*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.*

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

**CAUSE NO. FAM 143 OF 2016**

| | | |
|---|---|---|
| **BETWEEN:** | **X** | **APPLICANT** |
| **AND** | **Y** | **RESPONDENT** |

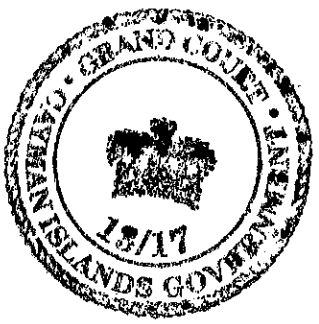
**Appearances:** Ms. Yvonne Mullen of Broadhurst LLC for the Applicant
Respondent in person
Guardian ad Litem Mr. David Holland of KSG Attorneys for the

**Before:** Hon. Justice Richard Williams

**Heard:** 27 August 2020

**Transcript provided and Judgment handed down** 27 August 2020

**Corrected transcript provided:** 28 August 2020



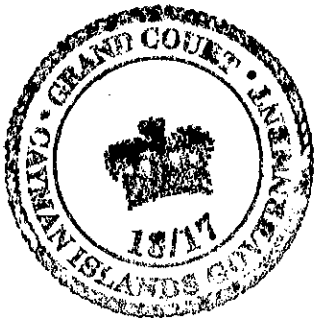

**HEADNOTE**

*Children Law (2012 Revision) – Mother's application for leave to appeal an order that Father be granted Residence – Mother's application for stay of execution of the Order pending appeal - Principles involved in appeals relating to children orders where their welfare is paramount – Test for granting leave to appeal – Principles involved in applications for stay of execution of orders made in private children law proceedings –Guidance of the Court of Appeal in* ***KN v MN*** *CICA No 14 of 2015.*

## EX-TEMPORE JUDGMENT

### Background

1. This matter requires a prompt decision. There is also a need for the parties, and possibly the Court of Appeal, to have my reasons for the decision today. I

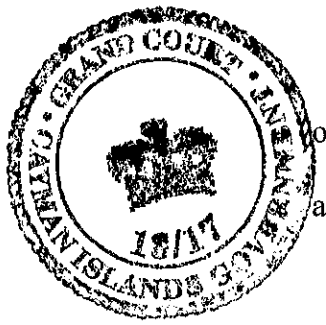



therefore deliver this Ex-Tempore Ruling and I will endeavour to have a perfected transcript available to them later today despite my full Family Mention Day list today.

2. This matter concerns a seven year old girl, Z. A ten day hearing was required to consider cross residence applications made by the parents. I will refer to the parents as the Mother and the Father respectively. The Judgment was reserved.

3. The detailed background to the case is set out in a full judgment ("the Judgment") delivered at the outset of today's hearing and following my return to the jurisdiction after an extended absence. As the Mother had indicated that she intends to approach the Court of Appeal, in light of the orders made today this Judgment has been drafted in haste to enable the Court of Appeal to be aware of my reasons for making the order. I see no merit in repeating that detail herein, save for the fact that I ruled that the residence of Z was to be transferred to the Father on 28 August 2020 ("the transition date") and I made ancillary children orders.

4. A draft copy of the Judgment was provided to the parties on 21 August 2020 to enable them to conduct their review pursuant to Practice Direction No.1/2004. This meant that the parties had seven days' notice of the transition date, as well as having ample time prior to the transition date to review my reasoning for the



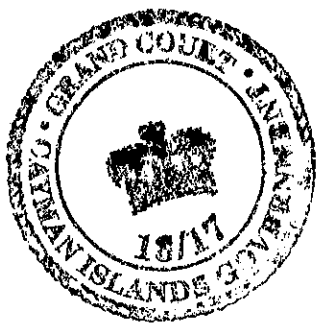

orders made to enable them to prepare for any applications related to a potential appeal.

5. The draft Judgment and the accompanying email circulated by my Personal Assistant made it clear to the parties that they must provide their written suggestions about typing errors, wrong references of fact or citation of authority or other minor corrections of that kind in the draft Judgment by or on Wednesday, 26 August 2020 at 3:00 PM.

6. The parties were informed that the perfected Judgment would not be delivered until 27 August 2020. The dates for the submission of any comments/suggestions from the parties relating to the draft judgment and the delivery date of the Judgment were set by me having regard to (i) the transition date and (ii) importantly, the need for Z to have stability during the ordered three-week settling in period with the Father which conceded with the start of the new school year.

7. The detailed written suggestions submitted on behalf of the Father were received on Monday, 24 August 2020.

8. A reminder email was sent by my Personal Assistant to the parties containing my following instructions:




*"If you wish to submit comments as per the Practice Direction before I finalise the Judgment they must be submitted by 3:00 PM today. If not submitted by 3:00 PM then I will go ahead and finalise the Judgment without them.*

*If you do not intend to submit comments, please let my PA know then I will go ahead and finalise the Judgment.*

*I intend to have this Judgment delivered by circulation before I start sitting on Thursday. (The Order comes into force on Friday, 28 August 2020)."*

9. At 6:04 AM on 26 August 2020 the Mother emailed simply stating that it was her intention to submit comments.

10. At 6:30 AM on 26 August 2020 the Mother wrote to my Personal Assistant stating:

> *"As what has been provided is currently a draft judgment, I do not believe I am able to formally file a notice of appeal and make an application for a Stay on (sic.) Execution Pending the Appeal against the decision of the Court.*
>
> *As such, in the absence of any fundamental change in the judgment arising from the review process that does not fully safeguard my daughter from the risk of sexual abuse by the Petitioner, I hearby (sic.) give notice of my intention to appeal against the decision of the Court, apply for a stay on (sic) execution and make an application to access to the video recordings of the final hearing.*

*In light of the above, and with due consideration given that I am a litigant in person, I am seeking directions as to the deadline by which each should be filed:*

*1. Notice of Appeal – In the Court of Appeal Grounds of Appeal*

*2. Application for a Stay of Execution Pending the Appeal against the decision of the Court; and*

*3. Application for the Recording of the Final Hearing[1] to be made available to:*

*a. myself for the preparation of the Appeal; and*

*b. the Court of Appeal for their consideration and independent review of the issues I intend to raise as the grounds for my appeal.*

*I would also ask that all parties please kindly provide their dates of availability in this regard."*

11. At 10:50 AM a further email was sent by the Mother in which she said:

*"Please kindly note that (Z) developed symptomology overnight and was seen at Integra this morning and my time and attention has been focused on that.*

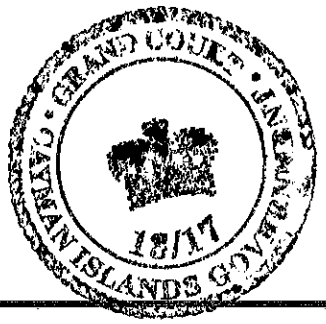
*Please find attached the medical note issued in regards to isolation as symptomology is monitored.*

*I respectfully ask for a shift in deadlines until 3pm Monday next week and any corresponding changes to residency shift accordingly so that I may focus my attention on looking after her while she is not feeling well.*

*I will advise should symptomology worsen or if isolation is required for longer than prescribed."*

[1] Having been approached by the Registrar of the Court of Appeal who had received a similar request from the mother, on 27 August 2020 I authorised the release of the audio recordings of the hearing to the parties. The Clerk of Courts was directed by me to make clear to the parties that the tapes could only be heard by the parties and their Cayman attorney. They must not be heard or sent to any third party.

12. The attached medical note stated that:

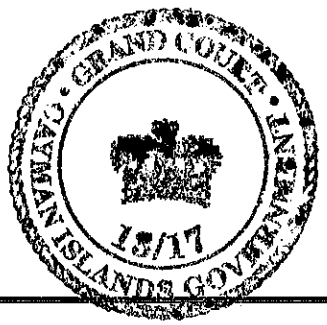



*"(Z) has been seen in our office by myself, Dr. Jasmina Marinova. It is recommended that she isolates in her house on the following date(s) 26/08/2020 to 28/08/2020 (including). If you have any questions please contact our office."*

13. Having reviewed the rather brief medical note it is evident that it did not set out any symptoms. I am afraid that this development fits the same pattern of conduct by the Mother, with her raising health issues at crucial parts of the proceedings or when there should be contact. I note that the isolation period *"recommended"* in the medical note is for only two days and conveniently ends on the last working day of this week, which is also the date set for the transfer of residence.

14. An email was then sent by my Personal Assistant to the parties at 12:03 PM stating:

> *"Williams J has reviewed the various emails received today from the parties and comments as follows:*
>
> > *"The draft judgment was circulated on Friday 17 July 2020. The parties have been given ample time (five days) to submit any comments that they may have, namely by 3PM today.*
> > *On Monday I received the suggestions presented on behalf of (Father)*
> > *I have received an email transmitted by (Mother) at 10:15AM this morning seeking an extension. Due to the nature of the Orders made in the Judgment and my concerns about further delay there will be no extension afforded. (Mother) and the Guardian ad Litem must submit any suggestions that they wish me to consider by 3pm this afternoon.*
> > *At 3pm I will be perfecting the Judgment on the material then before me.*




*I will be handing down the judgment in my Chambers at 9am tomorrow morning (27 August 2020), before embarking on my full list of hearings that starts at 9:30AM. If a party feels unable to physically attend the hearing in my Chambers, I am content for a copy of the Judgment to be delivered to them by email at 9AM and have them attend the handing down hearing by Zoom.*
*I have been made aware that (Mother) has been in correspondence with my Personal Assistant and the Registrar of the Court of Appeal. If (Mother) has any applications to make in regard to any proposed appeal that application should be made at the 9AM hearing.""*

15. An email was then received from the Mother at 3:36 PM[2]. In that email the Mother expressed her *"shock"* and *"dismay"* at the Court's approach and asked that further consideration be given to her request for an extension of time.

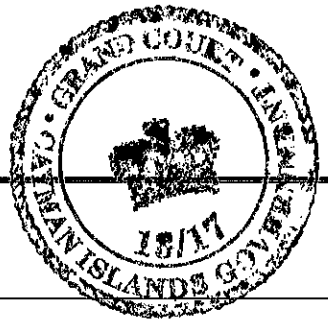
16. At 4:55 PM a further email was sent to the parties by my Personal Assistant in which she shared my following comments:

> *"I have again carefully considered the application made by (the Mother) for further time to submit her now overdue comments. I have also considered the content of (the Mother's) email sent at 3.36PM this afternoon.*
> *Paragraph 3 Practice Direction No. 1/2004 states: "Written suggestions for chambers must be submitted within 72 hours of the release of the judgment or reasons for the judgment; unless the judge otherwise directs".*
> *Having regard to the length of the Judgment I provided the parties with an additional 46 hours to submit their suggestions, with the deadline for submission being at 3PM this afternoon. When I set that limit I also had in mind the transition date set out in the order and the reasons set out in*

[2] 36 minutes after the deadline for submitting any comments.

*the draft judgment for making Friday the transition date. I am not satisfied that it is in (Z's) best interests for there to be any further delays, let alone until Monday as requested with the 'knock on' delays thereafter.*

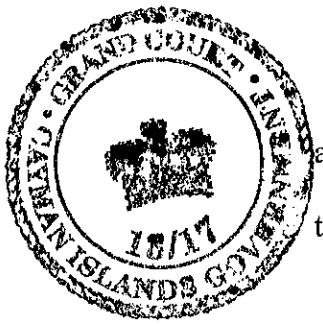
*I repeat my earlier directions:*




> *The Judgment will be handed down in Chambers at 9am tomorrow morning and I am willing thereafter to approve an order that accurately reflects the orders set out in my judgment.*
> *If any party is unable to attend the hearing in my Chambers they may attend by Zoom and a copy of the Judgment will be emailed to them at the same time (with a hard copy left for collection).*

*I understand that (the Mother) has been in frequent communication with the Registrar of the Court of Appeal throughout this week. I have fixed the hearing at 9AM tomorrow with that in mind to assist (the Mother). Although of course not binding on the Courts in the Cayman Islands, I feel that the approach set out in The Practice Direction (Court of Appeal. Civil Division : Leave to Appeal and Skeleton Arguments) 23 November 1998 should be adopted in this matter namely that "where the parties are present for delivery of the judgment , it should be routine for the judge below to ask whether either party wanted leave to appeal and deal with that matter then and there." I am conscious that my order is to come into force at noon on Friday and I feel that (the Mother) should be afforded the opportunity to be heard first thing tomorrow if she wishes to make an application for a stay of execution/leave to appeal..."*

17. At 6:12 PM, my Personal Assistant provided the parties with the Zoom details for the hearing for anyone who felt unable to attend the hearing in person. The opportunity to attend the hearing by Zoom was made due to the difficulties that (the Mother) stated that she had. I am pleased that the Mother has felt able to




attend today and to make applications in relation to the proposed appeal prior to the transition date.

**The Hearing**

18. As I have mentioned, the Mother has attended this hearing by Zoom and the other parties have physically attended in Chambers.

19. I note that, although stating that she was unable to provide her comment on the draft judgment, the Mother has been able to provide a helpful six page "Skeleton Argument in Support of an Appeal and a Stay of Execution Until the Appeal is Heard." This was filed at around at 9:00 AM this morning. I have been able to read the document prior to the hearing which eventually did not start until after 9:30 AM.

20. The grounds of appeal relied upon by the Mother are set out in her skeleton argument. It is evidence that most if not all of them relate to issues of fact. Therefore I do not intend to address each of them, although I do have regard to them when I consider the applications for leave and a stay.

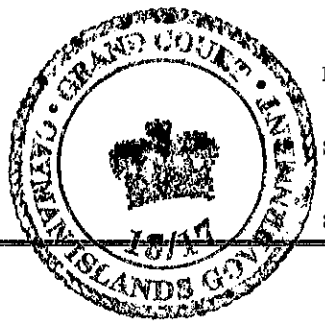
21. The mother contends that she was hindered in her ability to have a fair trial by the fact that she felt that she was not able to inspect DCFS documents, call evidence or cross-examine DCFS concerning their actual investigation into child sexual

abuse. The Mother also contends she was not provided with sufficient disclosure from DCFS. I recall that the allocated Social Worker was cross-examined for three full days by the Mother concerning her actions and the investigation. I commented upon that fact in my Judgment. Also, unusually for a private law child case, DCFS provided a large number of internal documentation, (some of which may arguably have been of a confidential nature). The Court was provided with two bundles of DCFS documentation at the hearing running to about nine hundred and eighty eight pages. I do not believe that this is a strong ground.

22. Another ground of appeal relates to the videos from the Dr. Lam sessions. My recollection is that an arrangement was put into place in an agreed order about the videos when both parties were legally represented. I do not recall any application being made by the Mother in the case management leading up the hearing concerning the videos. I do not recall her seeking doing so at the outset of the hearing or seeking an adjournment. The parties have spoken today about how the arrangements were put in place and that the Mother may have had greater access than she says, but it is not appropriate for me to explore that today. I am not satisfied that this is a strong ground.

23. Another ground of appeal relates to the interview techniques of the DCFS and about the Court's finding in the Judgment about the Mother's coaching of Z. These are purely matters of fact dealt with in the Judgment.

24. A further ground of appeal is that the Court failed to take into account domestic violence by the Father towards the Mother. This was something that the Mother raised late in the proceedings. I do not recall there being any specific allegations set out in the face of any of the large number of affidavits filed by the Mother, just a general allegation.



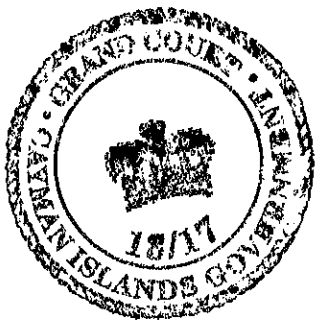
25. A further ground of appeal relates to the important evidence given by Dr. Lam the jointly instructed psychologist who was primarily retained at the insistence of the Mother and her then attorney. In fact Dr. Brown who was the psychologist the Mother had retained to treat Z, had recommended Dr. Lam to conduct the assessment as she had the requisite experience and background. Despite this the mother challenged at the hearing and again today, the experience and suitability of Dr. Lam to conduct the assessment.

26. I do not intend to go through all of the other grounds of appeal in the Skeleton Argument, but they deal with issues of fact. They are challenges to my findings of the facts and my application of them.

**Leave to Appeal Application**

27. The Court of Appeal has provided guidance when expressing concern about the granting of leave to appeal by the Grand Court Judges against their own findings of fact and against the manner in which the Judges weigh the evidence. My

Judgment in ***DT V MP*** FAM 276 of 2017, which the parties have, applied a number of cases which I refer to. Due to the urgency of this judgment and lack of time, I extract the below from my ***DT*** Judgment[3]. In ***KN v MN*** CICA No 14 of 2015, interestingly also an appeal brought to challenge the findings made by a judge in relation to child sexual abuse allegations made by then the Mother, Chadwick P. stated the following after highlighting the difficulty for the Court of Appeal in the absence of transcripts of evidence being provided from hearings in the Family Division:




> *"10. With that in mind, it is I think, desirable that judges sitting in the Family Court in this type of case should be slow to give leave to appeal against their own findings of fact. If there is a point of principle which needs to be determined by the Court of Appeal, then that would be a reason for leave to appeal to be given. But, if on analysis it can be seen that the challenge to the judge's findings of fact is that the judge weighed the evidence wrongly, then the administration of justice may be better served if judge has confidence in his or her own judgment and leaves it to the Court of Appeal to decide whether to entertain an appeal against those findings of fact.*
>
> *11. In that context, I draw attention to the observations made in this Court in the appeal of B v B (2014) 2 CILR, 234 at paragraph [66]. The issue in that case was whether a child should be relocated out of the jurisdiction. At the end of its judgment this Court observed:*
>
> > *"This appeal was brought with the leave of the judge. I should not be taken to criticize the judge for his decision to grant leave; it may be that he thought there was a perceived tension between observations in Payne - which had been consistently applied by the courts in this jurisdiction - and the more recent guidance given by*

[3] Set out at paragraphs 27-31 herein.

*the Court of Appeal in Re F which required consideration or resolution by this court. But if there were a need for this court to address a point of principle, it was unfortunate that that need arose in a case where litigation costs - which the parties could ill-afford - had already had an effect on the father's ability to meet maintenance orders which had been made against him. In my view, judges should be slow to grant leave to appeal in cases of this nature."*

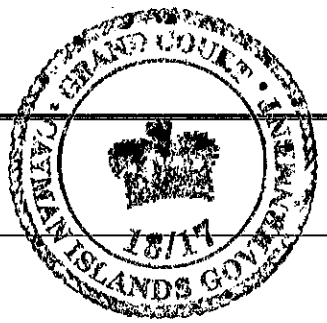
*I take this opportunity of reminding the profession and the Family Courts of those observations. Fact-finding hearings are intended to achieve finality in relation to the facts on which decisions as to the child's welfare should be based. That objective is going to be seriously undermined if leave is given to appeal against findings of fact as a matter of course; particularly in circumstances where there is, under the present practice, no transcript of the evidence which was before the judge. If there is a point of principle, then the position may be different. But again judges should have in mind that litigating points of principle is an expensive exercise; and that that expense should not lightly be thrown on parties whose means are better expended in providing for the welfare of the child in circumstances where the marriage has come to an end or broken up. There needs to be finality in these matters without undue expense and without undue delay. Granting leave to appeal in this sort of case is not easily reconciled with that need."* [My emphasis by underlining]

28. Chadwick P's observations are consistent with a recognition that a party's ability to appeal against any Children Law order believed to be unfair; is limited by a number of legal principles laid down in ***G v G [1985]*** *UKHL 13, [1985] FLR 894.* Lord Fraser noted in ***G v G*** that:

*"... the mother appealed to the Court of Appeal (1984) 6 F.L.R. 70. Sir J Arnold P. gave the first judgment and, before dealing fully with the facts*

*of the case, he referred generally to the method of trying appeals in cases concerning the custody of children. After referring to some recent reported cases on the subject, the learned President said, at p. 72s*

> *"Those cases exhibit some degree of homogeneity, of course; but they also seem, at first sight, to exhibit a degree of semantic dichotomy. It is a discernible thread running through, I think, every one of those cases and the cases cited in them, that it is not decisive of an appeal in this court from the decision of the court below, exercising the particular discretionary jurisdiction of deciding the custody of children (but also, I think, any discretionary jurisdiction), that the result of the exercise of discretion would, or might, have been different if the members of the Court of Appeal had themselves been exercising the discretion. There has to be more than that before the discretionary decision can be overturned. The question, if there be one, is: How much more?"*




*He stated his conclusion in the following passage, at p. 73:*

> *"I believe that there is a way of reconciling these cases. I believe that if the court comes to the conclusion, when examining the decision at first instance, that there is so blatant an error in the conclusion that it could only have been reached if the judge below had erred in his method of decision - sometimes called the balancing exercise - then the court is at liberty to interfere; but that, if the observation of the appellate court extends no further than that the decision in terms of the result of the balancing exercise was one with which, they might, or do, disagree as a matter of result, then that by itself is not enough, and that falls short of the conclusion, which is essential, that the judge has erred in his method. I cannot think of any case in which this particular issue has had to be faced, in which that method of determination is not intellectually satisfactory, logically supportable or consistent with the result of any of the cases in the appellate courts; and I shall approach this case on the footing that what this court should seek to do is to answer the question whether the court discerns a wrongness in the result of so striking a character as to make it a legitimate conclusion that there must have been an error of method - apart, of course, from a disclosed inclusion of irrelevant or exclusion of relevant matters."*

29. Fraser J then later, when commenting about appeals in custody cases and other cases concerned with children, said:

*"The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so, it will leave his decision undisturbed. The limited role of the Court of Appeal in such cases was explained by Cumming-Bruce L.J. in Clarke-Hunt v. Newcombe (1982) 4 F.L.R. 482, where he said, at p. 486:*

> *"There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children, and so he decided the latter. Whether I would have decided it the same way if I had been in the position - of the trial judge I do not know. I might have taken the same course as the judge and I might not, but I was never in that situation. I am sitting in the Court of Appeal deciding a quite different question: has it been shown that the judge to whom Parliament has confided the exercise of discretion, plainly got the wrong answer? I emphasise the word 'plainly.' In spite of the efforts of [counsel] the answer to that question clearly must be that the judge has not been shown plainly to have got it wrong."*

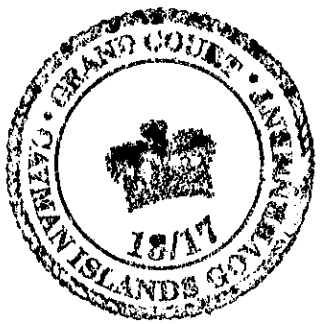
*That passage, with which I respectfully agree, seems to me exactly in line with the conclusion of Sir Arnold P. in the present case, which I have already quoted. The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of*

*which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong. In such cases therefore the judge has a discretion and they are cases to which the observations of Asquith L.J., as he then was, in Bellenden (formerly Satterthwaite) v. Satterthwaite [1948] 1 All E.R. 343, apply. My attention was called to that case by my noble and learned friend Lord Bridge of Harwich, after the hearing in this appeal. That was an appeal against an order for maintenance payable to a divorced wife. Asquith L.J. said, at p. 345:*

> *"It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."*

*I would only add that, in cases dealing with the custody of children, the desirability of putting an end to litigation, which applies to all classes of case, is particularly strong because the longer legal proceedings last, the more are the children, whose welfare is at stake, likely to be disturbed by the uncertainty."*

30. Leave to appeal will only be granted where there is a real prospect of an appeal succeeding, or some other compelling reason for the appeal to proceed. Henderson J rightly remarked in the family ancillary relief matter of ***Maria-Cotanza Lindsay Fear v Richard David Fear & Sharon Hollowell*** D129/2005 (Ruling 25 May 2010):




*"Leave to appeal is granted where the proposed appeal has a real prospect of success: Telesystem International Wireless Inc. and another v CDC/Opportunity Equity Partners LP & three others 2001 CILR note 21 (Grand Court). Leave may also be granted in an exceptional case because the point at issue is a question of public interest."*

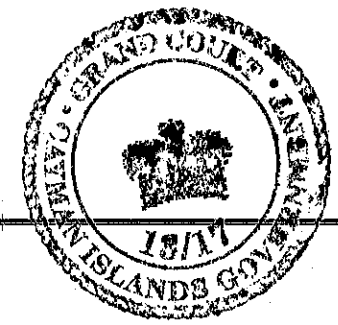
Henderson J went on to say that the latter did not apply in that case. I find in the circumstances of the matter before me, as I did in the ***DT*** case, that it does not apply to this case.

31. In ***CS v SR*** [2013] EWHC 1155 (FAM) permission to appeal was given to a husband appealing a district judge's financial remedy order. In that case Mr Justice Moylan indicated that he felt compelled to follow the guidance below which was given by Brooke LJ at paragraph 21 in ***Tanfern Limited v Cameron Macdonald & Anor*** (2000) 1 WLR 1311;

> *"Permission to appeal will only be given where the court considers that an appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. Lord Woolf MR has explained that the use of the word of 'real' means that the prospect of success must be realistic rather than fanciful [see Swain v Hillman, The Times, 4 November 1999; Court of Appeal (Civil Division) Transcript No. 1732 of 1999 ]." DT*

**Conclusions - Leave to Appeal Application**

32. In light of Chadwick P's observations in ***KN v MN*** and in ***B v B*** concerning the approach to be taken in certain cases by the Family Courts in the Cayman Islands, I have had the well-known principles expressed in ***G v G*** in mind this morning when considering whether the proposed appeal had a real prospect of success.




33. It is clear from what the Mother has said and from what she has written in her emails that her grounds of appeal are of a factual nature and, as the Mother puts it, there is "*an amount of factual inconsistencies.*" I have already spoken about the grounds of appeal and do not intend to repeat myself.

34. In reaching my decision that the proposed appeal does not have a real prospect of success I have considered all of the grounds set out in the Mother's helpful Skeleton Argument.

35. Although I reach the conclusion that there is no real prospect of success, I find that the substance of the proposed grounds of the appeal falls squarely within those mentioned by Chadwick P in ***KN v MN*** where he sent a clear message to the Grand Court that in family proceedings, where the challenges are to a judge's findings of fact and to his weighing the evidence wrongly, *"the administration of justice may be better served if the judge has confidence in his or her own*

*judgement and leaves it to the Court of Appeal to decide whether to entertain an appeal against those findings of fact".*

36. Accordingly, leave to appeal is refused.

**Application for Stay of Execution of the Order**

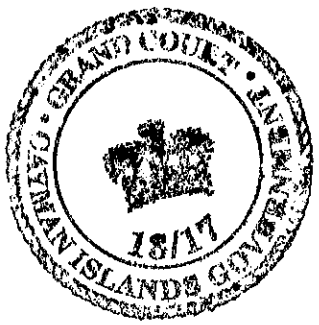
37. The Mother is also applying for a stay of execution of my order pending appeal or, if unsuccessful with her application for leave made to me, a stay of execution pending the Court of Appeal considering an application for leave to appeal.

38. In ***NB v LB of Haringey*** *[2011] EWHC 3544 (Fam)* Mr Justice Mostyn was considering an urgent application for a stay pending appeal of an interim care order which had been made in the Family Proceedings Court. At paragraph 6 of his judgment he highlighted a gap in the case law, when he highlighted:

> *"There are numerous authorities bearing on whether a stay should be granted although, rather surprisingly, there is none so far as I am aware on whether those tests are modified in a case involving a child, whether in private law proceedings or public law proceedings. Plainly, the test which I will adumbrate in a moment has to be seen through the welfare prism that overarches all family proceedings. That said, the principles cannot, in my judgment, be materially different whatever the nature of the dispute in hand."*

39. Mr. Justice Mostyn added at paragraph 7:

*"7. The leading authorities are Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065, Leicester Circuits Ltd v Coates Bros plc [2002] EWCA Civ 474, Contract Facilities Ltd v The Estates of Rees (decd) [2003] EWCA Civ 465, the old Court of Appeal case of Wilson v Church (No. 2) [1879] 12 Ch Div, 454, an unreported decision of the Court of Appeal, Winchester Cigarette Machinery Ltd v Payne (No. 2), 15th December 1993, and a helpful decision which seeks to draw all the authorities together given by the Chief Judge of the High Court of Hong Kong, Ma J, Wenden Engineering Services Co Ltd v Lee Shing UEY Construction Co Ltd, HCCT No. 90 of 1999. In that latter case the Chief Judge stated:*

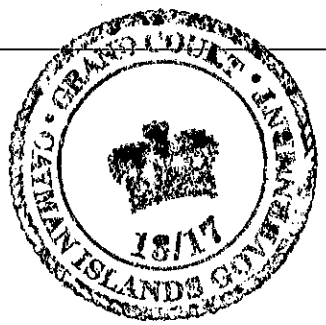



> *"7. The existence of merely an arguable appeal cannot by itself amount to a sufficient reason to justify a stay. It can be put this way, the existence of an arguable appeal, that is one with reasonable prospects of success, is the minimum requirement before a court would even consider granting a stay. In other words, however exceptional the circumstances may be otherwise justifying a stay of execution, if the court is not convinced that there exists arguable grounds of appeal no stay will be granted. Conversely, however, the existence of a strong appeal or a strong likelihood that the appeal will succeed, will usually by itself enable a stay to be granted because this would constitute a good reason for a stay. (See Winchester Cigarette Machinery Ltd)."*

*8. In most cases the court will not be dealing with the extreme situations I have referred to. Often, it will be faced with simply the existence of an arguable appeal. Here, it becomes necessary for the appellant to provide additional reasons as to why a stay is justified. The demonstration of an appeal being rendered nugatory is one example albeit a common one. Here, where it is demonstrated that an appeal would be rendered nugatory if a stay was not granted the court may require no more than the existence of an arguable appeal. Correspondingly, where it cannot be shown that an appeal would be rendered nugatory if a stay were not granted, the court*

*will require in the absence of any other factors the applicant to demonstrate strong grounds of appeal or a strong likelihood of success."*

40. Mr Justice Mostyn then derived, from the cases he referred to[4], the following five principles to be applied in any application for a stay in children family cases, namely:




- The Court must take into account all the circumstances of the case;
- A stay is the exception rather than the general rule;
- The applicant seeking the stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;
- The Court applies a balance of harm test, in which the prejudice to the successful party must be carefully considered; and
- The Court should take into account the prospects of the appeal succeeding, and only consider a stay where there are strong grounds of appeal or a strong likelihood of success.

**Conclusion – Stay of Execution Application**

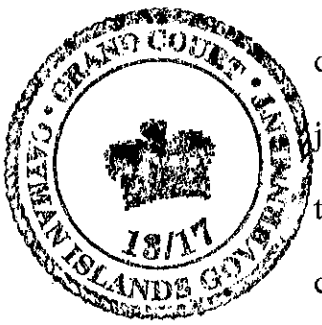
41. I refuse the Mother's application for a stay and when I do so I have regard to the above five principles. On the material before me I am not satisfied that there are strong grounds of appeal or a strong likelihood of success. I have had to carefully consider whether an appeal would be stifled or rendered nugatory if a stay is not

[4] See paragraph 39 above.

granted. Although a transfer of residence is a dramatic course to take and only one that I have reached after a great amount of thought, I do not feel that my refusal would render a promptly brought appeal nugatory. I have also considered the need to limit disruption to Z, especially that caused by a number of moves between the parents' households. One significant advantage of living in the Cayman Islands in a case such as this, unlike in bigger jurisdictions, is that there will be less disruption for a child as the parents live close to each other and, in this case, there is no need for Z's school or extra-curricular activities to be changed.

42. Having been the Judge with conduct of this matter throughout, and being well placed to take into account all of the circumstances of this case, I have real concerns about what the Mother will do to disrupt the transition at this highly sensitive time. That is one reason why I made the orders that I did with the timetable that was set.[5] Z's new school year will be commencing shortly and the order provides for a three week settling in period with no direct contact with the Mother to best assist Z in settling in to the home with the Father, the father's wife and her baby sister. My concerns about the ongoing risk of emotional damage for Z whilst in the Mother's care are heightened during this transition period as it is likely that the Mother will most unfortunately seek to undermine the order made and act in a manner that will make the transition a difficult one for all involved including Z. I am aware that the pattern of her non-compliance with certain

[5] Paragraph 310 of the Judgment.




directions and raising issues about Z's health since the circulation of the draft judgment appears highly consistent with the approach she has earlier adopted to try and delay important stages of these proceedings. I have this in mind when considering the balance of harm.

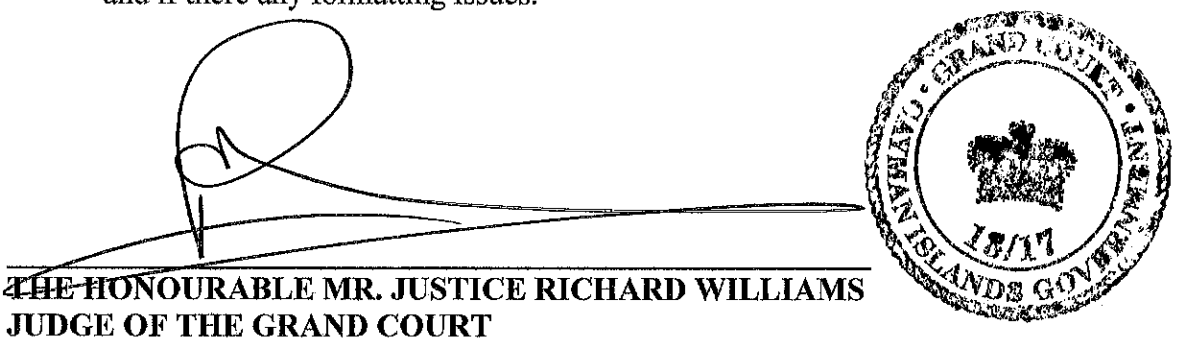
43. I am conscious that when a Judge considers that a significant change in the arrangements for a child needs to be made promptly and learns that there is a wish to appeal to the Court of Appeal he should give serious consideration to making an order which affords the aspiring appellant a narrow opportunity to approach the Court of Appeal for further, temporary relief before his order takes effect. When doing so the Judge is balancing the fact that the commencement date of his order has been reached because he has felt it necessary to do so when regarding the welfare of the child as being paramount, against the opportunity for the aggrieved party to approach the Court of Appeal.

44. This is why I directed that the parties attend before me at 9AM for the handing down of the judgment, before my full list of cases started. This is also why I had my Personal Assistant write to the parties indicating that if the Mother is asking for a stay of the execution of my order that she should make that application at the 9AM hearing. I had in mind that, if the stay application was refused, the Mother would have an opportunity to approach the Court of Appeal for temporary relief pending the order coming into effect at noon on the following day. I have made

sure that the Registrar of the Court of Appeal, who the Mother has been in correspondence with this week, was aware of the 9AM hearing and my indication to the Mother that she may make an application for stay at the hearing.

45. I therefore conclude that the application of the Mother for a stay of execution is refused.

46. I will try and have the transcript of the Judgment provided to the parties this afternoon and I will work on it in between the hearings I have today. I trust that the parties will understand if the transcript contains grammatical or spelling errors and if there any formatting issues.




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