IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM 237 OF 2010

BETWEEN:

DEPARTMENT OF CHILDREN AND FAMILY SERVICES

APPLICANT

AND

DE

1st RESPONDENT

AND

NE

2nd RESPONDENT

AND

HE & TE & JE
(by Mrs. Maggie McCormac, their Guardian ad Litem)

Appearances:	Mrs. Suzanne Bothwell of the Attorney General's Chambers for the Applicant Mr. Conor Fee of Samson & McGrath for the 1st Respondent Mrs. Karin Thompson for the 2nd Respondent Mrs. Maggie McCormac, Guardian ad litem in person
Before:	Hon. Justice Richard Williams
Heard:	1st & 9th May 2014
Decision Given:	1st May 2014
Draft Judgment:	22nd May 2014
Judgment circulated:	27th May 2014

HEADNOTE

Children Law (2012 Revision) ("the Law") – Interim Supervision orders - Procedural Guidance when making an application for an interim supervision order - Good practice for parties when preparing for a care/supervision order hearing - Making of residence orders and contact order at the same time as making an interim supervision order – Factors to take into account when deciding which of the separated parents possessing parental responsibility should care for the child when an interim supervision is in force – The operation of s.2 of Schedule 3, Part 1 of the Law - Procedural Guidance when making an Emergency Protection Order – s.43(1) of the Law duty of the Court to consider appointing a guardian ad litem, unless the Court is satisfied itself that it is not necessary to do so in order to safeguard the child's interests - Requirement of Summary Court & Grand Court to give reasons for orders made in children public law proceedings - Requirement to give notice of proceedings to overseas parent(s) in public law proceedings.

JUDGMENT

Introduction

1. This matter first came before me on 1st May 2014. At the conclusion of the hearing at 7:30 p.m. I informed the parties of my decision to make interim supervision orders in relation to all three children and I gave very brief reasons. I indicated that these reasons were incomplete and would be superseded by a written judgment. I now provide the said written judgment.

2. At the hearing I considered the documentary evidence placed before the Court and the oral evidence given by the mother and the social worker, Ms. Carla Court. I received oral and written submissions from Counsel. Mrs. Maggie McCormac was appointed as Guardian ad litem for all three children at the outset of the hearing. The Guardian did not have legal representation. Due to the lateness of her appointment, the

Guardian understandably did not feel that she was in a position to make any representations or take a position in relation to the applications at the hearing.

3. On 9th May 2014, at my request, the parties attended before me to clarify three issues. At that hearing, it was rightly conceded by all of the parties that, when making supervision orders, the Court could make also make contact and/or residence orders. All the parties agreed that a sufficient opportunity had been given to them to make submissions concerning the making of s.10 Children Law orders and they did not seek to make any further submissions. The parties also agreed, although the Form C2 Application made mention of the applications being for interim supervision orders, that full supervision orders had also been applied for by the Department.

The Parties and the Applications

4. The Department has applied for supervision orders for three children. However, what I have before me for determination at this stage is an application made by the Department of Children and Family Services ("the Department") for interim supervision orders under s.40 of the Law relating to the three children. The first child, HE, is a female born on 18th May 1999, and so is now 14 years old. I shall refer to her as HE in this judgment. The second child, TE, is a female born on 11th April 2003, and is aged 11. I shall refer to her as TE in this judgment. The third child, JE, is a male born on 5th May 2010, and is 4 years old. I shall refer to him as JE in this judgment. I will on occasion refer to the three of them collectively as the children in

this judgment. Regrettably the children's birth dates are incorrectly stated in the Department's pleadings and written evidence.

5. The children's biological mother, DE, was born in Honduras on 27th August 1980 and is 33 years old. The mother retains close ties with her family in Honduras. NE was born in the Cayman Islands on 21st December 1950 and is 63 years of age.[1] NE is the biological father of TE and JE. It is agreed that NE has treated HE as a child of the family since she was a year old and has taken on the role as father for all three of the children.[2] It is not clear from the limited information before me whether NE has acquired parental responsibility for HE. If there is no order or agreement providing the same, it is hoped that this position can be regularised by the mother and father consensually before the dissolution of their marriage.[3] HE is aware that NE is not her biological father. I shall refer to DE as the mother and NE as the father in this judgment.

6. HE's biological father is unaware of these proceedings. The Department will have to investigate whether he has parental responsibility, which would make him an automatic Respondent to these proceedings under r.3.7(1) the Children Law (Grand Court) Rules ("the Rules"). Pursuant to r.3.4(4), on an application for a care or supervision order, notice of the proceedings and of the date, time and place of the

[1] The Police Investigation Incident Report exhibit "CC2" to the first affidavit of Carla Court incorrectly states that his date of birth is 10th March 1976.
[2] NE's name appears as HE's father on her Honduran birth certificate exhibited to an affidavit sworn by the mother in April 2014 in the parties' divorce proceedings. This certificate may not be sufficient to establish parental responsibility for NE in relation to HE.
[3] A Judge may refuse to grant the certificate for dissolution of the marriage if this is not regularized as a judge may not feel satisfied about the arrangements for HE.

hearing or directions appointment (but not the application), is to be served upon every person who the applicant believes to be a parent without parental responsibility. These are public law proceedings in relation to HE and, with this and the Rules in mind, I note that Mrs. Justice Theis in ***Kent County Council and C and G and A (through his Children's Guardian)*** [2014] EWHC 604 (Fam) stated at paragraph 11:

> *"Even if (the father) does not have parental responsibility, there is a mandatory requirement for him to be given notice of the proceedings. Proceedings involving the State in relation to the removal of a child from the birth family are one of the most serious interventions in family life there can be. For that action to be taken without the father being properly served, notified of the proceedings and/or given effective access to legal advice to advise him of his position is deplorable."*

7. At paragraph 13 of the Kent County Council case, Mrs. Justice Theis provides helpful guidance as to what course should be taken if one or both of the parents live abroad.

The Parties' Positions

8. At the outset of the hearing the parties informed the Court that the Department's application for interim supervision orders was unopposed. Counsel for the mother indicated that this was her position if the three children were to reside with her. The parties accept that the interim supervision order, unlike an interim care order, would not divest in the Department parental responsibility and the resultant duty to safeguard the welfare of the children.

9. The Department initially sought "directions" concerning placement to be attached to the supervision orders pursuant to s.2 of Schedule 3, Part 1 of the Law, recognising that the supervision order meant that the obligation to keep the children safe would primarily rest with the parent with parental responsibility with whom the children were, at the time, living. The mother did not agree with the Department's proposal that the children remain with the father, with whom they had been placed pursuant to the initial emergency protection order granted on 17th April 2014. As the hearing progressed, it became clear that the mother was particularly keen that, at the very least, JE reside with her. The father was in agreement with the proposals of the Department. As already indicated, the Guardian ad litem was not in a position to make a recommendation.

10. At the hearing on 9th May 2014, the parties accepted that there may be an issue as to whether it was appropriate for the Court to direct a child to live with one of its separated parents (when both had parental responsibility) in his household rather than in the other parent's. The Court explained to the parties that its initial view was that this was not likely to be the intended purpose of directions made pursuant to s.2 of Schedule 3, Part 1 of the Law, adding that the directions ordinarily might be made to facilitate a residential or therapeutic placement for the child. As the Court did not receive full argument on the point I do not intend to go on and decide this issue in this judgment. All of the parties agreed that in the circumstances of this case, if the Court were to place the children with the father in the interim, then that may be better done by making a residence order in his favour rather than relying upon a Schedule 3 direction.

Good Practice for Parties in Preparation for a Child Public Law Hearing

11. As I stated in my very recent decision in ***Re WH (a minor care proceedings)*** Fam 88/2013[4], when public law proceedings are before the Court it is good practice for a 'threshold statement' to be prepared and filed prior to the interim hearing by the legal representative for the Department. This brief statement is a written outline of the facts on which the Department relies to satisfy the threshold criteria under s.40(2) of the Law. From the content of the statement, the Court should be able to adduce the essential nature of the problems that have led to the Department issuing the proceedings and seeking the order. Support for the adoption of this practice is given in ***Re G (Care Proceedings: Threshold Conditions)*** [2001] 2 FLR 1111 at para 12 Hale J.:

> *"The local authority are not required to plead their case at the outset or indeed at all. It is now the practice in many courts to require the local authority before the final hearing to make a clear statement of the facts they wish the court to find and the basis upon which they allege that the threshold is crossed. In my view this should be routine, so that the parents can know the case they have to meet and have a fair opportunity to meet it.'"*

12. The sentiments of Hale J. have greater significance in the matter before me. When the Department opened its case it stated for the first time that they sought a court order with directions that all three children should, in the interim, live with the father. At paragraph 5, page 21 and paragraph 7, page 22 of the Form C2 Application filed on 29th April 2014, the Department stated that they were applying for an "*order*

[4] Transcript of Ex Tempore Ruling will soon be available.

including directions" pursuant to s.2 of Schedule 3, Part 1 that JE live with the mother. However, it appears that at least 30 minutes prior to coming into Court the Department became aware of a possible development communicated to them via Mrs. Thompson who represents the father. It appears that the detail of the development was also communicated by Mrs. Thompson to the mother's attorney at Court. However, as a consequence of this development, the Department changed its position and no longer sought a "direction" that JE live with the mother, but one that he live with the father. Regrettably, this was not communicated to the mother's attorney outside of Court, and the first time that he was aware of the change of position was during the opening remarks made by Counsel on behalf of the Department. I accept that the Department's position altered at this late stage due to very recently received information, but the Department should hereafter ensure that it inform all of the other parties of the position it is taking prior to such a matter coming into Court.

13. Practice Direction No. 11/2014 "Court Bundles in Family Proceedings in the Family Division of the Grand Court" issued on 2nd May 2014 will hopefully ensure that, in future, every party is clear about the position taken by those involved in the case prior to coming into Court. The Practice Direction provides at paragraph 4.2(b) and (c) that in all cases the bundle should contain a statement of issues to be determined at the hearing and each party's position statement. Paragraph 4.5 of the Practice Direction provides:

> *"The summary of the background, statement of issues, chronology and reading list shall in the case of a final hearing, and shall so far as practicable in the case of any other hearing, each consist of a single*

document in a form agreed by all parties. Where the parties disagree as to the content the fact of their disagreement and their differing contentions shall be set out at the appropriate places in the document."

14. The events set out in paragraph 13 above are a good illustration as to why in all family matters, in particular public law applications, it should become standard practice for the attorneys, the Guardian ad litem and the allocated social worker to attend at Court well before the listed time for the hearing. The out-of-court discussions the parties may then have, especially if they give themselves possibly an hour to have them, will often prove invaluable when clarifying and narrowing down the issues as well as making any final alterations to agreed schedules prepared to assist the Court. This practice would also enable a party to inform the others if their position has changed, following which an attorney would have the opportunity to take fresh instructions from his client arising from the changed circumstances.

15. If the parties agree that the threshold criteria is met on the agreed facts, the parties should file a joint threshold statement setting out why that is. It is also helpful for prepared schedules to set out any disputed facts, in particular the facts upon which the findings are sought. It is also good practice for all of the attorneys, especially in unopposed proceedings, to consult and present the Court with a schedule of the agreed or admitted facts.

16. In this case, although the interim supervision orders were not opposed (albeit subject to the mother's condition that the children should live with her), the inference being that all the parties agree that the threshold criteria has been met, there appeared to be no agreement between the parties as to the factual substratum for making the order and on what basis it may be agreed that the threshold criteria had been met. I am fully aware that the benefit of the content of the above commended documents is restricted to setting out what the parties' positions are and that it ultimately is a matter for the Court to determine what facts it will base its decision on and whether the threshold criteria have been met.

17. For reasons expanded on by me in ***Re WH***, the recent decision of Mrs. Justice Pauffley in ***Re NL (A Child) (Appeal: Interim Care Order: Facts and Reasons*** [2014] EWHC 270 (Fam) does not prevent the recommended good practice being adopted. Although it is not appropriate for parties to be involved in drafting the Court's written reasons, the practice of inviting parties to submit their own position statement in which they set out an analysis of the facts as well as their contentions in relation to the resulting orders is still appropriate. Parties can still provide written details of the agreed issues as well as those which are set out in a dispute. I am of the view that it is appropriate and good practice for the parties to provide threshold statements and schedules of agreed and disputed factual issues.

The Court's Duty to Investigate

18. The investigative duty of the Court if, following the filing of an application for a full supervision order, it is asked to make an interim supervision order is set out in s.40(2) and s.33(2) of the Law. S.40(2) reads:

> *"A court shall not make an...interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child or as mentioned in section 33(2).*

S.33 (2) provides:

> *"A court may only make a care order or supervision order if it is satisfied –*
>
> *(a) that the child concerned is suffering, or is likely to suffer, significant harm; and*
>
> *(b) that harm, or likelihood of harm, is attributable to-*
>
> *(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect the parent to give to him; or*
>
> *(ii) ...."*

19. This means that the precondition that must be satisfied is that there are reasonable grounds to believe that a) and b) are satisfied. At this stage I need not make findings of fact, for my task is only to decide if there are reasonable grounds to believe.[5] As stated by Wall J. in ***Re G (A minor) (Care Proceedings)*** [1994] 2 FLR 69 this section means that the Court has to be satisfied by evidence that the significant harm suffered by the relevant child is attributable to the care, or absence of care, given to the child by the parent(s) against whom the order is sought. In this context the phrase

[5] Oxfordshire County Council v S [2004] 1 FLR 426.

"*attributable*" should be given its normal meaning and does not mean merely capable of being attributed to the parent. Wall J. rightly cautions that:

> *"Care orders are at the limit of the Court's powers. They are Draconian orders to which resort is only made when no alternative family arrangements for a child can properly be put in place."*

Therefore, despite the parties' agreement, I still have a duty to satisfy myself that the criteria for making a care order are met. If I am satisfied, I must consider s.3 of the Law, address the welfare checklist at s.3(3) and the no order principle at s.3(5).

20. The Department initiated its protective arrangements when it sought and obtained an emergency protection order. When I consider whether any of the children are suffering significant harm I may consider the circumstances at the time when the protective arrangements commenced, and not just the circumstances at the date of the hearing. Having regard to the case of ***Southwark LBC v B*** [1998] 2 FLR 1095 I adopt the same approach when considering whether one of the children is likely to suffer significant harm. When I consider future harm, it is not whether I am satisfied that it is more likely than not, but that there is a real likelihood of significant harm. The House of Lords in ***RH and R*** [1996] 1 FLR 80 defined "likely" to mean "*a real possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm.*" Before I move on, I note that in ***Re M*** [1994] 2 FLR 577 the Court stated that the availability of a suitable placement within the wider family does not prevent the Court finding the threshold test satisfied based on the care provided by the child's parent.

Background up to the Making of the Ex Parte Emergency Protection Order on 17th April 2014

21. This matter is not one of the cases in which the orders made within public law proceedings result in a child being removed from all of the persons who have parental responsibility and being placed outside of the family. I accept that the order made will affect the status quo that existed prior to the making of the emergency protection order. Before the protective measures were taken by the Department all three of the children lived with the mother. At that time TE and JE had regular contact with the father. It appears that the father's access with HE was an issue, as the father did not seek to promote it. I note that the parties were of the view that the public law proceedings should be heard in the Grand Court rather than remain in the Summary Court where the initial protective orders were obtained, because they should be linked with what they believed to be ongoing private law children proceedings.

Procedural background up to the making of the ex parte emergency protection order on 17th April 2014

22. To put the current proceedings into context, it is necessary to outline the factual and procedural background.

23. The mother and the father have been married to each other twice. Their first marriage was dissolved in March 2004. They remarried in August 2009, but on 24th September 2010 the husband petitioned for divorce. The petition was proved on 23rd October

2010. Following the mother and father's separation the children resided with the mother.

24. On 26th January 2011 Quin J. made an interim order. Pending the final hearing and the receipt of the court welfare officer's report, interim care control was granted to the wife and TE and JE were to have interim access with the father. The contact for TE was on alternate weeks from Saturday morning at 10 a.m. until school on Monday. The contact for JE was from 10 a.m. to 6 p.m. on alternate Saturdays. During the week TE would have contact with the father from after school on Tuesday until school on Wednesday and JE would be returned to the mother at 7:30 a.m. It appears that Quin J. was not asked to make any orders in relation to HE.

25. Ms. Geneveive Tomlinson, social worker, filed her court welfare officer's report on 29th June 2011 and an addendum on 15th July 2011. In the report she recommended joint custody with care and control to the mother. She recommended reasonable access to the father with TE and JE and highlighted the then difficulties in his relationship with HE.

26. On 29th March 2012 the private law proceedings came before the Chief Justice. Although the Chief Justice was primarily dealing with financial matters arising out of the parties' divorce, he also referred to children issues in his judgment. He noted that care and control of the children had been vested in the mother by consent and that the terms of access had "*been agreed and defined for expression in the written order to*

follow." The drafted final order contained a comprehensive access order. TE and JE were to have alternate weekend contact with the father from 10 a.m. on Saturdays until Monday morning, with TE being taken to school and JE being returned to the mother's residence. The previous Tuesday midweek contact arrangement remained in place. In addition, during the weeks when the father did not have access on the weekend, the children were to stay with him on Thursday evening until Friday morning with the same return arrangements that were put in place for the Tuesday access. The parties agreed half of all school holidays subject to work arrangements, suitable Christmas arrangements, the sharing of the children's birthdays and arrangements for the mother and father's birthdays and Mother's Day and Father's Day. The final order reflected that the parties also agreed joint custody.

27. On 30th November 2012 the Chief Justice approved the draft final order with a slight amendment in relation to access. As a consequence of the direction given by the Chief Justice that the order should reflect the access that had actually been put in place by the parties, a consent contact order was submitted on 10th January 2013. The amendment contained in that order was that the midweek access for TE and JE, during the week when there was no weekend access, started on Wednesday rather than Thursday evening. Although the financial orders were appealed, it is evident that the children issues had been fully resolved.

28. The private law proceedings only returned to Court after the Court of Appeal had ruled on the disputed financial matters. On 25th February 2014 the wife filed a

summons seeking leave to take the children on holiday to Honduras and concerning the practicalities of renewing HE's passport. The application was opposed and directions were given for the parties to contact Listing and to fix a hearing in relation to the temporary removal application, and a hearing for the outstanding ancillary relief financial issues. This was the only outstanding issue in the private law proceedings in relation to the children. Regrettably, when the public law proceedings commenced in the Summary Court it appears the Learned Magistrate may have been misinformed by those in attendance that there were pending private law residence order proceedings in the Grand Court. It also appears that it was this wrongly held belief that prompted the parties to decide that the public law proceedings to be issued, following the making of the extended emergency protection order, be brought in the Grand Court.

29. The Department applied for an emergency protection order in relation to all three children on 17th April 2014. Unfortunately, the application was not correctly brought as Form C11 is not the application; it is simply the supplement for an application for an emergency protection order. Even if the Department was unable to file it in time for the ex parte application, it should have been filed and served prior to the later inter-partes extension application. In future, when applying for an emergency protection order Form C1 should also be completed. [6] The parents should be given notice of the inter-partes hearing of the application by serving them with a Form C4 at least one day before the date of the hearing[7]. Form C11 sets out the ground for the

[6] R.4 Children law (Summary Court) Rules, 2013.
[7] My emphasis.

application as being reasonable cause to believe that the children are likely to suffer significant harm if they are not removed to accommodation provided by or on behalf of the Department. At paragraph 2B in Form C11, the Department appears to indicate that enquiries were being made about the welfare of the children under s.50(1)(b) of the Law and those enquiries were being frustrated by access to the children being unreasonably refused to someone who was authorised to seek access and there was reasonable cause to believe that access to the children was required as a matter of urgency. The reasons for the application were set out in paragraph 5 of Form C11. A brief summary of the reasons is that they were the nature of the relationship between HE and the mother which included physical confrontation between them with resultant injury to the child and the children witnessing domestic violence between the mother and her partner in which HE became involved. The form was completed by Carla Court, the allocated social worker. Unfortunately the statement of truth in the form was not properly completed, as there was a failure to make the necessary deletions at that part of the form. It is important that in future this is done.

30. From the Summary Court file, it seems that, when the ex-parte application came before the Learned Chief Magistrate on 17th April 2014, the only written evidence was Form C11 and an exhibited email dated 17th April from HE's school counselor. Based on the information before it, the Court granted an eight day emergency protection order. The Court also authorised the Department to remove the children to accommodation provided by or on behalf of them and to prevent the children from being removed from that accommodation. It is not clear whether the Chief Magistrate considered s.43(1) of the Law. This section provides that a guardian ad litem must be

appointed for a child in such proceedings, unless the Court is satisfied itself that it is not necessary to do so in order to safeguard the child's interests.

31. When the matter came before the Chief Magistrate, from the papers, no indication was given about when the hearing of the pending application for the supervision order would be listed. It is good practice for the Court when making the emergency protection order to do its best to ascertain when the next hearing date will be. This would prevent the difficulty that this Court has experienced when having to accommodate a contested interim supervision order hearing on short notice.

32. The order drafted by the Summary Court is not in the appropriate form. The appropriate form is Form C24. It is important for the correct order form to be used because on the face of the C24 Form the Magistrate is required to set out the reasons for making an order. Additionally, the form also contains further important explanatory details for the Respondent(s).

Contact for child with its parents when an emergency protection order is in place

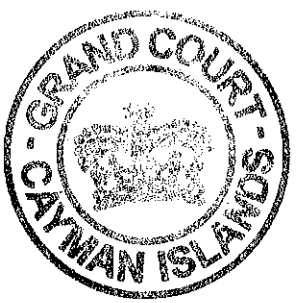
33. Pursuant to s.47(1) of the Law, when making an emergency protection order the Court may give such directions as it considers appropriate with respect to contact. There was no direction sought by the Department in relation to contact between the children and the parents. The Department should be aware that if the Court does not make such a direction, then they must, pursuant to s.47(4)(a) of the Law, allow

reasonable contact to take place between the children and the parents. In this case, it appears that the Department understood this obligation and facilitated contact.

34. Before I move away from the issue of contact for parents in public law proceedings I would like to take this opportunity to comment on a significant relevant flaw in the legislation. The presumption is that the Department must allow a child in their care reasonable contact with the parent. There is a glaring defect in one section in the Law which is clearly inconsistent with the presumption. S.36(4) of the Law should read:

> *"On an application made by the Department or the child, the court may make an order authorising the Department to refuse to*[8] *allow contact between the child and any person who is mentioned in paragraphs (a) to (d) of subsection (1) and named in the order."*

The absence of the words *"refuse to"* in the Law is a significant error and the legislation should be urgently amended. It appears that an error was made when drafting this section, which must have been intended to simply mirror s.34(4) of the Children Act 1989. It is with great regret that I have to say that this has been brought to the attention of representatives from Attorney General's Chambers from July 2012 and yet the section remains defective almost two years on. A copy of this judgment should be provided to the Attorney General forthwith, and his attention drawn to this anomaly in the legislation.



[8] My emphasis.

Practice guidance in relation to applications for an Ex Parte Emergency Protection Orders

35. It is clear that an application without notice may, with leave of the Court, be made in the Summary Court pursuant to the Children Law (Summary Court) Rules 2013, r.4(5)(b). If leave is refused, the Court may direct that the application be made on notice and a minimum period of notice is one day unless abridged by the Court. If leave is given, then the Department must serve a copy of the application on each parent within 48 hours after the making of the order. It appears that in this matter the mother did not receive the application until 23rd April 2014 and only after her attorneys had requested it. It is imperative, having regard to the nature of the application, that there is compliance with the rules in relation to service since a parent may wish to apply to discharge the order or at the very least be fully prepared in the short space of time available for the next hearing.

36. I accept that frequently emergency protection orders will be heard ex parte because, due to the very fact that the situation is considered to be an emergency, requiring immediate action, will make it inappropriate or impractical in a number of cases for the application to be heard inter partes. However, when considering making an ex-parte application for an emergency protection order, the Department should consider the following guidance set out in the Children Act Guidance and Regulations, volume 1, at para. 4.9:

> The Department *"...must make out a compelling case for applying for an emergency protection order without giving the parents notice. The case must be genuinely one of emergency or of great urgency. There*

should be clear reasons to believe the safety of the child will be compromised if the parents are alerted to the application."

37. If the Department makes an ex parte application it should remind itself of the duties placed on it regarding full disclosure and the filing and serving of documents helpfully set out in the practice guidelines contained in the oft cited case of ***Re S (Ex parte Orders)*** [2001] 1 FLR 308.

38. Munby J. in the important decision of ***X Council v B (Emergency Protection Orders)*** [2005] 1 FLR 341 confirmed the above. As the matter before me involves the first Grand Court case in which an ex-parte emergency protection order was applied for and made in the Summary Court, I make no apology for setting out in full Munby J.'s following guidance, which I hope will be of assistance in the future.

"[52]. Where the application for an EPO is made ex parte (without notice) the burden on the local authority is even heavier. In the first place, the local authority must make out a compelling case for applying without first giving the parents notice... . "

[53] An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency — and even then it should normally be possible to give some kind of albeit informal notice — or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on. As the court said in Venema v Netherlands, at paras [92]—[93]:

> *'It is essential that a parent be placed in a position where he or she may obtain access to information which is relied on by the authorities in taking measures of protective care or in taking decisions relevant to the care and*

> *custody of a child. Otherwise, the parent will be unable to participate effectively in the decision-making process or put forward in a fair or adequate manner those matters militating in favour of his or her ability to provide the child with proper care and protection.*
>
> *The court accepts that when action has to be taken to protect a child in an emergency, it may not always be possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child. Nor, as the Government point out, may it even be desirable, even if possible, to do so if those having custody of the child are seen as the source of an immediate threat to the child, since giving them prior warning would be liable to deprive the measure of its effectiveness. The court must however be satisfied that the national authorities were entitled to consider that there existed circumstances justifying the abrupt removal of the child from the care of its parents without any prior contact or consultation. In particular, it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to the removal of the child from its family, was carried out prior to the implementation of a care measure.'"*

39. Munby J. went on to say at:

> *[55] Thirdly, there is the problem presented by the ex parte application made otherwise than on the basis of wholly written evidence. There is, of course, nothing objectionable as such in that, for s 45(7)(b)[9] permits the FPC to hear oral evidence. But it is important that those who are not present should*

[9] S.48 (7)(b) of the Law.

nonetheless be able to know what oral evidence and other materials have been put before the FPC. Otherwise their ability to apply under s 45(8)[10] *for the discharge of the EPO may be compromised. As I said in Re S (Ex Parte Orders), at 222 and 320 respectively:*

> *'It is an elementary principle of natural justice that a judge cannot be shown evidence or other persuasive material in an ex parte application on the basis that it is not at a later stage to be revealed to the respondent. The respondent must have an opportunity to see the material which was deployed against him at the ex parte hearing and an opportunity, if he wishes to apply for the discharge* or *variation of the [order] either on the return day or earlier, to submit evidence in answer and, in any event, to make submissions about the applicant's evidence.*
>
> *It follows that those who obtain ex parte ... relief are under an obligation to bring to the attention of the respondent, and at the earliest practicable opportunity, the evidential and other persuasive materials on the basis of which the ex parte [order] was granted.'*

It is, therefore, particularly important that FPCs comply meticulously with the mandatory requirements of rr 20, 21(5) and 21(6) of the Family Proceedings Courts (Children Act 1989) Rules 1991[11]*. The FPC must 'keep a note of the substance of the oral evidence' and must also record in writing not merely its reasons but also any findings of fact.*"

[10] S.48(8) of the Law.
[11] See rr 20, 21(5) and 21(6) the Children Law (Summary Court) Rules, 2013.

Munby J. continued at para 56:

> *"Finally, I draw attention to some other points that I made in Re S (Ex Parte Orders) [2001] 1 WLR 211, [2001] 1 FLR 308, at 223 and 322 respectively:*
>
> > *'Persons injuncted ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told, if they ask, (i) exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing and (ii) what legal authorities were cited to the judge.*
> > *The applicant's legal representatives should respond forthwith to any reasonable request from the respondent or his legal representatives either for copies of the materials read by the judge or for information about what took place at the hearing.*
> > *Given this, it would be prudent for those acting for the applicant in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.'*
>
> *I see no reason why, mutatis mutandis, exactly the same principles should not apply in the case of an ex parte application for an EPO. The mere fact that the FPC is under the obligations imposed by rr 21(5), 21(6) and 21(8),[12] is no reason why the local authority should not immediately, on request, inform the parents of exactly what has gone on in their absence."*

Guidance in relation to applications for emergency protection orders

40. Emergency protection orders replace the out-dated place of safety orders. The purpose of the order is to enable a child in a genuine emergency to be removed from where he is or is being kept, if and, only if, this is what is necessary to provide immediate short – term protection. It is an extremely serious step. It must not be

[12] See rr.21(5), 21(6) and 21(8) of the Children Law (Summary Court) Rules, 2013.

regarded, sometimes as was the case with place of safety orders, as a routine response to allegations of child abuse or as a routine first step to initiating care proceedings. The grounds require some evidence that the situation is sufficiently serious to justify such severe powers of intervention being exercised. In ***X Council v B (Emergency Protection Orders)*** [2005] 1 FLR 341 Munby J., having undertaken a review of the law and practice relating to emergency protection orders, set out masterful guidance as to the appropriate approach for the Family Proceedings Courts when hearing such applications. Munby J. felt the matters he had considered to be *"so important"* that he carefully summarised the most important points at paragraph 57 of his judgment. The guidance given therein, subject to local adaption and having regard to local resources, should prove most helpful to the Family Courts at both levels in the Cayman Islands. With this in mind, I set out Munby J.'s summary in full. The now President of the Family Division in England and Wales listed the following 14 factors, which McFarlane .J in a later case[13] referred to as being "*required reading*" and which he said should be placed before the Magistrate's Court whenever an application is being made :

> *"(i) An EPO, summarily removing a child from his parents, is a "draconian" and "extremely harsh" measure, requiring "exceptional justification" and "extraordinarily compelling reasons". Such an order should not be made unless the FPC is satisfied that it is both necessary and proportionate and that no other less radical form of order will achieve the essential end of promoting the welfare of the child. Separation is only to be contemplated if immediate separation is essential to secure the*

[13] ***Re X (Emergency Protection Orders)*** [2006] 2 FLR 701 – see paragraph 42 below

child's safety; "imminent danger" must be "actually established".

ii) Both the local authority which seeks and the FPC which makes an EPO assume a heavy burden of responsibility. It is important that both the local authority and the FPC approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the Convention rights of both the child and the parents.

iii) Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.

iv) If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of, a CAO under section 43 of the Act.[14]

v) No EPO should be made for any longer than is absolutely necessary to protect the child. Where the EPO is made on an ex parte (without notice) application very careful consideration should be given to the need to ensure that the initial order is made for the shortest possible period commensurate with the preservation of the child's immediate safety.

vi) The evidence in support of the application for an EPO must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The sources of hearsay evidence must be identified. Expressions of opinion must be supported by detailed evidence and properly articulated reasoning.

vii) Save in wholly exceptional cases, parents must be given adequate prior notice of the date, time and place of any application by a local authority for an EPO. They must also be

[14] See s.45 of the Law

given proper notice of the evidence the local authority is relying upon.

viii) Where the application for an EPO is made ex parte the local authority must make out a compelling case for applying without first giving the parents notice. An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency – and even then it should normally be possible to give some kind of albeit informal notice to the parents – or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on.

ix) The evidential burden on the local authority is even heavier if the application is made ex parte. Those who seek relief ex parte are under a duty to make the fullest and most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law.

x) Section 45(7)(b) permits the FPC to hear oral evidence. But it is important that those who are not present should nonetheless be able to know what oral evidence and other materials have been put before the FPC. It is therefore particularly important that the FPC complies meticulously with the mandatory requirements of rules 20, 21(5) and 21(6) of the Family Proceedings Courts (Children Act 1989) Rules 1991. The FPC must "keep a note of the substance of the oral evidence" and must also record in writing not merely its reasons but also any findings of fact.

xi) The mere fact that the FPC is under the obligations imposed by rules 21(5), 21(6) and 21(8), is no reason why the local authority should not immediately, on request, inform the parents of exactly what has gone on in their absence. Parents

against whom an EPO is made ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told, if they ask, (i) exactly what documents, bundles or other evidential materials were lodged with the FPC either before or during the course of the hearing and (ii) what legal authorities were cited to the FPC. The local authority's legal representatives should respond forthwith to any reasonable request from the parents or their legal representatives either for copies of the materials read by the FPC or for information about what took place at the hearing. It will therefore be prudent for those acting for the local authority in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.

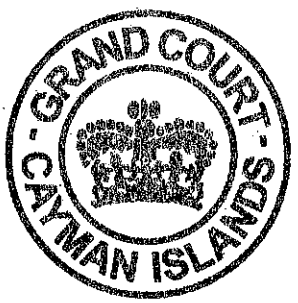
xii) Section 44(5)(b)[15] provides that the local authority may exercise its parental responsibility only in such manner "as is reasonably required to safeguard or promote the welfare of the child". Section 44(5)(a)[16] provides that the local authority shall exercise its power of removal under section 44(4)(b)(i)[17] "only...in order to safeguard the welfare of the child." The local authority must apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not of itself enough. The FPC decides whether to make an EPO. But the local authority decides whether to remove. The local authority, even after it has obtained an EPO, is under an obligation to consider less drastic alternatives to

[15] See s.46(4)(b) of the Law.
[16] See s.46(4)(a) of the Law.
[17] See s.46(3)(b)(i) of the Law.

emergency removal. Section 44(5)[18] requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision making actually takes place and that it is appropriately documented.

xiii) Consistently with the local authority's positive obligation under Article 8 to take appropriate action to reunite parent and child, sections 44(10)(a)[19] and 44(11)(a)[20] impose on the local authority a mandatory obligation to return a child who it has removed under section 44(4)(b)(i)[21] to the parent from whom the child was removed if "it appears to [the local authority] that it is safe for the child to be returned." This imposes on the local authority a continuing duty to keep the case under review day by day so as to ensure that parent and child are separated for no longer than is necessary to secure the child's safety. In this, as in other respects, the local authority is under a duty to exercise exceptional diligence.

xiv) Section 44(13)[22] requires the local authority, subject only to any direction given by the FPC under section 44(6)[23], to allow a child who is subject to an EPO "reasonable contact" with his parents. Arrangements for contact must be driven by the needs of the family, not stunted by lack of resources."



[18] See s.46(4) of the Law.
[19] See s.46(5)(a) of the Law.
[20] See s.46(6)(a) of the Law.
[21] See s.46(3)(b)(i) of the Law.
[22] See s.47(4) of the Law.
[23] See s.47(1) of the Law

41. In ***Re X (Emergency Protection Orders)*** [2006] 2 FLR 701 McFarlane J. reiterated the importance of Munby J.'s above guidance and at para 101, he gave the following additional "*good practice guidance*":

> *"(a) the 14 key points made by Munby J in X Council v B should be copied and made available to the justices hearing an EPO on each and every occasion such an application is made;*
>
> *(b) it is the duty of the applicant for an EPO to ensure that the X Council v B guidance is brought to the court's attention of the bench;*
>
> *(c) mere lack of information or a need for assessment can never of themselves establish the existence of a genuine emergency sufficient to justify an EPO. The proper course in such a case is to consider application for a child assessment order or issuing s 31 proceedings and seeking the court's directions under s 38(6) for assessment;*
>
> *(d) evidence given to the justices should come from the best available source. In most cases this will be from the social worker with direct knowledge of the case;*
>
> *(e) where there has been a case conference with respect to the child, the most recent case conference minutes should be produced to the court;*
>
> *(f) where the application is made without notice, if possible the applicant should be represented by a lawyer, whose duties will include ensuring that the court understands the legal criteria required both for an EPO and for an application without notice;*
>
> *(g) the applicant must ensure that as full a note as possible of the hearing is prepared and given to the child's parents at the earliest possible opportunity;*

(h) *unless it is impossible to do so, every without notice hearing should either be tape-recorded or be recorded in writing by a full note being taken by a dedicated note taker who has no other role (such as clerk) to play in the hearing;*

(i) *when the matter is before the court at the first 'on notice' hearing, the court should ensure that the parents have received a copy of the clerk's notes of the EPO hearing together with a copy of any material submitted to the court and a copy of the justices' reasons;*

(j) *cases of emotional abuse will rarely, if ever, warrant an EPO, let alone an application without notice;*

(k) *cases of sexual abuse where the allegations are inchoate and non-specific, and where there is no evidence of immediate risk of harm to the child, will rarely warrant an EPO;*

(l) *cases of fabricated or induced illness, where there is no medical evidence of immediate risk of direct physical harm to the child, will rarely warrant an EPO;*

(m) *Justices faced with an EPO application in a case of emotional abuse, nonspecific allegations of sexual abuse and/or fabricated or induced illness, should actively consider refusing the EPO application on the basis that the local authority should then issue an application for an interim care order. Once an application for an ICO has been issued in such a case, it is likely that justices will consider that it should immediately be transferred up for determination by a county court or the High Court;*

(n) *the requirement that justices give detailed findings and reasons applies as much to an EPO application as it does to any other application. In a case of urgency, the decision may be announced and the order made with the detailed reasons prepared thereafter;*

(o) where an application is made without notice, there is a need for the court to determine whether or not the hearing should proceed on a without notice basis (and to give reasons for that decision) independently of any subsequent decision upon the substantive EPO application."

Procedural background following the making of the ex parte emergency protection order on 17th April 2014

42. Having set out some general guidance in relation to emergency protection orders I now return to the background of this case. The emergency protection order was served on the mother on 17th April 2014 and at that time the three children were removed from her care and placed with the father, where they have since remained. It appears that the social worker by email sent on 23rd April 2014 first enquired with the Magistrate's Court for a date for the next hearing. The emergency protection order had been obtained on 17th April 2004 and was due to expire on 25th April 2014. In future, if the Department is seeking to proceed with their applications, they should at the same time as obtaining the order or very shortly thereafter be consulting with the Court to fix the next hearing date. This should not be done so close to the expiry date of the emergency protection order, wrongly expecting the Court to be able to accommodate the matter on short notice.

43. On 24th April 2014, a day before the emergency protection order was due to expire, Ms. Court indicated in an email to the Court Family Proceedings Unit that the Department would be seeking an interim care order. However, no application for either an interim supervision order or interim care order had been filed.

44. On 25th April 2014, the same date upon which the emergency protection order was due to expire, Ms. Court filed her report of the same date.

45. An extension to an emergency protection order can only be made on notice and not ex parte. The C11 supplement form was served on the mother on the afternoon of Wednesday, 23rd April 2014. This should have been served, along with a C1 application form[24] on the mother at the same time the order was served on 17th April 2014 if an extension was being is sought. When the Department serves a parent a record of the service must be kept by the social worker. This should be recorded in Form C8 and presented to the Court at the first hearing after the documents were served. The social worker's report was served on the mother on the afternoon of Thursday, 24th April 2014. The Department failed to then serve a completed Form C4 Notice of Proceedings on the mother, which should have been served at least one day prior to that hearing. It is important that the Department recognises the need to file the appropriate pleadings and to give parents adequate notice of hearing dates and of the evidence upon which they seek to rely.[25]

46. Having regard to the late receipt of the evidence and the deficient pleadings, much to the credit of Mr. Fee, the Summary Court was provided with a position statement on 25th April 2014 prepared on behalf of the mother. It appears that at the time the

[24] The Department failed to file Form C1.
[25] See Munby J. in X Council case - factor (vii) set out at paragraph 41 above.

mother was of the belief, prior to the hearing, that the Department would be seeking an interim care order at the hearing on 25th April 2014.[26]

47. At the hearing held on 25th April 2014, the Department did not seek an interim care order, but applied for an extension of the emergency protection order. If a party is seeking to extend the emergency protection order they are required to file Form C1 and attach a copy of the emergency protection order. [27]Although there need not be exceptional circumstances for extending, the Department should not expect the extension of an interim care order to be routinely made. The expectation should be that the eight days from the initial order is sufficient for the Department to investigate and decide whether or not to commence care/supervision proceedings. It should be enough time to obtain sufficient evidence for the Court to decide whether to make an interim care or supervision order. I accept that this will require the social worker and the Department's legal representative to take speedy and well-coordinated action. Significantly, the grounds for an extension are that the Court and not the Department, unlike in the case of the initial emergency protection order, must have reasonable cause to believe that the child is likely to suffer significant harm if the order is not extended. In considering whether to extend the order, the Court will have regard to the s.3 criteria in the Law, but the s.3(3) checklist does not apply. The Department must give its reasons for not being ready to apply for a care or supervision order. [28]

[26] Paragraph 5 of the position statement on behalf of the mother.
[27] My emphasis.
[28] My emphasis.

48. The application came before Magistrate Foldats who ordered, with the consent of the parties, that there should be an extension to the emergency protection order for the maximum permitted period of seven days. The order form used by the Summary Court appears to be a modified version of Form C24. Pursuant to the rules the Summary Court order for an extension should be in the format of the Form C25. From a review of the file, it appears that no formal reasons were given by the Learned Magistrates for the making of the initial emergency protection order or the extension of the emergency protection order.

49. A letter addressed to the Court from Counsel for the Department indicated that there had been discussions between the legal representatives and the Learned Magistrate which concluded that:

> *"Any future interim applications under the children law to be filed and heard before the Grand Court due to the fact that there were outstanding issues to be addressed in the matrimonial matter, including ongoing issues of custody."*

The letter, received by the Court at around 4:30 p.m. on Monday, 28th April 2014 sought an urgent hearing, informing the Court of the Department's intention to file an application for an interim supervision order on Tuesday, 29th April 2014. Regrettably, this gave the Court very short notice in which to accommodate a hearing, as the extended emergency protection order was due to expire on Thursday, 1st May 2014. Subject to the views expressed in paragraph 51 below, the Court should have at least been notified of the need for a hearing on the morning of Friday, 25th April 2014,

prior to the Court List for the following week being finalised, rather than leaving it until close of business on the following Monday.

50. In future, when the parties are in a hearing before the Summary Court in public law proceedings commenced in that Court and it is at the time agreed that any future application should be heard in the Grand Court, enquiry should be made at that time with the Grand Court Listing Office to ascertain when any proposed application may be heard. This is particularly important if a formal transfer is being considered by the Magistrate, but this procedure should also be followed where there is an emergency protection order and no formal transfer made, because it is unlikely that a Judge will be available for a substantive interim hearing before the order expires. If informed that the Grand Court did not have a Judge available in the required time frame, then the Magistrate may in such circumstances feel it to be sound case management to agree to hear the initial proposed interim supervision or interim care order application, but thereafter transfer the case up in the normal manner. This would give structure to the public law proceedings, and enable the Grand Court to better facilitate any hearing, having regard to the fact that the first interim order could be made for eight weeks. As it turned out, although presented with what really amounted to be a *fait accompli* to hear the case on such short notice, I was able to accommodate this hearing because on the Thursday I had a half a day of court hearings with the remaining part of the day allocated for judgment writing. However, due to other matters in the list and the length of this hearing, the Court still had to sit, without a proper break, from the end of the morning until 7:30 p.m. to complete it.

51. As soon as I became seized of the matter, conscious of the requirement set out in s.43(1) of the Law, I immediately commenced enquiries to try locate a Guardian ad litem for the children. Fortunately, Mrs. Maggie McCormac was available and she was appointed on 1st May 2014.

Procedure when applying for a Supervision or Interim Supervision Order

52. On 29th April 2014 the Department's Form C2 Application was filed and issued. Although the face of the document continually referred to interim supervision orders, all of the parties accept that the application form was filed in pursuance of an application for full supervision orders. It is important that Form C13 Supplement for an Application for a Care or Supervision Order is also completed. The Department failed to do that in this case. These forms, along with a completed Form C4 Notice of Proceedings and preferably the supporting evidence, should be served on the parents at least three days before the date set for the hearing or directions. In this case the notice was not served. The Court should then be provided by or at the hearing with a completed Form C8 Statement of Service. In this case this was not provided. Although there was short service of Form C2 on the parents, no parties took issue with service. Therefore, I was content to hear the application, also recognising that the Court has the power to disapply the requirements of service of documents on notice of the proceedings pursuant to r.3.8(7) the Rules.

53. When the Court receives the applications and supporting documents from the Department, it has to ensure that the case progresses in an efficient manner, minimising any delay. Once the application is received the Court is obligated to fix a

date for, ordinarily, a directions appointment. Notice of the hearing would be placed in the Form C4 which must be served by the Department on the parties. The type of directions which the Court should consider giving are set out at r.3.14(2) the Rules. The Court should also draw up the timetable for the progression of the case and it would be wise to remind the parties of their obligations set out in the Practice Circular No. 1/14 "Requirement for Strict Compliance with Court Orders made in the Family Division of the Grand Court." I accept that these directions were not given at the hearing on 1st May 2014. This was due to a lack of time available to the Court, but this will be addressed at the next hearing which I determined must be held by 21st May 2014.

54. It is important for parties to recognise that the reason for making interim orders, despite the delay principle, is to give sufficient opportunity to the parties to prepare their case and for the Guardian ad litem to undertake her investigations and file a report. It is not intended to put in place a procedure for repetitive interim orders over an extended period of time and is not be used to provide the Court with continuing control over the Department's actions, even if it lacks confidence in the applicant's ability to carry out its care plan. If an interim supervision order is made it should be recorded in Form C34.

55. The application for an interim supervision care order should ordinarily be made on notice. The application can be made with the consent of the parties pursuant to r.3.14(7) the Rules. If there is no consent, the Court must fix a date for hearing,

giving at least two days-notice to the parties (also r.3.14(7)). Pursuant to r.3.14(7) the Court may grant leave for an application for an interim order to be made without notice at the directions appointment.

56. There is confusion in the matter before me as to the manner in which the application for an interim order has been made. No party has taken particular issue about it, and the parents were content for the application to proceed. It may be that initially the parties treated the C2 Form as an application for both the full and interim supervision orders.

57. The threshold criteria and the making of a supervision order were not opposed. I recognise that an interim order should not be granted as a matter of course and applications are not to be considered as a rubber stamping exercise, even if unopposed. The fact that it is unopposed does not rebut the presumption of no order set out at s.3(5) of the Law.

58. In ***Hampshire County Council v S*** [1993] 1FCR 23 Cazalet J. gave the following helpful advice to assist justices with the way in which they should deal with interim applications. Some of the guidance should also be helpful to professional judges at both levels in this jurisdiction. Cazalet J. stated:

> "*1. Justices should bear in mind that they are not, at an interim hearing, required to make a final conclusion; indeed it is because they are unable to reach a final conclusion that they are empowered to make an interim order. An interim order or decision will usually be required so as to establish a holding*

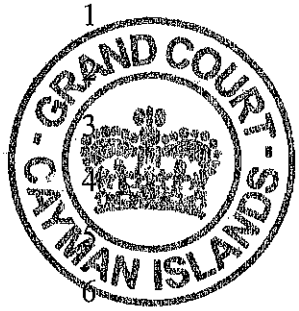
position, after weighing all the relevant risks, pending the final hearing. Nevertheless, justices must always ensure that the substantial issue is tried and determined at the earliest possible date. Any delay in determining the question before the court is likely to prejudice the welfare of the child (see s 1(2) of the Act).

2. ...

3. *At the start of a hearing which is concerned with interim relief, justices will usually be called upon to exercise their discretion under r 21(2) as to the order of speeches and evidence. Circumstances prevailing will almost certainly not permit full evidence to be heard. Accordingly, in such proceedings, justices should rarely make findings as to disputed facts. These will have to be left over for the final hearing.*

4. *Justices must bear in mind that the greater the extent to which an interim order deviates from a previous order or the status quo, the more acute the need is likely to be for an early final hearing date. Any disruption in a child's life almost invariably requires early resolution. Justices should be cautious about changing a child's residence under an interim order. The preferred course should be to leave the child where it is, with a direction for safeguards and the earliest possible hearing date.*

5. *When an interim order may be made which will lead to a substantial change in a child's position, justices should consider permitting limited oral evidence to be led and challenged by way of cross-examination. However, it will necessarily follow that, in cross-examination, the evidence will have to be restricted to the issues which are essential at the interim stage. To this end the court may well have to intervene to ensure that this course is followed and that there is not a 'dress rehearsal' of the full hearing.*

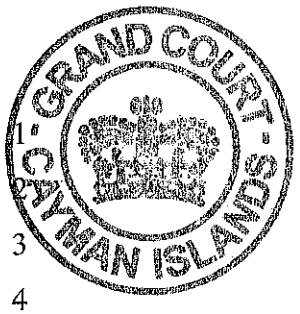


6. *Justices should, if possible, ensure that they have before them the written advice from the guardian ad litem. When there are substantial issues between the parties the guardian should, if possible, be at court to give oral advice. A party who is opposed to a recommendation made by the guardian should normally be given an opportunity to put questions to him or her in regard to advice given to the court.*

7. *Justices must always comply with the mandatory requirements of the rules. These include compliance with: (a) r 21(1), which requires the justices to read, before the hearing, any documents which have been filed under r 17; (b) r 21(5), which requires the justices' clerk to make an appropriate written record of the hearing and in consultation with the justices to record the reasons for the court's decision on any findings of fact; and (c) r 21(6), which requires the court, when making its order or giving its decision, to state the findings of fact and reasons for the court decision.*

8. *If shortage of time or some other circumstance delays the court in the preparation of its written finding of fact and reasons, justices should adjourn the making of their order or the giving of their decision until the following court day or the earliest possible date. At that further hearing it is permissible for one of their number to return to court and state the decision, findings of fact and reasons (see r 21(6). When the length of a hearing lasts beyond normal hours, it will often be sensible for the court to take this course so that it is not formulating its reasons and making perhaps a difficult decision under the sort of pressure which can arise when a sitting runs late into the day.*

9. *When justices grant interim relief, they should state their findings and reasons concisely. Although it will not normally*



be open to them to make findings on disputed facts (because the court will not have heard the full evidence), it may assist if the justices summarise briefly the essential factual issues between the parties."

59. When I consider the matter I am aware of the caution required when considering now keeping the children's residence with the father, rather than returning them to the mother with whom they had lived in the status quo established prior to the making of the initial emergency protection order.

60. When I consider whether a supervision order should be made, I have also considered what ancillary orders the Court can make. I am satisfied, and the parties all agree, that in addition to a supervision order I may also make interim residence and/or interim contact orders. If I make a residence order I must also make an interim supervision order, unless I am satisfied that the children's welfare will be satisfactorily safeguarded without one (s.13(3) and s.40(3) of the Law). The Children Act 1989 Guidance and Regulations, Volume 1, Court Orders para 3.42 issued by the Department of Health in 1991 notes that:

> *"Where a suitable relative or other person connected with the child is prepared to look after him and is likely to be able to meet his needs at least for a trial period, the residence order – supported where necessary by an interim supervision order – offers an attractive alternative to the interim care order. The local authority should always weigh carefully the pros and cons of such an arrangement."*

This is one of the reasons why I have considered making a supervision order coupled with the residence order to the father in this case.

61. Although the supervision order is not opposed, I am still required to consider the evidence placed before the Court. When I consider that evidence I note that in the Children Act 1989 Guidance and Regulations, Volume 1, Court Orders, para 3.37 issued by the Department of Health in 1991 the following its stated:

> *"The child's version of events may form an integral part of "reasonable grounds for believing" as could, for example, medical evidence that certain symptoms were consistent with abuse. After further assessment this may be rejected at the full hearing. Court findings of fact leading to the making of interim orders should therefore not be binding on the court at the final hearing, and should not be regarded as prejudicial to any of the parties to the proceedings."*

Factual Background to Application for Supervision and Interim Supervision Order

62. When I consider the evidence I am satisfied that there are reasonable grounds for believing that each of the children's circumstances fulfill the criteria for a full supervision order. The test of course is not the same as for a final order which requires proof that the relevant child is suffering or likely to suffer significant harm.

63. Although at page 2 of her affidavit the social worker indicates that she has been assigned to the case since 11th December 2014, it is clear that she means since 2013. On 11th December 2013 a referral was made from TE's school that a teacher had

witnessed the mother's boyfriend inappropriately kissing TE on the mouth after bringing her lunch. This allegation does not seem to have formed a part of the social workers ongoing investigation, nor is it put forward as a reason for making the interim order.

64. On 14th January 2014 a referral was received by the Department from a counselor at HE's school stating that HE had disclosed that she and her mother fought often and that the mother became aggressive both verbally and physically towards her. When the social worker met with HE and TE on the same day to discuss the report, she gained the impression that they sought to minimise the mother's behaviour. HE indicated that the mother had got angry during a row arising out of her refusal to let HE attend a party. HE said that they had been arguing and that her mother pushed her on the couch, putting her hands on her throat for a few seconds. HE told the social worker that her mother rarely went out to drink and that she would return between 7-8 p.m. TE did not give great detail about the argument at the time, but did say that the mother went out with her boyfriend and that she could smell alcohol on her breath on her return.

65. On 12th February 2014 the Department received a further referral from a counselor at HE's school. The Department was informed that the counselor had seen her with a "busted lip" and that HE had told him it had been caused during a confrontation with her mother during which her mother had pushed her from behind causing her to fall

and hit her lip. The counselor stated that HE had asked him not to inform her mother of her report to the school.

66. On 17th March 2014 a further referral from HE's school was made. It concerned a physical altercation between her mother and her boyfriend in which the counselor had been informed by HE that the mother had an injury and *"blood was spilt."* Significantly, HE had told the counselor that she had to get involved, by stepping in between the two adults during the fracas. She told the counselor that she had had to use a beer bottle to hit the boyfriend on the head and the shoulder, which caused him to desist and leave the property. The counselor was aware that, despite this incident, the boyfriend had returned to the property a week later. The mother in her affidavit said that she was not cut and there was no blood on the scene. The mother also said that HE did not get physically involved in the argument, but simply shouted at her boyfriend

67. Towards the end of March 2014 the counselor at HE's school reported to the Department that there had been a kitchen fire at the home whilst the mother was working. HE had called 911 and sent a text message to her mother's boyfriend to ask him to contact her mother because she did not have credit on her phone. The counselor was concerned that the children did not have emergency access to the mother.

68. On 17th April 2014 the counselor at HE's school reported to the Department that HE had told him about another major altercation between her mother and her boyfriend in the early hours of the morning. The counselor was told that HE was the only child at the home. She told the counselor that the adults were drinking alcohol and a very violent fight occurred. HE reported that the boyfriend pushed and hit the mother in the face and the mother was throwing glass items at the floor in front of him and hitting him with a broom. HE said that the boyfriend had started hitting her mother in the face in the yard and, yet again, she had had to intervene to break up the fight, this time using a broom. HE said that the police arrived at the scene. The mother's boyfriend had telephoned them.

69. The police incident report records that the boyfriend had told them that there had been an argument with his girlfriend in which glass had been smashed and that both parties had got physical. The mother told the police officers that she had seen the boyfriend whilst she was at a bar in George Town. She said that they had been drinking and that he took her to her home. The mother said that he had asked her for sex and she refused. She told the police that he then became abusive and grabbed onto her, punching her in the face and that he then left the location. The police took photographs of her injuries.

70. It is important to note that the social worker states that, when she met with the mother and her boyfriend at the Department Office in West Bay to talk about the various

incidents, both of them "*emphatically denied*" that the children had witnessed domestic violence or that they drank to excess.

71. On 28th April 2014 the social worker interviewed HE and TE separately to try and obtain further information regarding all of these incidents. She felt that on this occasion the girls were more forthcoming with information.

72. In relation to the 11th July incident, HE told the social worker that she and her mother had a row concerning her being able to go to a party. As the argument progressed the mother made disparaging remarks about HE's father. She said that her mother "*got in her face*" and was yelling and calling her names. HE admitted that she rolled her eyes towards her mother, following which she said the mother slapped her in the face really hard. HE said that she responded by swinging a plastic ketchup bottle at her mother, which hit her. HE told the social worker that her mother grabbed her hair and proceeded to hit her in the face several times with her fist. HE said that she ran from the kitchen to get the mother's boyfriend to help because she was scared about how bad the fight had become. HE said that she tried to back off by moving back towards the living room, as her mother was being so physical with her, but she fell back onto the couch and her mother then came at her and started choking her. She said that she started hitting her mother in the face and tried to push away and that, in the end, her mother's boyfriend had pulled her mother off her. HE said that she then went up to her bedroom at which time the mother came up to the room and started hitting her in

the head on more than one occasion. HE told the social worker that this was the last time that her mother had hit her so many times and so severely.

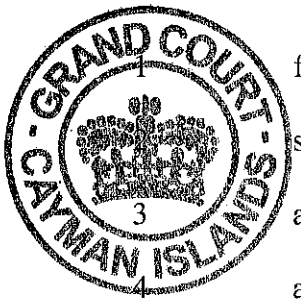
73. During the April interview, HE told the social worker about the 12th February incident. Initially HE had said that she and her mother had an argument, and when she turned away from her mother, her mother had pushed her from behind causing her to fall on the floor and bust her lip. However, during the April interview HE told the social worker that she did not fall from a push by the mother, but that the injury had been caused by the mother punching her in the face. It is significant to note that when the mother was asked about how HE received the injury, the mother had initially said she was unaware about how this could have happened.

74. It is important to note that the counselor indicated that the children had become wary about discussing what was happening in the family home with him, because previously they had not realised that he would pass the information on and that this would result that the adults would have to be questioned. The social worker indicated the children declined to speak with her for two and a half weeks. She said she became aware that the children were fearful that, if they continue to discuss these matters, their mother would find out and the consequences would follow. I am concerned that if HE and TE reside in the mother's property at this time this may hinder the investigation being carried out by the Department and the children's guardian, for the children may again be reticent about talking about life within that household.

75. As a consequence of these events, the social worker is concerned that the mother is placing her own emotional needs before the needs of the children. She reaches this conclusion as she believes the mother has a history of allowing her boyfriend back into the household despite the violent altercations between them, some of which HE has had to intervene in. She said this has put not only HE at particular risk of physical harm, but all of the children who witness an incident or who may be drawn into the same, at risk of of both physical and emotional harm.

76. The social worker contends that the nature of the relationship between HE and her mother is not good and is unhealthy, contending that there have been a number of violent disagreements within a relatively short period of time between them, in which the mother has caused physical harm to HE. The social worker has concerns about the mother's ability to properly care for the children due to the evidence leading her to believe that the mother is drinking excessive amounts of alcohol which leads the mother to be involved in violent altercations and HE having to take on some of the parenting roles in the household. The social worker also contends that the children have suffered emotional harm due to the mother's threats to them, and they are fearful of what she may do.

77. The mother, in her affidavit sworn on 30th April 2014, agrees that the description of the 17th April incident was generally an accurate account of what had happened. She says that the relationship with her boyfriend has since ended and that she wants nothing more to do with him. At the time of the hearing the mother had not applied



for an injunction restraining him from coming to the property. At the hearing the social worker indicated that there had been more than one incident with the boyfriend and yet, until this protective action was taken by the Department, the mother always allowed him back into the property. The social worker was concerned that this pattern would continue.

78. In her affidavit she said that she had not spoken to her boyfriend since the children had moved to the father's property. However, on the day of the hearing the applicant informed the Court that they had received information that she and her boyfriend had been seen together in public very recently. It would be inappropriate for me to make a finding about whether that actually happened at this hearing, especially having regard to the manner in which the information came to light. However, it requires investigation, for if it is right, it goes to the issue of whether the mother can genuinely prioritise the children's security above her own emotional needs. It was this development that led the Department to ask that JE remain with the father, at least until the 'report' is investigated.

79. In her affidavit the mother accepted that she and HE have arguments. She stated that these are caused by her trying to appropriately discipline and protect her child, not allowing HE to put herself in harm's way. Interestingly, in her affidavit the mother says that she had never been physically aggressive or violent to HE in the way that is described in the application.

80. As I have already indicated, the Court may at an interim hearing have regard to the evidence of a child when considering whether the threshold is made out. It is not appropriate for me to make final findings in relation to HE's allegations, but they were reports made on a number of occasions to a school counselor. HE intended them to be confidential and apparently did not wish them to put the mother in any trouble.

81. The mother's denial about the nature of her altercations with HE are concerning. The mother's denial about HE getting physically involved in the fracas on 17th March is also concerning. I say this, because in her affidavit, the mother relates that she and the children are "*very close and have a loving relationship*" and that they "*get on great*" together and "*have lots of fun together.*" She said they have a *"normal family life."* If she is right, it is most surprising and concerning that these serious reports are being made by HE to the school counselor and by HE and TE to the social worker that conflict with the mother's version of the events. It is not natural or healthy for a child to say that a parent is interacting with them in this way, either by laying on of hands or by permitting the children to be in the vicinity of incidents of violence involving a third party on more than one occasion.

82. I must consider if a child may suffer harm if made to return the household in which the child says that the care giving parent has been abusive to them and the parent denies that they been so, pending the full investigation of the allegations and the reason why the child is making them.

83. In her affidavit the mother explains that HE's injured lip was caused by her swinging the back of a hand towards HE and catching her on her lip. The mother said that the lip was not cut and did not swell up. However, both the school counselor and the social worker noted the injury on the lip.

84. The mother characterises the incidents as being a very small number of isolated incidents. However, I do not share the view that they are either a very small number or isolated. The allegations are of a number of incidents within a short period of time and are most concerning in nature. It does appear that the mother in her affidavit seeks to minimise the serious nature of the reports.

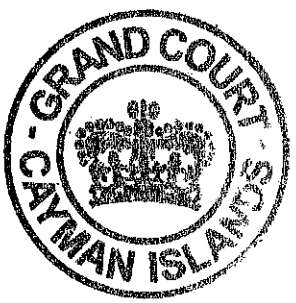
The Threshold Criteria

85. The reported incidents are disturbing. It is agreed that most of the incidents happened although the precise events may be disputed. It is agreed that there has been more than one violent incident between the mother and her boyfriend in the house. I am satisfied, from the reports of the counselor and the evidence of HE in particular, that there are reasonable grounds to believe that the circumstances, in respect to HE, in s.33(2) are made out. There is evidence that leads me to conclude that there are reasonable grounds to believe that this harm is both physical and emotional.

86. In relation to TE, it is clear that she has not been directly involved in any altercation between the mother and her boyfriend. It is clear that the mother has not excessively laid hands on her. However, at this stage, the fact that the boyfriend has been

permitted by the mother to return to the property after incidents of violence satisfies me that the reasonable grounds for believing are also made out in relation to likely physical and emotional significant harm. It appears that TE suffers from regular stomach aches and that she has nightmares in which she is being assaulted and in which she sees JE as an adult who acts very badly despite her efforts to convince him otherwise. The social worker is understandably concerned that these may well be caused by things that she is seeing within the household, things that she is seeing because of the mother's conduct in the household. It is interesting to note that TE comments that she regards HE as her primary carer and the person who takes on the responsibility of looking after her.

87. In relation to JE, it is clear that his mother loves him dearly and that she can look after his day to day needs. However, he was a witness to the 18th April incident in the kitchen. I am concerned, until there is greater clarification concerning the mother's ability to keep the boyfriend away from the property, from herself and from the children that there are reasonable grounds for believing there is a likelihood of JE suffering physical and emotional harm. I require her to seek a protection order preventing her boyfriend from coming to the property or having any contact with her wherever she may be. If this is done and thereafter she ensures that she does not facilitate any breaches of the terms of the order, she will be better placed to have JE return to live with her.



88. I am satisfied that the harm is attributable to the lack of care given to the children by the mother, which falls below what it would be reasonable to expect a parent to give.

The Welfare Checklist

89. Having reached this conclusion I then move on to consider the welfare checklist at found at s.33(3) of the Law.

90. Firstly, the wishes of the children. I am told that TE and HE are greatly attached to each other and that they would wish to live with each other. Ms. Court has indicated that the two girls have expressed concern about repercussions if they were to return to their mother's home at this time. It does appear that, at this time, they do not wish to do so. I am unable to determine what JE's wishes are, but I am satisfied at this time he would feel comfortable in either of his parents' homes.

91. Physical, educational and emotional needs. At this time, on the evidence before me, I have concerns about the mother meeting the children's physical and emotional needs and her ability to put those above her own emotional needs. However this view may change as the Guardian ad litem and the social worker progress their enquiries. I am satisfied that, for the interim, the father can meet these needs.

92. The likely effect on the children of the change of circumstances. I have considered that the status quo prior to the first emergency protection order was the children living with the mother and having regular contact with the father. Over the past two weeks

the children have lived with the father. The children appear to have coped well with their move to their father. There is evidence before the Court that HE and TE have concerns about moving back into their mother's property. At this time, it would not be in their interests for them to be made to move back to their mother's property. The position in relation to JE is being urgently reviewed by the social worker.

93. The children's age, sex and religious persuasion. I have regard to the fact that HE and TE are girls and they are residing with the father. I also have regard to JE's age. It is likely that having regard to his age and his bond with the mother, if the mother is able to satisfy the Court that she will ensure that her boyfriend will no longer be returning to the property or having any contact with her and/or the children, he could return to her care.

94. Any harm which the children are suffering or at risk of suffering, I have dealt with this when considering the threshold for making an interim supervision order.

95. How capable are each of the children's parents of meeting the children's needs. In relation to JE, subject to the mother excluding the boyfriend for the property, it may be that she will be better able to meet JE's needs. However, at this time I am satisfied that the father is in a better position in the interim to meet the needs of HE and TE.

No Order Principle – Supervision and Residence Orders

96. I have considered the range of powers available to the Court as well is the no order principle set out at s.3(5) of the Law. I am of the view that the making of orders in relation to each child is better than making no orders at all. This is a case in which I am satisfied that a supervision order is required to ensure the safety of the children and to enable the Department to actively intervene and assist the family.

97. I am satisfied that residence orders in relation to each child should be made in favour of the father, this is particularly so in relation to HE, as it is unclear whether he has parental responsibility for her. He is a family member, he has parental responsibility in relation to the other children and whilst there exists real concerns about the mother's ability to safeguard the children from harm, it is appropriate that they be placed with him. This is best done by there being a residence order. In these circumstances, if a residence order is made during the public law proceedings, the Court must make a supervision order.

Contact Orders

98. In relation to contact, having considered the welfare checklist, I am satisfied that contact should take place between all three children and their mother. In relation to JE that should take place after school every day between 3:00 p.m. to 5:30 p.m. The mother may collect JE from and then return him to the school. If possible arrangements should be made for contact on at least one day over the weekend. There may be a variation in these arrangements, including increased contact, if all parties agree. I would like the contact and supervision order to be reviewed and therefore the

supervision order will be for three weeks rather than the possible maximum of eight week permitted.

99. In relation to HE and TE, in light of the evidence of the social worker concerning the children's wishes for it to be supervised and about the problems at a recent supervised visit, I order supervised contact. It should take place at least twice a week but should be under constant review to see if that can be increased. If all the parties agree, the Guardian being well placed to share the wishes of the girls about contact, the contact frequency can change as well as the need for supervision.

100. I do not have the jurisdiction to order the Department to supervise contact. I can only do that under s.18 of the Law by way of a family assistance order. I cannot impose obligations or conditions upon persons other than those referred to in s.13(7)(b) of the Law, and the Department does not fall within that category.[29] However, the social worker has very kindly offered to facilitate supervised contact on a voluntary basis, and I note that the supervision will be undertaken on that basis by the Department.

Supervision Orders

101. Accordingly, bearing in mind all the relevant factors set out in the welfare checklist s.3(3), and the threshold criteria having been met, I make a three-week supervision order for JE and I make an eight-week supervision order for TE and HE. Regrettably as the matter concluded at 7:30 p.m., I was not in a position to give directions to

[29] See Leeds County Council v C [1993] 1 FLR 269.

timetable to the next hearing. The parties are to consult with each other to ensure that the two hearings dates are fixed to be heard within the requisite time frame.

The Order

102. Accordingly I order:

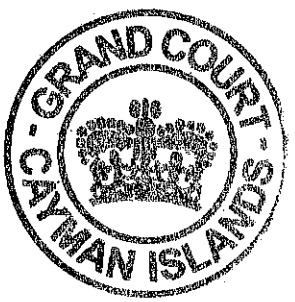
(i) an interim supervision order be made to the Department in relation to all three children. The order for JE to last for 21 days, the orders for HE and TE to last for two months.

(ii) an interim residence order be granted in favour of the father in relation to all three children.

(iii) JE to have contact with his mother as set out in paragraph 98 above.

(iv) HE and TE to have contact with their mother as set out in paragraph 99 above.

Dated this 27th day of May 2014.



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.