. The mother permitted the father to stay in her Cayman rental property with N during these visits (vacating the property herself even if she was not travelling). Alas, the current status of the parents' views about each other means that such an arrangement could not occur now and the father (and AF) would have to find alternative accommodation if visiting Cayman for contact. Short term rental accommodation in Grand Cayman, in normal (non-covid) times, can be extremely expensive.

135. N visited Canada and had contact with the father in Canada on six occasions (if one includes the contact that is currently taking place when I draft this Judgment). The first contact with the father was between 16 December 2017 and 4 January 2018 when the mother and N came to Newfoundland for Christmas and shortly before the father started Border Control training on 15 January 2017. N was not with the father throughout this period, as she also spent time with the mother and wider members of the family. N did not then travel to Canada for a year and the

contact with the father on that trip was between 18-25 December 2018 when the mother brought N to Calgary, where the father was working at the time, before she went on to Newfoundland. The next period of contact in Canada was between 21 July 2019 to 14 August 2019 when the father travelled from Calgary to Newfoundland. The next contact was in Newfoundland in Canada during the period 19 December 2019 to 5 January 2020 when N saw the father and wider family members. There was then the Summer 2020 and the ongoing Summer 2021 contact which I have already commented upon.

136. I do not find that the mother sought to be obstructive in relation to N's direct contact with the father, in fact on occasion she went out of her way to facilitate it. The mother, when she and N visited Canada, may have been to a degree insensitive about the amount of time that N would spend with the father when compared with her wish for N to spend time with maternal family members. If a child is residing in a different country to the absent parent, then contact with that parent should be the priority, although there should also be some more limited contact with the wider family members. This seems to have been recognised, when one looks at the contact arrangements put in place for summers of 2020 and 2021.

137. The father's contention that he has had to fund the cost of all the contact visits is a misleading one. It is clear that the paternal grandparents have been able to retain a good relationship with the mother. They have been very willing in the past to facilitate contact by financing N's travel costs to Canada. Unfortunately, the father took umbrage with this as he viewed them as interfering and usurping his role. He also felt that when paying for these flights the grandparents were going behind his back and in effect enabling an arrangement whereby N remained in the Cayman Islands without his consent. The father forbade his kind parents from continuing to play this financially supportive role, despite the fact that their kind contribution had greatly assisted this family, which has very limited funds, to put in place contact.

138. The father gave evidence that the majority, if not all, of the flight expenses were paid by his father from his business account and that he had been informed that he had to pay it back to the firm. He said that he wrote a cheque for the amount that had been paid on the flights (and also for other contributions to him from the father) and therefore he argues that, due to that, he has had to pay for all of the travel. There is some documentary evidence to support the father's contention about the source of funds, but it is not supported by any sworn evidence provided by the person that he says requested the payment. The paternal grandfather did not give any evidence about that. In any event, it seems that the father was adamant that he refund any money spent on the flights, as he wished to be seen to be independent from his parents and he did not wish them to interfere in such matters. The consequence of the father's position in relation to this is that, although the paternal grandparents indicated to the Court that they would still be willing to contribute towards flight costs, the parties would now be fully responsible for meeting those expenses. It is evident, especially after the astonishing levels of legal fees they are now indebted to pay due to the manner in which they have litigated this case and their income levels, that there will be very limited funds available to pay for flights to and from Canada for N.

139. The father has spent a great deal of time criticising the Mother's parenting ability, her lifestyle choices and the mother's approach to contact arrangements. Although there are areas where the mother could have been more sensitive to his predicament as it relates to N, a lot of his claims are exaggerated and based on his own one- tracked negative and fault based interpretation of the facts. The father should also take some of the blame due to his over intrusive ongoing investigations into the mother and some of her friends' affairs and his expectations in relation to the communications with the mother. The parties have been separated for almost four years and are entitled to move on with their own lives without having their life being constantly monitored by the other. The expectation about and level of communications contained in the material before

me are greater that one ordinarily expects or sees between who have been separated for so long, even if they have a child. One would expect after these proceedings have concluded that the parties may be able to move on with their lives without unduly intruding in the other's life. I accept the father's contention that N has a large number of wider family members who are significant and supportive figures in N's life in Newfoundland. I accept that they could potentially play a role in N having a well-rounded upbringing. I accept that this father is a very important figure in N's life and it is important that her bond with him is maintained and further developed.

N's health and educational needs

140. Although a considerable amount of time was spent presenting evidence about the matters outlined in the earlier paragraphs herein, the real core issues (and the ones which could have become clouded under the sheer volume of material and concentration on the other issues) are N's health and educational needs. N's health needs are intertwined with her educational needs, as her health issues impinge on her educational development and on what input needs to put in place when she is at school to promote her development. Consideration of her health needs during these proceedings has been made more difficult by the very late (even some during hearing and after the hearing) introduction of important evidence concerning the same. This included the very significant report of Dr. de Jonge.

141. The father argues that N has behavioural issues and contends that this is because of the mother's lifestyle, including the introduction of certain of her male friends into N's life and the blocking of contact which he alleges the mother inflicts upon him and N (especially when she is concentrating on her relationships with various men). The father has gone through the chronology of events, highlighted occasions when the school & Ms. Pal have reported incidents involving N and then sought to associate them with information about the mother's social life at the time

which he found on social media or by other enquiries. Having conducted that exercise, he then concludes that the difficulties N has been having at school, as well as at home, flow from the mother's conduct, the men who the mother allows into her home and his absence. However, this contention is not supported by expert evidence.

142. The early sign, in the evidence, about N finding it hard to cope is seen in a message the mother sent EY on 3 October 2017. She told him that N had been hitting her adding that she knew that N was "*trying to deal with everything.*" I understand the father's concern that that was a very trying time for a child of N's age, it being hard for her to comprehend why her daddy was leaving their home especially if N started to see another man, EY, spending time with her mummy.

143. There are reports about N from the school. In May 2017, March 2017 and March 2018 N was unfortunately bitten by a child or children at the school. At the time N was, as the mother terms it, "*the victim*" and to a degree might have been influenced to later act in a similar fashion. On 29 June 2018, N bit another child on the arm at school. On 5 October 2018, N had a disagreement with another child during a game at school and that child bit her on the arm. It does appear at that time that there was what might be viewed as a biting culture between certain students in that class, and, looked at in isolation, the alarm bells would not have been ringing about N as she was mostly the recipient of such behaviour.

144. The concerns become more apparent in 2019 when the school started to observe and report on incidents of troubling behaviour by N. In a report dated 15 February 2019 it was recorded that N got upset when another child was on the piece of playground equipment and N pinched the child on the cheek, drawing blood on that child's cheek. The father was aware of this incident, as he raised it with the mother in a message dated 17 February 2019.

145. In a report dated 1 May 2019 it was recorded that N got upset as she felt that she was being left out of play at the school. She screamed and ran over to the children. The school's view was that she was going to hit one of the children. After pausing, she ran after the children again and hit one of them in the face. In a report dated 16 May 2019 it is recorded that when another child did not give her a ball, N took a stick and scratched it on the child's head. That same afternoon, N became upset by another child putting chairs away incorrectly and when the teacher went to calm her down, N did not want to listen and dropped the chair on the teacher's foot twice, then turned around and twisted the other child's arm. My understanding from the text messages between the parties that the father was aware of some of these reported incidents.[28]

146. However, he was not aware of certain reports that he found in the glove box of the mother's vehicle on 23 April 2019 when he was visiting Grand Cayman to have contact with and care for N. It is regrettable that the mother failed to bring these notes to the father's attention, especially as he had already expressed concern about similar earlier behaviour from N. The first report/note is dated 26 February 2019, in which it was recorded that N was interrupting another child's work and continued doing so, after being told to stop. N then flipped a toy car and let out a massive shriek and started to cry and ran out of the classroom.

147. Again, dated 9 April 2019, it was recorded in a report that two children told the teacher that N had hit them. N refused to come out from under a slide, where she was hiding, when asked to do so by the teacher. After saying "*no*", N kicked the teacher when she was removed from where she was hiding and she began to yell and scream. The report notes that N quickly changed from being really angry to happy and apologised to the teacher and her two classmates.

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[28] The father states that he was not aware of these May 2019 incidents and the May 2019 reports until 29 January 2021 when he received the mother's evidence in reply.

148. Again, on 11 April 2019, N began to bother a friend of hers by putting her feet on the girl. When she was asked to give the other child space, N refused to do so. N then refused to leave the game when told to do so by the teacher. When N was told to leave the classroom, she began to scream and cry had to be calmed down by the teacher in the hallway.

149. The next incident in one of the reports which the father was not informed of occurred on 12 April 2019. It was recorded that N was fighting with another child over a toy. When the teacher took the toy away, N got upset and scratched the child and stormed away and yelled "*I am angry.*" N then screamed, walked around, pushing over a toy car and flipping over a see saw. Then 30 minutes later, N again got upset with the same child playing with a toy that she wanted and she tried to take the toy by yelling and pulling.

150. I note that there were text exchanges between the parents on 24 April 2019 concerning the school, and from the mother's side, particularly about the school fees. I note the mother failed to inform the father about the above incidents during those messages. It is therefore understandable why the father, especially as he was coming to the Cayman Islands to care for N, is aggrieved by this. The mother should have informed the father and she inappropriately failed to do so.

151. With this background, N began to see Teena Saunders in May 2019 for counselling support. The father was and remains displeased by the fact that he was not involved in the decision to involve Ms. Saunders and he takes great umbrage at the fact that she became involved as he believed that she was a friend of the mother. One of the reasons that he did not wish her to be involved is because he felt that, due to her association with the mother, it would be awkward for them both if he were to share the concerns he had about the mother's private life with her. Having heard from Ms. Saunders, I accepted her evidence that, although they may have been work colleagues and as

families went out together a few times until around December 2017, she and the mother should not be regarded as being friends who socialised with each other. I found the father's criticism of Ms. Saunders to be without merit.

152. Ms. Saunders appropriately limited her social engagement with the mother as "*the priority was to provide the best care possible*" for N. This is something she made clear to the father in an email sent on the 24 May 2019. Although the father had initially expressed concern about her involvement, she felt that after she explained to the father about her social detachment from the mother, that the father was content for her to continue and to share her session notes with N's teachers.

153. In her affidavit sworn on 18. January 2021, Ms. Saunders said that she was aware of the incidents in May 2019 and she stated that at that time N:

> *"was demonstrating significant difficulties with emotional identification and regulation resulting in the use of maladaptive reactions such as hitting, pinching, yelling and expressing herself with volatile reactions. Her resiliency and flexibility in accepting redirection and following the request of has diminished"*

154. On 30 July 2020[29] Ms. Saunders wrote to the parents, stating that N

> *"was given a diagnostic code as required by the insurance company to ensure eligibility the services. It was given by me and is "Adjustment Disorder with mixed disturbance of emotions and conduct". This was used as a best fit as it reflects the change in a family dynamic and (N's) challenge in emotional identification and regulation. She was exhibiting difficulties both at home and at school with sudden bursts of anger and was expressing it physically more than*

[29] Unfortunately this was the time that the father was made aware of this 'diagnosis'.

verbally. This is not an uncommon way for kids to express themselves at a young age. A big change in family status can often also result in young children exhibiting excess attempts at control when they do not necessarily understand what is happening and they need to take back control.

In my opinion,(N) has really made a lot of progress and no longer is expressing herself physically. She is navigating the demands of school and he is much better

Our work in moving forward together will be to continue to learn how thoughts/feelings/behaviours all influence each other. I would also like to see (N) work on her flexibility and ability to problem solve and continue to get her needs met verbally."

155. In her affidavit Ms. Saunders commented that the diagnosis applied to an identifiable stressor that had occurred in the previous three months. In this case, she indicated that N did not begin to express difficulty immediately after the date of family separation, but in May 2019 after the father's April 2019 contact. However, it is right to highlight that, in fact, the type of conduct seen in May 2019 was already being exhibited by N prior to the father's arrival. This is set out in the notes/reports that the father found in the glove compartment of the mother's motor-vehicle. In such circumstances, it would be wrong to infer that N's misbehaviour began and was as a consequence of something that happened during contact with the father. N may well have been upset after the father had to leave to return back to Canada and this may have caused her to be stressed, however, it is wrong to say that the issues at school only began after the April contact.

156. I have reviewed the psychotherapy contact notes which are in the bundle. I do not intend to set that content in any detail in this judgment. Although I note the counselling that N undertook and acknowledge that Ms. Saunders' intervention and the strategies that she put in place have been helpful to N in recognising and regulating emotions and assisting N in how to how to respond to

other. In relation to diagnosis and the way forward, the most relevant expert is that contained in the report of Dr. de Jonge, which I will come to later in this judgment. Before I move on, it would be right to highlight that from N's exchanges with Ms. Saunders, it is clear that she dearly loves both of her parents and that she misses her father.

157. In January 2020 N was referred by Dr Swan at the Health Service Authority to Cayman ABA ("ABA") for focused ABA therapy. As the mother is a Government employee, CINICO pay 100% of the fees, which are in the region of CI$1,248 per month. The initial meeting with the mother was on 5 February 2020. The counselling therapy with Ms. Saunders still continued, until she came off the case later in 2020. The Board Certified Behaviour Analyst at ABA who was allocated to assist N was Natasha Luchies.[30] Initially, it was felt that, as the behavioural issues were in her home in the Cayman Islands and at her school, those were the main stakeholders who ABA would work with and they did not feel that it was appropriate to involve the father as that was not relevant to behavioural change and the environment. However, when ABA found out that N had gone to Canada to visit the father in July 2020, Ms. Luchies reached out to the father to see if parenting training with him could be initiated. He informed her that he would "*love*"[31] to be involved and he asked for documents from ABA.

158. It is clear from the ABA Progress Report dated 14 December 2020, that ABA viewed caregiver participation as being a crucial step in N's treatment programme. The caregivers are encouraged to attend therapy sessions and meetings as well as to *"participate in learning how to generalize treatment gains across environments."* The assessor in the report highlighted that "*participation, training and support are the foundation of a successful and sustainable intervention. Caregivers will be required to actively participate in therapy sessions to learn therapeutic techniques, and to*

[30] Elizabeth Anoush Pal took over in February 2021 after Ms. Carola had become involved in November 2020
[31] Anoush Pal during her evidence in chief

implement these techniques when Cayman ABA staff are not in the home or community setting.... Caregivers will be taught the fundamentals of Applied Behaviour Analysis, including the principles of reinforcement, prompting and fading, and appropriate skill teaching; observing, assessing and analysing behaviour and developing appropriate preventative and reactive strategies to intervene with behaviour problems."

159. There was a regrettable delay in getting the reports to the father because ABA indicated they may require the mother's consent as she was the person who would sign the agreement with them and she had informed ABA that she had concerns about what information should be shared. Also, it is evident that they were never able to schedule the parenting training with the father, the father saying that was because ABA failed to oraganise and ABA, on the other hand, saying it was due the father telling them that he was busy and that he had a family emergency in the Fall. I do not intend to explore the reasons for the sessions not being set up nor the issues surrounding the provision of documentation to him as they do not help me in the determination that I must make. That said, I understand the father's frustration, as he again felt he was being left out on the periphery of the decision making concerning his child's health. Ms. Pal stated in oral evidence that she had conversations with both parents in which they outlined the concerns that they were seeing.

160. ABA's role was not the same as a psychologist who looks into the full background of a child from birth to present and they are not diagnostic professionals. They do not investigate and diagnose mental health conditions and they are concerned with what they observe in the environment and what they can do to change the environment where the behavioural concerns arise. Dr. Pal stated in her oral evidence that the "*assessment is not a diagnostic one – we observe behaviour. If see skill take place we say yes. If we see skill deficit we mark it as a no.*" She also

indicated in her oral evidence that she did not know the root cause of N's issues until she had seen the report of Dr. de Jonge which had only just been shown to her.

161. The therapy started with ABA attending at N's school in March 2020. However, due to the Covid pandemic, the work transitioned to support at home with teletherapy. In the Progress Report, ABA set out the primary areas of concern that they had in relation to N. The report recorded:

> *"(N) engages in the following problem behaviors which jeopardize her ability to access school curriculum and initiate and maintain a meaningful school relationships with peets (sic.)*
>
> 1. ***Attention Maintained Behaviour:*** *banging on doors where an adult is, climbing on another person, vocalizations at a louder, higher intonation than normal conversational level.*
> 2. ***Escape Maintained Behaviour:*** *fidgeting, sliding out of chair, running away from work or demand area, vocal protest, asking more than one off –topic question.*
>
> *In addition to the problem behaviors noted above, (N) presents with delays across some skill areas which impacts the ability to adequately communicate and socialize with others, engage in independent self-care and safety, and independently function across environments.*

162. During 2020 ABA noted concerns such as N engaging in stomping, slamming, throwing, aggression and felt that may impede her ability to properly participate in the classroom. ABA also noted that they had concerns about her non-compliance with safety instructions. The father noted and reported that in May 2020 he witnessed N on Facetime charging at the mother with rage and attempting to hit her in the face, and then slipping and hurting herself.

163. The ABA report highlighted N's skill deficits as follows:

> *"A formal skills assessment has not been conducted; however, during direct observation, (N) did not demonstrate fluent use of fine motor skills to complete writing activities which may inhibit her ability to progress academically. Additionally, (N) exhibits deficits in the area of social skills as it pertains to perspective – taking on complex social cues. In the area of executive function, (N) requires development to regulate and monitor her own behaviour.*
>
> *During observations in the home setting, (N) followed instructions to play a board game and was observed attempting to change the rules of the game in order to win. When the assessor provided instruction that the rules would need to remain the same, (N) began to talk about her cat rather than playing the game. She was also observed engaging in attention maintained behaviour when (the mother) and the assessor were talking. She began bouncing her ball in the house after the expectation was stated that she should not bounce the ball in the house. This resulted in attention from her mother."*

164. The assessor at ABA found that N required support in the area of social skills to help to engage in appropriate peer and adult interactions, particularly when she loses a game. In addition she requires support in the area of cognition in order to teach her about the perspectives of others and how to interpret social situations.

165. The report recorded that, in the school setting, N participated in class, raised a hand and was able to do her assignments with the help and prompting of the classroom aid. N was able to sit down for only a couple of minutes, but would then start moving around her chair, playing with the chair or playing with a pencil sharpener. When carrying out a writing assignment N required quite a lot of help from the classroom aid to complete the task. N's attention span was observed to be very

short. As a consequence, it is reported that the goal was to design objectives that will help N "*attend to the teacher in class, stay on task for longer periods, and fade the prompts given by the classroom aid.*"

166. The assessor concluded that N needed support in the area of language skills to teach her to "*request breaks from none-preferred tasks in different environments as a replacement for non-compliant behaviour.*" The assessor added that N required support in the area of "*executive functions*". It was recommended that lessons be provided to improve N's ability to better integrate her skills and thoughts, to try to prevent the occurrence of challenging behaviours that result from a lack of self-regulation. The skills to be worked on could enable N to organise and plan her thoughts and actions, because persons with developmental delays or behavioural issues lack the ability to "*regulate their own internal and external constructs.*" The assessor felt that the ongoing support which ABA could give in this area would be important for N's "*functioning in a school setting in order to access the school curriculum fully and to engage in meaningful and sustained social interactions with peers.*"

167. The assessor felt that N was beginning to make gradual progress towards her current goals, having regard to the limited hours and gaps in the service that it provided. It was felt that N would benefit from increased ABA treatment hours to again help skills to be applied when she was at school, concentrating on her ability to regulate and monitor her emotions and behaviour as well as her ability to sit and attend to lessons for longer durations. It was also felt by the assessor that, due to N's attention and escape maintained behaviours, the parents would benefit from continued parent training both to "*understand the concepts of ABA as well as training on implementation on individualized behaviour interventions.*"

168. On January 6 2021, ABA suggested to the parents that N needed a psychological assessment. ABA believed that N was possibly dyslexic, that she needed firm boundaries, that she needed psychological counselling, that she could not express herself and that impacted her well-being, that she was not processing the separation from the father and that she still needed ABA therapy. Ms. Pal said in her oral evidence that they could make recommendations about schooling and about stakeholder training with N's teachers, adding that if the teacher or aide was unable to implement the training, then they would have to recommend that the school was not a fit.

169. When commenting on the report from Dr. de Jonge during her oral evidence Ms. Pal stated that it was *"amazing"* to get the report, as it gave ABA the background information that they could work with, as a diagnosis makes their job a lot easier. She said that they could "*take from the recommendations and make a matrix of care.*" She said she would need to speak to Dr. de Jonge about her report and schedule a school observation. ABA said that after reading the report they would try to give the teachers the tools that are recommended to assist change. She said that the teacher training depended on the teacher and the nature of the training.

170. Ms. Pal indicated that she would like to continue working with N and that it would be in N's best interests for her to do so due to her familiarity. She said she would require the consent of both parents if she were to continue. She felt that if ABA's input came to an end it would have a knock on effect on N's progress. She said she would envisage parental training for the mother being once a week and training with the teachers once a week. Ms. Pal said that she could do the foundational work with the father, and when N is with him, do "*hands on*" work once a week with him instead of with the mother. She highlighted that if ABA's input ceased, then another option was the Wellness Center, although she believed that there might be a waiting list there. The Wellness Center's involvement would also be free, as they accept the CINICO coverage that is given to Government employees.

171. Ms. Pal did not agree with the father that N has "*mental health difficulties*", saying that no one in her field would say that she was "*mentally ill*", which she felt was a general phrase. She said that instead she would say that N had "*behavioural issues*". She explained that a child expressing operational deficient disorder[32] may develop from separation in a family and if a child feels that it is missing one side of the family. She said that it was not uncommon, when there has been separation, to see a child express behavioural difficulties. When asked about Dr. de Jonge's diagnosis, she opined that (i) although ODT technically falls under mental health, her definition is that it is a behavioural condition, (ii) that ADHD is a lifelong mental health issue, because it is a neurological condition and is about "*how the brain is wired*" and (iii) that dyslexia is a learning difficulty.

172. The report of Dr. de Jonge presents an informed insight into the needs of N which require addressing. As already mentioned, Dr Jonge's assessment evaluation was not prepared for court proceedings, but to consider the referral that had been made to her due to N's hyperactivity, her struggling to focus and her being behind academically. In her report she noted the background that:

> "*(N) struggles to pay attention and that multiple repetitions of her name need to be said to get her attention, and or physically touching her. (N) is said to have good memory skills and no difficulty with understanding language to make herself understood. (N) isn't afraid of strangers but appropriately wary. She seeks comfort from mom in new situations. (N) gets frustrated easily and she can throw down the object she is working on and stomp and yell. She has spent some time on identifying emotions and mom and she often talk about how other people*

[32] Ms. Pal indicated that the parents had been told on 5 January 2021 that this appeared in the report which has to go to the health insurers because either was no diagnostic code and then ABA has to select the most appropriate code that matches the referral which had been for behavioural concerns.

might feel in different situations; they read books together and discuss this. Cayman ABA has worked on this.

(N) is said to be very creative and likes to play with dolls and make up stories. She loves sensory play, riding on her scooter, playing outside with friends, painting, arts and crafts, singing, swimming and playing with her pets and she loves camping. She can also make up songs very well and sing."

This is mostly consistent with the observations set out in the evidence from the other experts, including some teachers, in this case.

173. Dr. de Jonge also highlighted, under the heading '*Behavioural*', what the father had told her when she wrote:

> *"Dad has concerns with regards to her aggression, hitting, scratching, screaming and tantrums. Dad indicates there were incident reports of her at school having violent outbursts, crying the bathroom, drawing blood, panicking and hiding and assaulting her teacher."*

174. Dr. de Jonge was aware of the ABA therapy as well as the content of the December 2020 Progress Report. She took from a review of the report that the assessor felt that that work needed to be done on "*social skills and perspective taking*" and that N "*struggles with fine motor skills and exhibits deficits in the area of social skills, perspective taking and complex social cues. She also needed to develop self-monitoring and regulation skills as well as attention skills... (N) needs to learn to follow rules for gaining attention with someone she wants to talk to, speaking to different audiences, three step instructions with distractions, respond appropriately to the words No, inhibit a response, control her emotional outbursts, use the word "think" and increase penmanship and recite months of the year."*

175. The report contains details about different tests carried out by the Dr. de Jonge with N. I do not intend to set out herein the details in relation to all of the tests, but I have reviewed them and have regard to them. The testing found that N's overall intelligence was in the average range for children of her age. N's oral expression and listening comprehension were found to be normal.

176. N's reading and writing tests showed weaknesses, some of which may be due to inattention. N was found to have a weak ability to read words and that her spelling was similarly weak. Dr. de Jonge concluded under the subheading *"Ability vs. Achievement"* that N *"scored significantly below what is expected, given her ability in reading and written expression as well as spelling."* Dr. de Jonge felt that it was *"clear"* that N was behind in reading and writing. She noted N got agitated when asked to write and she refused to try to write simple words. She also noted that N struggles with the alphabet to label the names of letters and rather names them by sound. Dr. de Jonge felt that the patterns shown were likely to be related to *"deficits in orthographical processing"*. The Dr. commented that the tests showed that N has *"a high level of inattention and persistence intolerance; as such, it is unclear as to whether she's actually encoded much of the teachings in school.* She felt that N had struggled during lockdown with online learning, as well as the fact that she missed school in September/October 2020.

177. Dr. de Jonge conducted attention testing due to *"strong indications during the intake of hyperactivity and inattention.*" The testing showed that N had a very high level of body movement and vocalization and that it was *"incredibly hard for her to sit still and sustain attention.*" The reaction time task showed a very low score as was N's ability to sustain attention auditory stimuli. Other tests were attempted, and could not be completed or scored, as it was too hard for N to keep focus. A number of tests showed clinical levels of attention problems and risk levels of hyperactivity which are indicators of *"Diagnostic Statistical Manual-V (DSM-V)*

criteria for Attention Deficit Hyperactivity/Impulsivity[33] *combined subtype is a moderate to severe level".* The tests also showed that N had difficulty in several areas of executive functioning as she is "*often distracted, has trouble following directions and is unable to focus attention on any single task for an extended period of time.* Dr. de Jonge found that N's Behavioral Control Index score fell into the *"Extremely Elevated Classification range indicating that (N) has extreme difficulty maintaining her self-control and has difficulty regulating impulsive behaviors."*

178. When analysing N's social emotional well-being, Dr. de Jonge found that she had a good ability to understand, in certain situations, what feelings a person would have. N found it harder when she had to analyse faces for their emotion to then match that face with another face showing the same motion. N often misunderstood a given facial expression for disgust, fear and sadness, meaning that she would more often than her peers judge a facial expression to be one of these three rather than what it actually was.

179. Another test was carried out whereby N looked at pictures and was encouraged to tell a story about each one. The purpose of this test was to reveal some of the dominant drives, emotions, sentiments and complexes and conflicts of N's personality. Dr. de Jonge commented that:

> *"A theme that passed through the stories multiple times was one of sadness and loneliness. The maternal role also played a role in her stories. One of the stories was related to a tug of war between mom and dad and mom won; she stated this very matter of fact and she also refers to her mom winning in a different story. Aggression plays a role in some of her interpretations, one where a tiger eats a monkey. Finally, another theme that runs through the stories is disobedience. It*

[33] ADHD

is noted that she did not elaborate very much on her stories and was very concrete."

180. Dr. de Jonge, when considering the material provided by the parents and by the teachers, as well as considering the tests she had conducted felt that N had a very elevated level of aggression and defiance. In fact, the tests indicated "*clinical levels of anxiety, depression, somatization, aggression, atypicality, anger control bullying.*"

181. Dr. de Jonge, when considering the criteria for Oppositional Defiant Disorder (ODD), found that N presented with many indicators of an oppositional character. She noted that "*She would consistently do what she wanted to do and struggled to comply with the clinician. She very often would walk away mid-task and when asked to come back or simply request a break she would say "no". She would sit on a chair by the wall that turns and turn it around with her shoes on the wall, marking up the wall. When asked to stop, she persisted. She would often walk around the room, grabbing everything off the table even when asked not to. When faced with a reward of going to the gym it still remained hard to get her through the assessment, but it did facilitate it.*" Dr. de Jonge concluded that, based on parental information as well as observations that there is a suggestion that N meets the criteria for ODD.

182. Dr. de Jonge indicated that even with her lack of persistence, lack of persistence and inattention N still had some clear strengths. For example, the N's abstract reasoning was very high, as was her ability to translate 3-D shapes. N had a high vocabulary sufficient to express herself. She concluded that N was a "*bright*" child. Despite that, she felt that there were clearly areas that are holding N back from showing her potential, as well as slowing down her learning. These include the high levels of hyperactivity and impulsivity, which coupled with her inability to sustain her attention is clinically significant. She concluded that N did meet the DSM-V diagnosis of ADHD

- combined subtype, a moderate to severe level. Dr. de Jonge concluded that this combined with the underlying indicators of ODD "*greatly impact (N's) ability to register information faster and will impede her academic progress.*"

183. In her conclusions Dr. de Jonge stated:

> "*..., It is noted in parental interview that there is a significant history of aggressive behaviour towards other children as well as Mom. However, these behaviours are said by mom to have dissipated. (N) herself does state that she gets in trouble in school and teacher gets mad at her and shouts or she makes her go outside or in reception. The C.A.T indicates that there are underlying aggressive tendencies that still play for (N). She also mentions spitting at mom and hitting her. The C.A.T also showed a tendency to shy away from difficult situations emotionally as well as highlighting the role Mom plays in her life. Sadness and loneliness are also indicated by (N), and she mentions sometimes crying about dad. She also mentions her family and that they are all in Canada. Although (N) in our sessions did not talk about her feelings directly, it is clear that there are underlying currents that are affecting her affect. It is possible that her situation is adversely affecting her and contributing to her outbursts and oppositional behaviour. This needs to be taken together with a difficulty in reading facial expressions and misinterpreting them as such misinterpreting situations based on incorrectly interpreted non-verbal communication.*" [My emphasis]

This is consistent with the father's evidence that N has told him that (i) her teacher yells and screams at her; (ii) her teacher rips up her work and gets mad at her; (iii) her teacher does not like her because she does not do her work and (iv) she is often asked to go "*to reception with the*

babies". This does cause some concern as to whether the teacher has the necessary skill set to appropriately address the needs a child with some of the issues that N possesses.

184. Dr. de Jonge highlighted the importance of reassessment concerning N's reading and writing and suggested that this be conducted around October 2021. She said that N requires psychological counselling to support her through the separation of her parents as well as with navigating social situations and emotions. Dr. de Jonge helpfully mentioned five institutions in Grand Cayman which may be able to assist with that work, if N were to remain in the Cayman Islands. She felt that N should be encouraged to continue to work with ABA and that the work should concentrate on all areas of social relations and functioning as well as attention, hyperactivity, impulsivity and behaviour modification. Dr. de Jonge advised that extra tutoring would be important to catch up on lost ground due to the remote classes during the pandemic and the lost two months of school, as well as to assist with things N has not been able to take on board whilst in class. Again, Dr. de Jonge suggested four facilities that may offer the required one on one tutoring. Dr. de Jonge made suggestions generally for what could be put in place for when N is at home to address some of the areas of concern highlighted in report and she suggested that this could be done by the use of available online programmes or involvement in certain extracurricular opportunities. She made helpful suggestions for N's school to follow, including having ABA or an Occupational Therapist observe N in the classroom to help with extra suggestions in this area.

185. After the substantive hearing had concluded, but prior to the parties filing their closing written submissions, the matter came before the Court as a consequence of the father's summons dated 10 May 2021 seeking interim orders about N's schooling and his summer contact. Further evidence was adduced by the parties, which I have also considered when determining the relocation specific issue order application.

186. A lot of that updated information related to N's present school. When N returned from Canada after the proceedings before MacDonald J there remained issues about her schooling. The father had signed, although I find under some duress, the papers to enable N to attend her current school, but he then renewed his objections. The father stated, and the mother agreed, that they had both had agreed that they did not want to bring up their child in a religious school and he renewed his initial objections about the school partly based on that and on his concerns about the quality of education provided by the School. The School in question is a Government (non-private) school. Wayne Roberts, the Behaviour Supports Manager and designated safeguarding lead at the Department of Education, in his oral evidence, confirmed that there was a "*strong focus*" on religion at that School, an ideology that is often seen in the Government schools. Although N attended the Montessori School for a short time upon her return to Grand Cayman, it is evident that the parents then (and still now) cannot afford to commit to pay private school fees. After missing the first two months of the school year at her school, the father relented and permitted her to attend her current school.

187. The mother is of the view that the school offers an appropriate standard of education and is able to meet N's educational as well as relevant interlinked health needs. She is also of the view that the school is able and willing to cater for and accommodate the extra assistance that N needs as highlighted by Dr. de Jonge and by ABA. The mother was keen to highlight that she is not employed by the school, although she does work there for half of a five day working week. The mother says she likes N attending that school, as it enables her to be involved in her education.

188. I do not agree with her view stated during her oral evidence that N has "*a wonderful education*[34] *for free*" in the Cayman Islands. Although the mother appears to genuinely hold her views about the standard of education that the school can provide, when she gave her evidence there was

[34] My emphasis

reluctance from her to concede that the school academically only reaches a satisfactory level. This is not unique to the school and is seen in a number of the government schools. The mother seemed reluctant to even consider whether the Vanier School, or any other state school in Newfoundland or in Canada, would offer a better education and supportive network. Although she did concede in cross examination that *"I believe that the Canadian School education is very good, excellent."*

189. The Inspection Reports have highlighted some areas of concern with the school. The most recent report is dated January 2020. The report highlighted the following key strengths:

(i) the good behaviour and positive attitudes to learning shown by the students;

(ii) the school had a broad and balanced curriculum enriched with heritage arts lessons and a strong extracurricular programme;

(iii) the school's leader's self-evaluation improvement planning processes had led to improvements since the previous inspection with eight quality indicators now being graded good;

(iv) the school has excellent links with parents due to good communication and partnerships.

190. The report identified areas that required improvement, requiring the Principal and staff to:

(i) raise attainment in mathematics;

(ii) improve teaching and progress to be at least good overall; and

(iii) improve the support and guidance for students by (a) teachers using learning support plans to adapt their teaching to the needs of students with special educational needs, (b) improving secondary school transition arrangements for all students, but especially for those with special educational needs and (c) ensuring more effective deployment of teaching assistants so they can help students to overcome the barriers to learning highlighted in learning support plans.

The recommendation in (iii) is particularly applicable to N's situation.

191. The overall evaluation was satisfactory, but with it being noted *"the school has improved significantly since the previous inspection."* The school's arrangements for self-evaluation improvement planning were judged to be good. The inspectors identified good practice in a number of aspects of work of the school, including students' behaviour, students' learning, self-evaluation and improvement planning, the breadth and balance of the curriculum, health and safety and the deployment and use of resources for learning.

192. The report indicated that *"most other quality indicators were judged satisfactory, including teaching, leadership, and students' progress in English, science and mathematics.* The Inspector's Report assesses the achievement of students in relation to English as satisfactory, in mathematics as weak, and in science as satisfactory. The progress of children in the key subjects of English, mathematics and science was graded as only unsatisfactory. The grade for ensuring effective teaching to support students learning teaching was found to be satisfactory overall.

193. Having reviewed this report, it is clear that the level of the school is only at the satisfactory level. The Inspectors' reports prior to the 2020 report and the Auditor General's 2019 Report highlighted that the school was on the whole providing an unsatisfactory education experience for its students, so I accept that there has been an improvement. The father understandably feels that his child, especially having regard to the challenges N has which had been highlighted by the psychologist and other professionals, requires and deserves more than satisfactory. I agree with him when considering the longer term development and requirements of this child. The father has presented an extraordinary amount of information about the education system in Newfoundland and in Canada and in particular about the Vanier School. It is not necessary for me to read all of that material, including the links to online information provided by the father or for me to set out

details of the review conducted of that material herein. However, from the substantial reading that I have done from the information provided by him, I am satisfied that the quality of education would be better in the Canadian School system (including at Vanier School and at most other schools in that area) than the satisfactory education offered at N's present school.

194. Although I do not wish to dwell too greatly on this, the dramatic events that occurred at the school in early May 2021 makes one question the school inspector's conclusion that the leadership had improved processes at the school or even that the leadership was satisfactory. The fact that the Headmistress and the Special Needs Coordinator had allegedly performed "*exorcisms*" at the school on a number of children and forced them to drink an unknown substance to cleanse them is nothing short of shocking and is totally unacceptable. One concern is why other members of the teaching staff failed to have sufficient insight to prevent this. My understanding is that it only came to light when one of the children complained to its parent. Although, the Department of Education acted appropriately by removing the risk, namely the Principal and the other member of staff, the events rightly heightened the father's concern about the religious undertones at the school. Thankfully, N was not one of the directly affected children.

195. In his evidence presented for the May 2021 hearing, the father stated that he and the mother had completed the next model of their parental training with ABA. He said that there was a meeting that they had with Ms. Pal on 30 April 2021, in which she provided her thoughts following her observations of N in the classroom at school. He said that she noted that N was off-task approximately 60% of intervals, compared to her peers who were at 20%. He said that Ms. Pal noted some concerns of ongoing impulsive behaviour, but also he fairly noted that she had highlighted that there had been some good behaviour observed by her. He said that Ms. Pal informed them that Dr. de Jonge's recommendations needed to be implemented at school as soon as possible and that there needed to be a meeting at the school to determine the best way to

determine what supports might be needed at school. In her notes of the meeting Ms. Pal noted that they discussed "*although (N) is not engaging in disruptive behaviour at school, off-task behaviour can present challenges for her assessing learning opportunities and this is how children can sometimes slip through the cracks.*"

196. The parents had a meeting at the school to discuss N's challenges and the content of Dr. de Jonge's report on 3 May 2021. The Parents (including AF), Ms. Pal, Leslie Hayes (an educational psychologist), Dr. Meredith Rankine (the then special needs coordinator mentioned in **paragraph 194** above) and Philecia Clarke (N's teacher) were in attendance at the meeting. The father said that Ms. Clarke indicated that N had become "*more defiant in class*" in recent weeks. When Ms. Pal asked if she could come into the school to provide ABA support for N she was told by Dr. Rankine, that there were proper procedures that had to be followed, including obtaining the proper recommendations and getting the newly appointed on site Behaviour Inclusion Specialist (Claudio Boyd) involved. The meeting was told that the school would try to get a plan together for N by the end of 2021 and that there would be a meeting in June 2021 to discuss that. Dr. Rankine had indicated that N (unbeknownst to the father) had been on a monitoring learning support plan since October 2020, and that there had been observations in the classroom by Ms. Murray, the school counsellor. I have no information about that counselling and what it involved.

197. The mother feels that the father is unjustifiably critical of the school and states that at the 30 April 2021 meeting the father had indicated that he did not want Ms. Pal's services within the school as he wanted the focus to be on supporting at home. The mother said that she had, around 7 May 2021, been in communication with Wayne Roberts, who she said agreed that Ms. Pal could provide services in the classroom and he instructed the mother to send a letter to Dr. Rankine about that. She stated that the case had been added to the agenda for the School Based Support Team ("the Team") meeting on 19 May 2021. The mother said that the procedure is that an

educational psychologist will review the outside agency report and then a case conference is conducted with the parents. After that the matter is raised with the Team meeting to approve outside agency services. She indicated that the last stage had been reached, namely when the Team gives its approval to get the services within the school.

198. It is evident that at that time of the 3 May 2021 meeting, even the bare bones of the type of structure and teaching methods that Dr De Jonge had recommended in her report in March 2021 had not started to be put in place. However, it is apparent that things may have moved on since then and that ABA support for N may be available in the school setting from the outset of the upcoming academic year. This is a factor that I take into account when considering the timing of any relocation if one is ordered.

199. A great deal of evidence was given about the support network that would be available for a child with N's needs in St John's. The considerable information that was provided also highlighted the position that could be generally found at schools in Newfoundland and more widely in Canada. The mother notes that although a child may receive ABA therapy in Canada, it is not available in the Vanier School or possibly in any other school. However, it is clear from the evidence of Mrs. Piercey that the schools in Newfoundland would be able to provide a sophisticated support structure to meet the integrated health and educational needs of this child. These include educational psychologists on staff. It is also evident that the required therapy and input would also be available outside of the school setting if required, for example at the Janeway Family Centre. Mrs Piercey felt that Janeway would be a good fit for N via its learning behaviour and child development programme. The service is available after a family doctor makes a referral and there is not a long waiting list. The availability of this service would, of course, be dependent upon N living in the catchment area.

200. I note the mother's concern that there is no child psychologist in place for N at this time if she were to move. I accept the father's evidence that, if relocated to St. John's, N could again be placed on a waiting list for Dr Crosbie through the public health system and that within a reasonable timeframe such assistance would also be available. The father said that this child psychiatrist is only available in St John's, but there are many others available in the private health care system who would be covered by his insurance in Newfoundland. The father said that there is availability with child psychologists and that Key Assets[35] would be a great fit for N, and that when he contacted them they said N could see a child psychologist there within a week. It is evident from the wider material provided that, even if N were not living in St John's but elsewhere in Canada, the medical provision for a child with the needs of N could be met.

201. I take on board the evidence of Mrs. Piercey who I found to be an informed and helpful witness. My only reservation about her evidence was when she appeared to be recommending the type of residence order that the Court should make, her having not in any way assessed the mother. I accept her view that it would be ideal if both the parents lived in St John's, as N would be able to see both the parents and would not feel the pressure of the "tug of war." She felt that over the years she would have picked up on the tensions between the parents caused by the events surrounding the Canadian court proceedings.

202. In relation to matters of education and the health support in St John's, Mrs. Piercey was a helpful witness. Relying upon her experience as a child psychologist and her local knowledge she stated that a school like Vanier could assist with exceptionalities such as ADHD and ODD and if required dyslexia. She said schools in the area would ordinarily meet with the parents and work out an individualised program for a child of this age who had already diagnosed with ADHD,

[35] I have read the Key Assets and The Beacon Center literature and I am satisfied that they could offer the assistance that N needs

which would also address the learning issues with the input of an educational psychologist. From her experience, the programme could involve a child with individual work and possibly working with a student assistant, as the Eastern School Board is sometimes willing to hire a person to sit with a child to help him/her to get work done. The father says that if N was living in Newfoundland, ABA support would be available via the Autism Society of Newfoundland and Labrador. It does not appear that ABA would be in the school setting, but it is clear that there are already other relevant in house specialists in the school.

203. Mrs. Piercey reviewed the report of Dr. de Jonge and felt that it illustrated that N's school needs to have good structure. She highlighted the need for firm expectations to be put in place at the school and she was concerned why N was still saying the teachers were mad at her and were still shouting at her.

Court Welfare Officer

204. I have considered the content of the report[36] filed by the welfare officer, Melissa Alexander, which also contains the aforementioned input commissioned by her from Mrs. Piercey. Despite the lack of a recommendation in the report, the recommendation section stating "*The decision on this matter is being left to the Honourable Court*", when I consider the approach to the content in her report, I remind myself of the following, non-binding, observation of Cheung J.A. in the Hong Kong Court of Appeal decision in ***Naziya Aslam v Rafaqat Ali*** CACV 144 of 2003:

> *"24. We will further add that a social welfare report is not a special category of material information, nor should the recommendation assume a status somewhat akin to a legal assumption which needs to be rebutted. Ultimately the decision lies with the judge based on the available evidence and guided by the relevant principles..."*

[36] Dated 12 March 2021

205. **Ms. Alexander** expressed a view that N presented as *"an age-appropriate energetic child"*. She said that N avoided questions when asked about her father at their first meeting. However, when she met N at her school after the Christmas holidays, she happily mentioned her father and their interaction, N told the welfare officer that she missed her father and that she was happy when she spoke with him. She reported than N told her that she liked Canada, but that she also likes living in the Cayman Islands. When N was asked about what her favourite thing was about Canada, N shared that it was her father. When asked the same question about the Cayman Islands, N said that her favourite thing was her mother. N told Ms. Alexander that it makes her sad that her parents have conflict, but she said that she knew about that because *"dad tells me things he should not"*. N would not elaborate on this answer when Ms. Alexander invited her to do so.

206. Ms. Alexander felt from her observations of them together that N was comfortable with her mother and that she needed to be redirected by the mother with instructions having to be repeated. One of the issues with the report is that if there were to be a relocation the reporter was apparently of the belief at that time that the mother would stay in the Cayman Islands and N would have be cared for by the father. She said that if N were to relocate that she would benefit from a continued relationship with the father and the extended family, but that relationship with the mother would be affected. The report and the oral evidence of the Welfare Officer felt rather general in content and really did not not take the matter much further.

Impact on the father if the Application to Relocate is not made

207. I accept that the father states a genuine wish for N to relocate to Canada. He does not regard the Cayman Islands as being this Canadian child's long-term home and he feels it is important that N moves to Canada to be with him and spend time with her wider family. He is conscious of N's needs and feels that the education system in Canada, especially at a non-religious school, would meet both parents' expectations and better meet the needs of N. He understandably has some

concerns about the governance and education provided at N's current school, which at best is termed as being satisfactory. He also genuinely feels that the health system in Canada, and in particular St John's, is superior to that in the Cayman Islands and would, after a short transition, be better tailored to meet N's needs

208. I am satisfied that the father's application is genuine and that it is not motivated by some selfish desire to exclude the mother from N's life or to exert control over her. His application is driven by genuine concerns for the future of N's welfare and not by some ulterior motive. His application is realistically founded on practical proposals both well researched and investigated. If N were not to relocate to Canada the impact on the father would be significant not only because of the limited role he would play in the development of N due to his time with her being so limited, but also because he would feel that little weight has again been given to his genuine views about what is in his child's best interests.

209. The father would be devastated if N were to remain in the Cayman Islands with there being no likelihood of a return to Canada for the foreseeable future. It was patently clear when he gave his evidence that he dearly loves his child and is desperate to be able to play a meaningful role in her life. Even if N and mother were not able to relocate to St John's, which is the father's desire as he wishes a shared residence order with N spending equal time with parents, a move for N with the mother to elsewhere in Canada would still make contact far more feasible and cost-effective.

Impact on the mother if the application to relocate is made

210. The mother has commendably indicated that if the order made is for N to relocate to St John's or to Canada, then she would accompany N and seek to remain N's primary carer. I accept that the mother is understandably attached to the type of lifestyle she enjoys in the Cayman Islands, where she has forged a number of friendships. The mother is committed to a job that she enjoys and in

which she contributes to the Cayman community, albeit employment due to a series of renewed fixed term contracts. To have to leave her friends, her employment and the life she has developed for herself and N here (particularly following the parties' separation four years ago) would be deeply upsetting to the mother. She became very tearful when she explained that if she had to move back to Newfoundland, especially with little time to put arrangements in place, she would have to move in with her elderly parents who live in in a small house in a rather parochial fishing village which is not in daily commuting distance to St John's.

211. The mother's opposition is primarily driven by genuine concerns for the future of N's welfare and not by some ulterior motive. I say that, but I also acknowledge that the mother's wish to remain is partly motivated by her desire to live a distance away from the father and away from the stresses arising out of their difficult interaction which she finds to be emotionally draining. However, if she were to remain in the Cayman Islands with N, the father's emotional response and great difficulty in accepting such a state of affairs would mean this tension that has been very evident since the separation would remain and likely increase.

212. I have to consider how the mother's disappointment might affect her ability to care for N and what effect that could then have on her welfare, which is paramount. I have to have regard to how the mother would transition back to St John's, or if not St John's to another part of Canada. With this in mind, I have to consider whether any relocation of N should be immediate or gradual. If gradual, it should have regard to the need for the mother to have a reasonable opportunity to make the necessary relocation practical arrangements including finding employment, whether that be in St John's or in another part of Canada.

Conclusion

213. The overarching principle is that N's interests are paramount. The relevant parts of the 'welfare checklist' found at s.3(3) of the Act assist the Court in that exercise. I have considered it all and have incorporated it, either directly or indirectly into my analysis in this Judgment. To that I would add the following:

(a) **The ascertainable wishes and feelings of N** – Due to N's age and lack of understanding, despite her occasional statements about her time at each parent's home and about Canada to the Welfare Officer, I am unable to form a view about her wishes and feelings, save that she clearly loves her parents and enjoys her relationship when with either parent. She also misses her wider family members and has said, for example to Mrs Alexander, that she likes being in both the Cayman Islands and in Newfoundland. I am satisfied that N would like to see more of the father than she has done since the parties' separation.

There is evidence from the professionals that she has been saddened by and likely detrimentally affected by the changes that came about due to the parents' separation and by the lengthy periods where there has been a lack of meaningful time that she has had with her father over the years since the parties' separation. I am also satisfied that N would not want to have the status quo so fundamentally changed to a position where she would primarily reside with the father instead of with the mother, who been her primary carer to date.

(b) **Physical, emotional and educational needs**: I am satisfied that N's physical needs are being met by each parent when she is in their care. The father's ability to meet the long term physical needs of N, despite recent extended summer contact, is to a degree still untested. However, I am satisfied that AF would be a great assistance to him and that she would play a significant role in assisting to meet N's needs when N is in their household.

On the whole, either parent can meet N's emotional needs when she is in their care. I find that the detachment from the father is upsetting for N and has affected her emotional

welfare. This does not mean that there should be a shared residence order (if made), with an equal time with each parent child arrangement put immediately into effect if N relocates to Canada. This does not mean that if N relocates to Canada that she must necessary live in St John's, although that would be greatly preferable. I accept that Canada is a large country, but if N were living in Canada in an area where the mother could find suitable employment, and where the required infrastructure was in place for N, then N could still have far greater contact with the father than has occurred since the parties' separation. I again remind myself that the father has said that the mother informed him that the only part of Canada that she would move back to is Newfoundland. The parties' financial positions, especially now as a consequence of their astronomical legal cost liabilities accrued in these proceedings, would likely not enable frequent contact if N were to remain in the Cayman Islands and this would not be in the N's best interests and would impinge on her emotional needs.

Even though N's recent school report shows a degree of improvement, I am not satisfied that N's educational needs are being met as well as required at her current school. Longer term, this child requires more than a school that can only offer a satisfactory education to enable this "*bright*" child to reach her full potential and to address the educational and interlinked behavioural issues that have been so fully highlighted. The mother agreed during cross examination that N "*has a right tothe best possible education*" Neither parent wished N to attend a religious school, yet the school she attends is such a school. In fact, the school has had to endure very troubling and extreme religious orientated conduct by the most senior of staff there, and this has simply fortified the father's view that a non-religious school is what is best for N.

I am satisfied, on the evidence provided, that Vanier School would offer a better education for N than that which is available at her current school. If N and mother were to relocate to St John's, then that school would be a good choice. With this in mind, if I

order a relocation, it would not be an immediate one, but one giving the mother a reasonable period of time to make her planned and structured move and to explore her employment opportunities. However, if the mother felt unable to establish herself in St John's, but only to elsewhere in Canada, I am still satisfied, from the vast amount of material that has been provided to me, that the Canadian education system at another school would highly likely also better meet N's developing needs. When I say this, I not only refer to the academic development, but also having in mind the internal and external support infrastructure that is required to meet N's wider needs and help her meet her full potential.

I have regard to the impact of the parents' conduct towards each other and their co-parenting flaws on her emotional wellbeing. For N's longer-term emotional development, it is imperative that the parents take up any opportunity to receive counselling to improve their communication skills and the manner in which they jointly parent N. I am satisfied that this would be available for both of them if they were in Canada.

I accept that the present geographical distance between the parents may reduce the mother's stress caused by the parents' sometimes unhealthy interaction with each other and that N is more removed from the immediate friction. That said, the father who is desperate to play a more meaningful role in N's upbringing would be so distraught and unaccepting of the situation that there could well be a complete breakdown in co-operation between the parties which would have a knock on effect on his important relationship with N.

If the mother is compelled to relocate, I have considered whether there would, as a consequence, be an impact on the mother's sense of well-being and whether that would be transmitted to N. Although she would be hugely disappointed if not able to remain in Grand Cayman, there is no relevant evidence that a refusal would detrimentally affect her health or ability to care for N. If she were to return to St John's, she would also have the

benefit of her and the paternal wider family members to support her. When I reach the above conclusion, I am acutely conscious that the mother would emotionally benefit from not having to deal with the father on a regular basis, but I also note that she has told the Court that what she has learned in counselling has greatly assisted her in how she deals with her relationship and interaction with him.

(c) **The likely effect of any change in circumstances:**

N would likely miss her friends and the year round open air lifestyle that the Cayman Islands offer. However, if she were to return to Newfoundland, it would be a familiar area. She would benefit from the wider family support and involvement from both the maternal and paternal sides of her family. N is a Canadian child with Canadian parents and therefore culturally it would not be alien place for her to move to and to grow up in. N has made it clear to Ms. Alexander that she likes being in both Canada and the Cayman Islands.

I am satisfied that the educational and health support network would be more structured in St John's (and most places in Canada) than in the Cayman Islands. I accept that the mother has done her best to ensure that N receives the behavioural therapy and other assistance that is available here. She is a very committed mother. However, the structure has to an extent been disjointed and slow to put in place, for example, with school until apparently only very recently failing to recognise the need for considerable interagency cooperation, even if that means third parties coming in to the school to provide training for the school team and to assist N. After hearing from Mrs. Piercey, coupled with the relevant parts of the considerable material that have been provided, I am satisfied that St John's (and other parts of Canada) offer a more developed, reactive and interrelated global programme for a child with N's needs .

It should not be read that the Court is of the view that the medical and therapeutic professionals in the Cayman Islands do not provide appropriate treatment and assistance

to the children in the Cayman Islands. I found, although she did not attend Court but from the content of her report, Dr. de Jonge to be a psychologist with great insight as she was able to help us all understand the diagnosis for N and what input N requires to address her exceptionalities. I found both Ms. Saunders and Ms. Pal to have been conscientious as well as knowledgeable about and dedicated to the treatment and assistance that they have given to N.

When I consider the change of circumstances I have considered very carefully what would be the effect on N of having to start at a new school and to be assisted by a new team of therapeutic professionals in Canada after cutting her links from the professionals who have been helping here for quite some time here. These considerations, including the transitional work that would need to be put in place as highlighted in the ABA Report, are why I do not order an immediate relocation.

If the relocation were delayed to enable the mother to properly make arrangements for employment and accommodation in St John's (or elsewhere in Canada), then that would clearly be in N's best interests. If the relocation were delayed it would also enable the transitional therapeutic work to be undertaken in Cayman in a structured manner as well as setting up the necessary arrangements in Canada. Having regard to N's age, despite the father's view that an immediate move is required, I find that her short-term educational needs and her short-term health needs would be met here during the necessary transitional phase. I do feel though that those needs will be better met medium and longer-term if she relocates to Canada.

(d) **Age, sex, background and any characteristics the court considers relevant:** N is a six year old female who has lived all of her life primarily with her mother in Grand Cayman. It would not be in her best interests to relocate to Canada and to primarily reside there with the father, even with the attention that would also be given by AF, who I found to be a caring competent and sensitive individual. It would be in N's interests for her to benefit

from her father playing a significantly greater role in her upbringing as well as enjoying the benefits of time spent with her wider family members.

A move to Canada, even if it is delayed and is carefully transitioned during the upcoming academic year, is still the right time for that to happen (rather than N remaining here for the foreseeable future). This is because of the relatively early stage that N is at with her education, and because of the health characteristics and needs detailed in this Judgment. Although the mother states that she believes that her employment contracts would continue to be renewed, there is still a possibility that could change and she would have to relocate herself if unable to find work in the private sector in Grand Cayman. It would not be in N's interest if she had to move in a few years' time when her education needs are greater due to her age.

(e) **Any harm which N has suffered or at risk of suffering:** I have expressed my concerns about the effect of the communication difficulties between the parties and their interaction. It is important that the parties, whether both are in Canada or with the mother remaining in the Cayman Islands, address these issues and that they seek assistance with co-parenting, for a failure to do so could result in emotional harm to N. The parties must sensitively handle the outcome of the decision in this judgment, shielding N from their displeasure about any of the orders made.

(f) **How capable are each of the parents in meeting N's needs?:** Both parents have shown themselves to be capable of meeting N's needs during the periods when she had been in their care. They both should play significant roles in her care, which they adequately discharge when she is in their care. It is in N's best interests that the parents retain this important input in his life.

(g) **Range of powers available to the Court:** I have considered the range of powers available to the Court and have this in mind when I determine the applications and wider relevant orders to be put in place.

214. Having carefully considered all of the evidence, the guidance from the case authorities and the welfare checklist I have come to the conclusion that the welfare of N compels me make a specific issue order for N to relocate to Canada. I am not ordering a specific relocation to St. John's, although that would be the most desirable outcome and the one the mother would be expected to strive for, as that may be too limiting on the mother at this time. I note the positive views the mother had expressed during her oral evidence about and the possible opportunities that may exist in Marystown, Newfoundland which are set out a paragraph 125 herein. The importance to N of the mother, who is her primary carer, means that the Court must have regard to the mother's need to be able to make the practical relocation arrangements for herself and N and for them both to have an opportunity to leave the Islands and their friends here in a structured manner. I have considered whether the relocation could be delayed to the end of the Mother's contract in June 2022, but such a lengthy delay would not be in this child's best interests. To make an order that restricts the mother to moving to only to St John's in the timeframe available may not be fair. In the same vein an order for an immediate relocation could, for a number of reasons including contractual obligations, well require the mother to remain in the Cayman Islands for a period of time without N, which again would not be in N's best interests. It would be in N's best interests for her and the mother to move to Newfoundland at the same time. I accept my order leaves some areas of uncertainty, which one may feel would be better resolved in Canada when the parties are both there so any order I make today is not intended to fetter a Court in Canada. Despite the submission that a normal order in Canada is shared custody with equal time with each parent, there are no normal or usual orders in a children case such as this one under the Act; each case turns on its own facts with N's interest being paramount.

215. When making this relocation order I have balanced the importance of N being able to have a meaningful lifelong relationship with the father against the mother's genuine desire to remain in

the Cayman Islands. I have regard to the great upset which will be caused to the mother due to the life outside of work that she has been able to establish and due to the difficulties which may come from having to find employment and set up home in Canada. However I feel that that detriment would be offset by the extension of N's relationship with her father and wider family members.

Section 10 Orders

216. There has been no established s. 10 order in place in relation to N. To date there has not been a residence order made and I do not feel that it is appropriate for me to make a final order, although I do feel that an interim order is required to provide certainty about the arrangements pending N's relocation. Determination about what child arrangements will be in N's best interests when N is back in Canada is not really feasible until N has returned in Canada. The mother's employment and where she is able to live will have a major bearing on the arrangements that could be put in place. Therefore, the child arrangements orders that I will make at this time are interim orders pending the N's relocation to Canada.

Orders

217. I therefore order that:

(a) The father's application for a specific issue order for N to relocate to Canada will be granted, but this will not take effect, unless otherwise agreed by the parties, until an agreed date no later than 10 January 2022;

(b) Pending N's relocation to Canada, she will continue to reside in the Cayman Islands with the mother;

(c) Pending N's relocation to Canada, she will have regular indirect contact with the father, the minimum frequency being once every other day;

(d) If N travels to Canada before 10 January 2022, then she should have direct contact with the father for at least 50% of the time that she is in Canada.

(e) There is a specific issue order that N is to return with the mother on the flight to the Cayman Islands on 22 August 2021[37]

(f) There be a specific issue order that, pending N's relocation to Canada, she will continue at her present school unless the parties are able to agree an alternative school;

(g) Any disputes as to the living arrangements for N in Canada will be adjudicated by the relevant Family Court in Canada following her arrival there;

(h) I record the agreement of the parties that the divorce will be in Canada by the Petition already issued by the husband in the Court of Queen's Bench of Alberta, Canada, and that pursuant to the parties' agreement the divorce proceedings Fam 1578/2019 brought by the mother in the Grand Court of the Cayman Islands should be discontinued.

Footnote

218. I agree that the decision I have to make is exceptionally difficult as there are finely balanced merits each way. I realise that both parties may have a degree of discontent about the orders made. I have had to make them because they have sought the Court's assistance, being unable to resolve numerous issues themselves. As I have said in a number relocation cases before, they, being N's parents, must recognise that moving forward it is their responsibility and work together for the sake of N's wellbeing. Having regard to the circumstances in the matter before me, it is worth repeating the following from Theis L.J. in the concluding paragraph of her decision in ***C v C (International Relocation: Shared Care Arrangement)*** [2011] 2 FLR 701 at 723 and which I set out in ***B v B***:

> *"There are no winners and losers in this situation, all the court has endeavoured to do is reach conclusions on the evidence that are in the best interests of the children. Both these parents have to take responsibility to protect the children*

[37] The Court was informed in email correspondence from the parties received on 11 August 2021 that the mother has reserved seats for herself and for the child to return to the Cayman Islands on 22 August 2021.

from their ongoing communication difficulties and take steps to improve their method of communicating with each other, which can only benefit the children."

The parents should carefully consider these insightful words of Theis L.J.

.....

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

The Judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the Judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.