

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

3
4

CAUSE NO. FAM 163 of 2013

5 **IN THE MATTER OF AF**

6

7 **Appearances:** Mr Connor Fee of Sampson and McGrath for ADF

8

9 **Before:** Hon. Justice Richard Williams

10

11 **Heard:** 29 July 2014

12

13

14

15

EX- TEMPORE JUDGMENT

16

17 **The parties and the applications**

18 1. This matter comes before me in my capacity as the judge responsible for the
19 Family Division of the Grand Court and also due to my being the Hague
20 Convention Network Judge for the Cayman Islands.

21

22 2. Due to the requirement for a prompt decision to be made, I give this in the form of
23 an ex tempore judgment. A copy of this oral ruling will be transcribed and copies
24 provided to the parties. Additionally, I permit copies of the judgment to be
25 provided to the parties' attorneys and the Court in any related proceedings that
26 may be brought in the United Kingdom and to the Central Authorities of the



1 Cayman Islands and the United Kingdom involved in any Hague Convention
2 procedure concerning the relevant child.

3

4 3. This matter concerns AF (female), born on 22 February 2013 and who is,
5 therefore, aged 17 months. AF is a Caymanian national and has resided in the
6 Islands until the mother removed her on or around 8 July 2014. Her parents are
7 unmarried. ADF, her father, is a Caymanian national and SM, the mother, is also a
8 Caymanian national, but she may also hold a United Kingdom passport. The father
9 states that the mother had lived in England for five years prior to AF's birth and
10 that she has a 5 or 6 year old child who was born in England and whose father is
11 English.

12

13 4. Under the Children Law (2012 Revision) ("The Law") the birth mother always
14 has parental responsibility for the child. Pursuant to section 4 (2) (b) (i) of the Law
15 the father has parental responsibility for AF as he, along with the mother,
16 registered her birth.

17

18 5. The father seeks orders as a consequence of the alleged wrongful removal and
19 retention of AF in the United Kingdom since 8 July 2014. The application is
20 brought in the existing Children Law proceedings. The particulars of and the
21 factual basis for the application are set out in the father's C3 Form and his affidavit
22 sworn on 29 July 2014, both of which been filed today. The father seeks orders for
23 (i) the immediate return of AF to the jurisdiction, (ii) a prohibited steps order to



1 thereafter prevent the removal of the AF from the jurisdiction, (iii) an interim
2 residence order in his favour and (iv) the suspension of the consent child
3 maintenance order made by this Court on 21 January 2014. The father also seeks a
4 declaration that AF is habitually resident in the Cayman Islands and that she has
5 been wrongfully removed by the mother, without his knowledge or consent.

6
7 6. Ex-parte orders of this nature are Draconian and are ordinarily made only in
8 exceptional circumstances, based on sufficient evidence filed by the Applicant. A
9 determination is made by the Judge based on the evidence placed before him by an
10 applicant in the absence of any representations from the other party. Therefore, an
11 applicant has a clear duty to assist the Judge and provide the Court with full and
12 frank disclosure of the evidence, in other words, he has a high duty of candour. A
13 failure to do so would ordinarily be grounds for a discharge of the order. An
14 applicant at an ex parte hearing should, if aware of it, outline to the Judge any
15 defence the respondent would likely argue if they had been in attendance. For
16 example, if the father had knowledge that the mother intended to return AF to the
17 Cayman Islands.

18
19 7. When I today consider the father's ex parte application before me I am acutely
20 aware of the obligation placed upon the applying party and the Court at such
21 hearings. Mostyn J. in *UL v BK [2013] EWHC 1735 (Fam)* sets out his concerns
22 about the overuse of ex-parte applications and the duty placed on the applying



1 party. Although that is a case dealing with freezing injunctions made within
2 divorce proceedings, the general principles arising out of his review of the case
3 law are insightful when considering Children Law applications.

4

5 **Background**

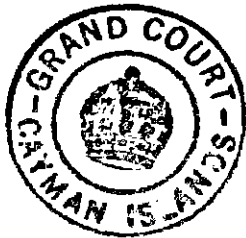
6

7 8. On 13 August 2013 the father filed his C1 Form seeking a contact order and
8 “*joint custody*” in relation to AF. In the application form he noted that it had been
9 agreed between the parents that AF would spend one day a week with him. In the
10 form he stated that the mother stopped allowing these visits because she did not
11 want his girlfriend around AF. In the application he expressed a willingness to
12 attend mediation.

13

14 9. His application came before me on 16 September 2013 for a first appointment
15 hearing. To their credit, the parties were able to reach a consent order, whereby AF
16 was to have contact with the father every Sunday between 10am to 5pm. It was
17 agreed that the father would pay on the first day of each month \$300 child
18 maintenance until AF reached the age of 18 or ceased full-time education (up to
19 the age of 21) whichever is the later. It was also agreed that the parties would
20 equally share any medical, optical and dental expenses not covered by the mother’s
21 family health insurance policy.

22

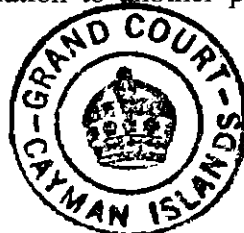


1 10. My notes from the hearing reflect that there was an evident communication
2 problem between the parties. The mother expressed some issues that she had in
3 relation to the father's girlfriend, with whom he cohabited. The notes reflect that it
4 was agreed that the father would afford the mother an opportunity to visit his new
5 premises and to meet with his cohabitee.

6
7 11. On 23 December 2013 the father filed a Form C3 in which he contended that the
8 mother was breaching the contact order by preventing contact taking place. He was
9 seeking the Court's assistance to ensure compliance with the court contact order.

10
11 12. That application came before me on 21 January 2014. My notes from that hearing
12 reflect that the mother was contending that the father had moved to a new property
13 without notifying her where he was living and that he had failed to introduce her to
14 his cohabitee. The father contended that the mother had unilaterally ceased contact
15 and had failed to take up the opportunity to meet his cohabitee, who he said had
16 now become his wife. Thankfully, the parties were able to agree that the previous
17 contact order should continue and that there should be such further contact as may
18 be agreed between the parties.

19
20 13. My notes from the hearing record that the mother raised concerns about the father
21 not complying with the maintenance part of the order. The Court explained to the
22 parties that they must fully comply with each part of the order and that non-
23 compliance by one party in relation to one part of the order was not an excuse for
24 non-compliance by the other party in relation to another part of the order. The



1 Court also explained the importance of contact for AF. Without a review of the
2 parties' means, the parties agreed that the maintenance order would be increased to
3 \$450 per month with the mother preserving her position in relation this amount.

4
5 14. On 14 July 2014 the father and his wife contacted the Court, as he was concerned
6 that the mother may have removed AF from the jurisdiction. He was informed by
7 the Family Proceedings Unit that he could make an application, but it would be
8 preferable if he urgently applied for legal aid which would enable him to make the
9 appropriate application.

10
11 15. The father has today his Form C3. In his supporting affidavit he states that the
12 mother, on or around 8 July 2014, removed AF from the Cayman Islands to the
13 United Kingdom without his knowledge or agreement. He believes that the mother
14 has no intention to return AF to the jurisdiction. He says that the mother had made
15 threats in the past that she would remove AF to the United Kingdom. He says that
16 he has no idea where AF is now located or who she is staying with. He states that
17 he has no way of contacting the mother.

18
19 16. In his affidavit of the father relays that on 13 July 2014 he attended at the
20 mother's property to collect the child for the court ordered contact. He said when
21 he arrived he telephoned the mother and that his call went straight to her
22 voicemail. He said that he then made an answered call to the maternal
23 grandmother, who also resides in the property. He looked through the window of



1 the property and noted that the mother's room appeared to be completely empty,
2 giving him the impression that she had moved out.

3
4 17. Contact was then successfully made with the maternal grandmother. The maternal
5 grandmother told the father's wife that the mother "*went away*" with AF. When
6 asked where she had gone the maternal grandmother stated "*I'm not allowed to tell*
7 *you*" and added that she did not know if and when they were coming back to the
8 Cayman Islands.

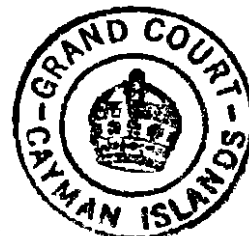
9
10 18. The father then contacted the police and he gave a statement to Officer Ricardo
11 Lewis. The officer contacted the maternal grandmother. Most regrettably, the
12 maternal grandmother refused to provide any information about where AF have
13 been taken or whether she would be coming back to the Cayman Islands. If the
14 police have reasonable grounds for believing that the child has been abducted, may
15 wish to carefully consider whether there are reasonable grounds for believing that
16 the maternal grandmother is an accomplice.

17
18 19. The father has since found out that the mother has left her job with one of the
19 'high street' banks in the Cayman Islands. He has received some limited
20 information from the mother's sister that the mother is living at an undisclosed
21 address in south London.

22

23

24



1 **Habitual Residence**

2 20. I am aware of the following case law. Due to the urgency of the situation, I herein
3 set out my review of the case law in my recent decision in **CMS v RGS** Fam 177 of
4 2013. Therein I stated that it is the habitual residence immediately before a
5 wrongful removal or retention that is the determining factor when considering
6 habitual residence: **RE S (A Minor) (Abduction)** [1991] 2 FLR 1 & **Re F (Minors)**
7 **(Abduction: Habitual Residence)** [1992] 2 FCR 595.

8
9 21. The legal principles in relation to habitual residence are helpfully set out by Mrs.
10 Justice Pauffley in **FT and NT (Children), Re** [2013] EWHC 850 (Fam) when she
11 states that:

12 *“2. Habitual residence is a question of fact to be determined by the*
13 *trial judge. He or she should normally stand back from the*
14 *evidence and take a general view, rather than conducting a*
15 *microscopic search. An appreciable period of time and a settled*
16 *intention will be necessary to enable a person to become habitually*
17 *resident in country B as opposed to country A.*

18 *3. The requested period of time is not fixed and will depend upon*
19 *the facts of each case. Bringing possessions, doing everything to*
20 *establish residence before coming, having a right of abode,*
21 *seeking to bring family, durable ties with country of residence or*
22 *intended residence and many other factors have to be taken into*
23 *account. Habitual residence may be acquired despite the fact that*
24 *a move may only have been temporary or on a trial basis. A month*
25 *has been held to be ‘an appreciable period of time’ though that has*
26 *been described as ‘the high watermark’ in a case where the Court*



1 of Appeal upheld the trial judge's finding that six weeks was
2 sufficient to result in the acquisition of a new habitual residence.

3 4. In relation to 'settled intention' it has been said that there must
4 be a degree of settled purpose. The purpose may be one or there
5 may be several. It may be specific or general.

6 5. The habitual residence of young children of married parents all
7 living together as a family is the same as the habitual residence of
8 the parents themselves and neither parent can change it without
9 express and tacit consent of the other or order of the court."¹

10
11
12 22. Millett L.J. stated in *Re M (Abduction: Habitual Residence)* (1996)1 FLR 887:

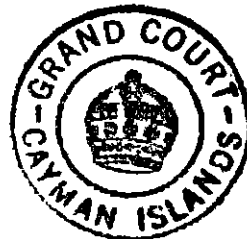
13 "Where both parents have parental responsibility, neither of them
14 can unilaterally change the habitual residence of the child
15 wrongfully and in breach of the other party's rights: *Re J.* at 572
16 and 449 respectively per Lord Donaldson, MR."

17
18 23. In the Court of Appeal decision of *ZA & Anor v NA* [2012] EWCA Civ 13

19 Patten L.J. said at paragraph 52:

20 "... Whether one treats both parents or only the mother as having
21 the care and control of the children, it is well established that the
22 habitual residence of the children cannot be changed by the
23 unilateral action of one parent, which is not consented to, or
24 acquiesced in by the other. This would be a charter for abduction.
25 The forced retention of the children in Pakistan cannot therefore
26 found the basis of a claim that by passage of time and their

¹ My emphasis



1 *inevitable involvement in family life and education in Pakistan the*
2 *older children have ceased to be habitually resident in England.”*
3

4 24. Even though the mother has parental responsibility, she is not able to take
5 unilateral action to remove AF from the Cayman Islands. AF has resided in the
6 Cayman Islands throughout her life. It is clear, from an objective view of the facts
7 of this case, that before the mother’s unilateral actions in relation to AF that she
8 was and is habitually resident in the Cayman Islands.

9
10 25. AF’s habitual residence cannot change unless all of those with parental
11 responsibility create a change, for instance that they arranged for the child to live
12 in settled circumstances in the United Kingdom, or for example themselves
13 moving to the United Kingdom for a settled purpose. What is important is that they
14 changed the habitual residence voluntarily. It is important not to elevate the test
15 into a domicile or quasi-domicile test because habitual residence is a question of
16 fact. Consent, agreement, acquiescence, acceptance of each of those with parental
17 responsibility is crucial because of the requirement that residence must be
18 “voluntary” to be habitual. If it is not voluntary, it cannot be said to have been
19 settled. Accordingly, admittedly only on the evidence currently before me and
20 without having the benefit of hearing from the mother, I find that AF remains
21 habitually resident in the Cayman Islands.



1 26. I am satisfied that the mother has wrongfully removed AF from the Cayman
2 Islands in breach of the custody rights attributed to the father who has parental
3 responsibility.

4
5 27. I am also satisfied that there is reason to believe that the maternal grandmother
6 may be able to provide information which may lead to the location of AF.
7 Although no written application has been made I have brought the decision of **HM**
8 **(an Adult) PM v KH & HM (by her litigation friend the Official Solicitor) & the**
9 **States of Guernsey** [2010] EWHC 870 (Fam) to counsel's attention this afternoon.
10 At paragraph 36 Munby LJ states that:

11
12 *"It has long been recognised that, apart from any statutory jurisdiction, the*
13 *Family Division has an inherent jurisdiction to make orders directed to third*
14 *parties who there is reason to believe may be able to provide information which*
15 *may lead to the location of a missing child."*

16

17 Munby LJ went on to say that:

18 *"In appropriate cases, though this is usually confined to relatives, friends and*
19 *associates, the court can require the attendance at court to give oral evidence of*
20 *anyone who there is reason to believe may be able to provide relevant information.*
21 *Compliance with such orders can, where appropriate, be enforced by endorsing*
22 *the order with a penal notice and then, in the event of non – compliance, issuing a*
23 *bench warrant for the arrest and compulsory production in court of the defaulter."*

1 28. Being aware of this case and recognising the Court's powers under the inherent
2 jurisdiction, the father invited the Court to make an order for the maternal
3 grandmother to attend before the Court and to provide any relevant information
4 that she is aware of that will assist in locating the whereabouts of AF.

5

6 29. I am satisfied that it would be appropriate to make that order. I direct that the
7 maternal grandmother, whose name should be placed in the order (but whose
8 name is left out of this anonymised ruling), must attend at Court at 9 AM on
9 Tuesday, 5 August 2014. I attach a penal notice to that direction. If in the interim
10 the maternal grandmother provides sufficient disclosure concerning AF's
11 whereabouts to the attorneys representing the father and/or the Central Authority
12 for the Cayman Islands, the father can apply for the hearing to be vacated
13 administratively. If it is vacated administratively they must provide a draft order
14 which must be served on the maternal grandmother informing her that her
15 attendance is no longer required

16

17 **Orders**

18 30. Accordingly, I make a specific issue order requiring the mother to return AF
19 immediately to the jurisdiction. A penal notice is attached to this order.

20



1 31. I make a prohibited steps order, which upon AF's return to the jurisdiction,
2 prohibits anybody from removing her from the jurisdiction without an order of the
3 Court. A penal notice addressed to both parties is attached to this part of the order.

4
5 32. I suspend the order requiring the father to make child maintenance payments of
6 \$450 into the Court Funds Office until further order.

7
8 33. I have carefully considered the father's application for an ex parte residence
9 order. When doing so I have regard to the paramountcy of AF's welfare and I
10 have considered the welfare checklist. For the purpose of this ex tempore ruling, I
11 do not intend to set out the welfare checklist, but I do not feel it appropriate in the
12 circumstances to make an ex parte residence order in relation to AF paying
13 particular regard to her very young age and the fact that she has always resided
14 with the mother. I think it is fair to say that the father understands the Court's
15 concerns about making such an order and has not forcefully pursued that part of
16 his application today.

17 Dated this 29th day of July 2014.

18

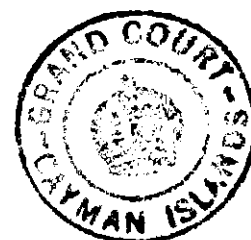
19

20 
21 **The Honourable Mr Justice Richard Williams**
22 **JUDGE OF THE GRAND COURT**

23

24 The judgment was delivered in private, but the Judge hereby gives leave for it to be
25 published.

26



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

