

This Ruling was delivered in private, but the Judge hereby gives leave for it to be published.

The Ruling 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 Ruling itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.

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

CAUSE NO. FAM 167 of 2016

IN THE MATTER OF EE and PE

Appearances: Mr. David Holland of Samson & McGrath for the father,
ISE.

Before: Hon. Justice Richard Williams

Heard: 1 September 2016

**Transcript of Ex
Tempore Ruling provided:** 2 September 2016



HEADNOTE

Family Law – Children – Wrongful removal by mother to the USA – Ex parte application for specific issue and prohibited steps order – Re F (A Child) [2014] EWCA Civ 789 Munby J. stating that a court should not make a declaration about a child's habitual residence on an ex parte basis - Duty of applicant to provide full and frank disclosure when making ex parte applications.

EX-TEMPORE RULING

The Background

1. This ex parte application comes before me this afternoon in my capacity as the Judge responsible for case management in the Family Division of the Grand Court



and also due to my being the Hague Convention Network Judge for the Cayman Islands.

2. Due to the requirement for a prompt decision to be made, I give this in the form of an Ex-Tempore Ruling. A copy of this oral Ruling will be transcribed and copies provided to the parties tomorrow. Additionally, I permit copies of the Ruling to be provided to the parties' attorneys and the Court in any related proceedings that may be brought in the United States of America and to the Central Authorities of the Cayman Islands and the United States involved in any Hague Convention procedure concerning the relevant children.

3. This matter concerns twin males EE and PE born on 18 April 2013 and who are, therefore, 3 years old. The children are US nationals and have resided in the Cayman Islands since January 2016 until the mother removed them to the maternal grandfather's home in New Orleans in the United States of America without the father's consent on 26 August 2016. Before residing in Cayman the family lived in in Russia for three years and prior to that in Boston for five years. The twins' parents were married on 1 December 2007.

4. ISE, the twins' father, is a US national. SOE, their mother, is also a US national. The father is a Dean at UCCI and he is a therefore a Government employee with his wife and children as his dependents for immigration purposes.

The Application

5. The father seeks orders as a consequence of the alleged wrongful removal of the twins to the USA by the mother. The particulars of and the factual basis for the application are set out in the father's C1 application form. The father has signed the statement of truth found at the foot of the C1 application form.



6. At paragraph 7 of the C1 form the father sets out the reasons why he is making the application. He states that when he returned home from work on Friday, 26 August 2016 he found that the children and his wife were not there. At around 8:45 PM he received a WhatsApp message from the mother saying that she and the children had left to visit family in New Orleans and that they would be back within a week. The children were due to attend school on 29 August 2016 and the father states that the wife had sent a message to the school on 27 August 2016 saying that the children had to leave Cayman due to a family emergency and she was not sure when they would be returning.

7. In paragraph 7 the father also says that he had no idea that the mother was intending to take the children to the United States. He says that, due to the limited contact that he has been able to have with her since she left, he is very concerned that she and the children may not return to the Cayman Islands. He states that the wife has not shown him any planned return travel tickets. The father says that the mother refuses to discuss matters in any detail with him over the phone, but has



mentioned that she wants to start a new life in the United States. He is also concerned because the mother in recent messages seems to be saying that she is afraid of him and makes false allegations that he has assaulted her. He asserts that she is the one that has assaulted him in the past.

8. In the C1 Form the father seeks (i) a declaration of habitual residence of the twins; (ii) an order for the immediate return of the twins to the jurisdiction; (iii) an order for disclosure of the twins' whereabouts; and (iv) a prohibited steps order to prevent the removal of the twins from the jurisdiction following their return, especially as under newly adopted procedures any such order has to be registered with the Immigration Department. The father no longer seeks an order for the disclosure of the twins' whereabouts as he is satisfied that they are at the paternal grandfather's home in New Orleans.

9. Ex-parte orders of this nature are draconian and are ordinarily made only in exceptional circumstances, based on sufficient evidence filed by the Applicant. A determination is made by the Judge based on the evidence placed before him by an applicant in the absence of any representations from the other party. Therefore, an applicant has a clear duty to assist the Judge and provide the Court with full and frank disclosure of the evidence, in other words, he has a high duty of candour. A failure to do so would ordinarily be grounds for a discharge of the order. An applicant at an ex parte hearing should, if aware of it, outline to the



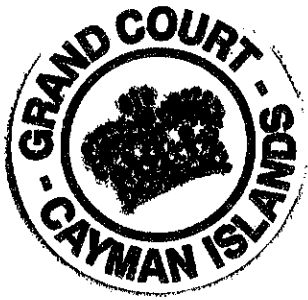
Judge any defence the respondent would likely argue if she had been in attendance. For example, if the father had knowledge that the mother intended to return the twins to the Cayman Islands. I note that he contends that initially she stated that she only intended to be away for a week, until tomorrow, but the father has not been shown any flight details and he states that the mother appears to now be saying that she may not return.

10. When I today consider the father's ex parte application before me I am acutely aware of the obligation placed upon the applying party and the Court at such hearings. Mostyn J. in *UL v BK [2013]* EWHC 1735 (Fam) sets out his concerns about the overuse of ex-parte applications and the duty placed on the applying party. Although that is a case dealing with freezing injunctions made within divorce proceedings, the general principles arising out of his review of the case law are insightful when considering Children Law applications.

Habitual Residence

11. I have in the past made ex parte declarations as to habitual residence in wrongful removal cases. I set out my review of the case law in my decision in *CMS v RGS* FAM 177 of 2013. However, there has been a recent change of approach to habitual residence due to the Supreme Court decision in *RE B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4.

12. Today is not the time to consider *Re B* or to make any declaration in relation to habitual residence. In *Re F (A Child)* [2014] EWCA Civ 789 the Court of Appeal was concerned with an appeal against a finding that a child was habitually resident in England and Wales at the date that the court became seized with care proceedings. Munby P., giving the leading judgment, stated that although it was imperative that the issue of jurisdiction was addressed as early as possible in the proceedings, it was also imperative that it was dealt with in a procedurally appropriate manner. Munby P. made it very clear that a court should not declare a child to be habitually resident on an ex parte basis. Munby P stated at paragraph 12(i) that:



"While it is now possible to make an interim declaration, a declaration made on a 'without notice' application is valueless, potentially misleading and should accordingly never be granted: see St George's Healthcare NHS Trust v S, R v Collins and Others ex p S [1999] Fam 26."

13. Munby P. went on to say at paragraph 12 (ii):

"The court cannot come to any final determination as to habitual residence until a proper opportunity has been given to all relevant parties to adduce evidence and make submissions. If they choose not to avail themselves of the opportunity then that, of course, is a matter for them, though it is important to bear in mind that a declaration cannot be made by default, concession or agreement, but only if the court is satisfied by evidence: see Wallersteiner v Moir [1974] 1 WLR 991."

14. Having regard to the approach of Munby P., it would not be appropriate for me to make an ex-parte declaration. Munby P. stated that there may be occasions when it is necessary to address the issue before there has been an opportunity for proper investigation and determination and for an interim indication to be given in a recital to any order. On the limited evidence before me I do not feel it appropriate or necessary to place a recital in my order along the lines of “upon it provisionally appearing that the child is habitually resident ...” I note that this is a family which has resided in the Cayman Islands only since January 2016.



15. Even though the mother has parental responsibility, she is not able to take unilateral action to remove the twins from the Cayman Islands. I am satisfied, on the balance of probabilities based on the limited evidence before me, that the mother has wrongfully removed the twins from the Cayman Islands in breach of the custody rights attributed to the father who also has parental responsibility. Accordingly, I make a specific issue order requiring the mother to return the twins to the jurisdiction within two days of personal service of this order upon her or by any other date agreed by the father in writing. A penal notice is attached to this specific issue order.

16. I make a prohibited steps order, which upon the twins' return to the jurisdiction, prohibits anybody from removing them from the jurisdiction without an order of



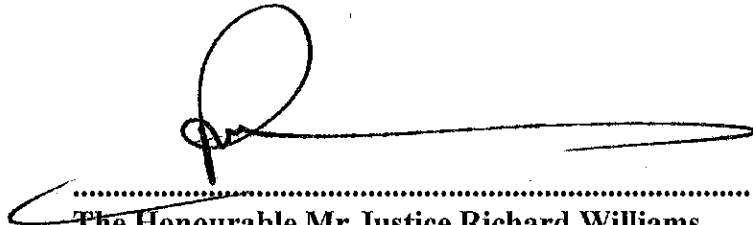
the Court. A penal notice addressed to both parties is attached to this part of the order.

17. When considering whether to make the prohibited steps order and the specific issue order, I have considered the contents of the welfare checklist set out in s.3(3) of the Children Law (2012 Revision).
18. Having regard to all of the circumstances of this case, including the fact that it is a wrongful removal case, I am satisfied that the aforementioned s.10 orders are required to give certainty by enabling a proper investigation and decision being made in the Cayman Islands which would be in the best interests of the twins, which are paramount. I have considered the no order principle contained in s.3(5) of the Children Law (2012 Revision).
19. I give leave to the mother to apply to vary or discharge these orders on 48 hours' notice (excluding weekends and public holidays) to the father. The mother must personally attend the hearing of any application she makes.

Footnote

20. If the mother fails to return the twins then the father should approach the Central Authority for the Cayman Islands under the Hague Convention on the Civil Aspects of International Child Abduction ("The Convention"). The Central

Authority will likely contact her counterpart in the United States and hopefully submit a formal written "Application for Assistance under the Hague Convention on Child Abduction" as well as a factual background document signed by the father. Any such application would be made by the Central Authority pursuant to Article 8 of the Convention on the basis that that the twins had been removed by the mother in breach of custody rights in accordance with Article 3.



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



This Ruling was delivered in private, but the Judge hereby gives leave for it to be published.

The Ruling 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 Ruling 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.