

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 FAMILY DIVISION

3 CAUSE NO. FAM 3 OF 2010

4

5 BETWEEN:



AP

PETITIONER

6

7 AND:

AP

RESPONDENT

8

9 **Appearances:** Mr. David Holland of Samson & McGrath for the Petitioner

10 Mr. John Meghoo for the Respondent

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

12 **Heard:** 25<sup>th</sup> November 2013 and 21<sup>st</sup> February 2014

13 **Written submissions:** 28<sup>th</sup> February 2014

14 **Draft Circulated:** 22<sup>nd</sup> April 2014

15 **Delivered Down:** 5<sup>th</sup> May 2014

16

17 **HEADNOTE**

18

19 *Children Law (2012 Revision) – Variation order providing for shared custody -*

20 *Residence application - Shared Residence – Apportioning time child spends with each*

21 *parent.*

22



## JUDGMENT

1

### 2 **Background**

3 1. This matter concerns A, a young boy born on 11<sup>th</sup> December 2005 and who is,  
4 therefore, just over 8 years old. I shall refer to him as A in this judgment. The  
5 Respondent mother (“M”) is a 40 year old Caymanian national and the Petitioner  
6 father (“F”), who has Cayman status, is aged 41. Both parents reside in the  
7 Cayman Islands and have parental responsibility in relation to A as he is a child of  
8 the marriage. I shall refer to the parents as M and F and to the child as A. The  
9 parents were married on 25<sup>th</sup> April 1998.

10

11 2. F works in the banking industry, having initially worked in the Cayman Islands as  
12 a teacher and administrator for Cayman Kindergarten. M’s primary trade was in  
13 hairdressing, but she has very recently taken up employment, on probation, in one  
14 of the large hotels operating in Grand Cayman.

15

16 3. F petitioned for divorce on 11<sup>th</sup> January 2010. M cross-petitioned for divorce on  
17 24<sup>th</sup> February 2010. A sensible compromise was reached by the parties, resulting  
18 in F withdrawing his Petition. M’s Cross-Petition<sup>1</sup> was proved on 22<sup>nd</sup> February  
19 2011. The Certificate of Dissolution of the Marriage was granted on 24<sup>th</sup> February  
20 2011.

21

---

<sup>1</sup> Save for paragraphs 19, 21, 22, 24 and 25 of the Cross-Petition.

1 4. On 9<sup>th</sup> February 2011 the parties commendably agreed a comprehensive consent  
2 order dealing with all ancillary relief financial and children arrangements. It  
3 appears that the Court approved the order administratively, no affidavit evidence  
4 having been filed by either party or Court Welfare Officer's Report obtained. The  
5 following child related orders were set out in the consent order:

6 (i) the parties to share custody of A;

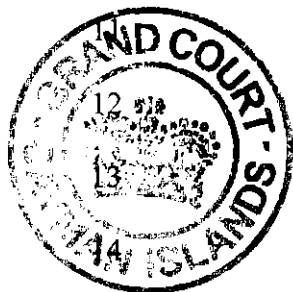
7 (ii) A to live with M each Monday, Tuesday and Wednesday and with F each  
8 Thursday, Friday and Saturday. A to alternate each Sunday between his  
9 parents;

10 (iii) the pattern in (ii) above to be repeated during school holidays, each parent  
11 to be entitled to take A on holiday out of the jurisdiction of up to 2 weeks  
12 at any one time, subject to any time being made up to the other party and  
13 subject to the provision to the other party of the full travel itinerary  
14 including dates of travel, accommodation details and a contact telephone  
15 number;

16 (iv) A to stay alternate public holidays between M and F;

17 (v) these living arrangements are subject to future variation agreed between  
18 the parties or, in the absence of agreement, by court order with both  
19 parties having liberty to apply;

20 (vi) any future disagreement in relation to issues in relation to A to be  
21 mediated in the first instance by a mediator agreed by the parties, or in  
22 absence of agreement by the Court;



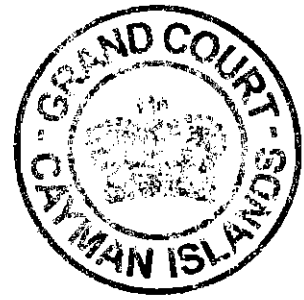


- 1 (vii) F to pay A's school fees. The cost of any extra/curricular all miscellaneous  
2 activities to be divided equally between the parents;
- 3 (viii) F to continue to pay A's medical, dental and optical insurance until A  
4 reaches the age of 21 or he is no longer in full-time education whichever  
5 event is the later; and
- 6 (ix) F to pay \$500 per month to M for the purpose of engaging a helper to  
7 assist in the care of A. This payment is to be reviewed every two years to  
8 determine if a helper is still required.
- 9

10 **Father's Application and position**

11 5. F's application is brought by means of his summons dated 27<sup>th</sup> June 2013. In the  
12 Summons he seeks the following orders :

- 13 (i) a variation of paragraph 2(ii) above, namely to grant F "*sole care and*  
14 *control*" of A "*so that the child shall reside primarily with*" him and have  
15 "*access*" with M;
- 16 (ii) a variation of paragraph 2(iii) above by means of a prohibited steps order  
17 preventing M from removing the child from the Cayman Islands without  
18 F's consent or an order of the Court;
- 19 (iii) that paragraph 2(v) above, which required there to initially be mediation to  
20 attempt to resolve disputes concerning A, be discharged; and
- 21 (iv) that paragraph 2(ix) above, which required F to make a payment to M  
22 towards the cost of her employing a helper, be discharged.



1 6. F seeks an order that:

2 (i) A primarily reside with him;

3 (ii) if M were able to take Saturday, Sunday and Monday as leave from work,  
4 A would spend alternate weekends from Friday after school to Monday at  
5 6:30 PM with M;

6 (iii) A spend either Tuesday or Wednesday afternoon with M from after school  
7 until 6:30 PM; and

8 (iv) A spend equal time with each parent during his school holidays, dates to  
9 be worked out having regard to the parties' respective work schedules.

10

11 7. F contends that:

12 (i) M should ensure that A's regular weekend sporting activities are  
13 maintained when he is with her;

14 (ii) priority should be given at all times to either parent over third-party  
15 caregivers; and

16 (iii) M should provide F with details of her work shift schedule in advance on a  
17 weekly/monthly basis.

18

19 8. In his written closing submissions, Mr. Holland states that:

20 *"F is much less concerned about the label attached to any care*  
21 *arrangement than he is with the actual structure of the*  
22 *arrangement itself..."*

23

1 This is a sensible position for him to take. It is one which fortifies my view that  
2 the making of a shared residence order, for reasons I will elaborate upon later on  
3 herein, is in A's best interests especially having regard to the decision I made  
4 concerning the time to be spent with each parent.



5  
6 **Mother's position**

7 9. M contends that the consent order made on 11<sup>th</sup> February 2011 should not be  
8 varied, and as a consequence the shared care arrangements set out therein should  
9 continue.<sup>2</sup>

10  
11 **The hearing**

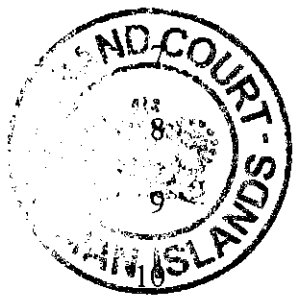
12 10. The hearing of this matter was spread over two days. The hearing commenced on  
13 25<sup>th</sup> November 2013 and the evidence concluded on 21<sup>st</sup> February 2014. The  
14 Court Welfare Officer, Ms. Cindy Dilbert, submitted her initial report on 19<sup>th</sup>  
15 August 2013 followed by a further report on 25<sup>th</sup> October 2013. Ms. Dilbert  
16 submitted an addendum report on 31<sup>st</sup> December 2013 following a request by the  
17 Court for her to make enquiries in relation to F's partner and into the effect, if  
18 any, of A's current living arrangements on his education. On 21<sup>st</sup> February 2014  
19 the matter was adjourned for this reserved judgment to be delivered following the  
20 provision of the parties' written closing submissions directed to be filed by 28<sup>th</sup> of  
21 February 2014.

---

<sup>2</sup> Paragraph 8 written submissions made on behalf of M dated 21<sup>st</sup> February 2014.

1 **Factual background and contentions**

2 11. I will now go on to deal with the relevant background. I have regard to the  
3 approach of *Thorpe LJ in Re F (Shared Residence Order)* [2003] EWCA Civ  
4 592, [2003] 2 FLR 397, namely that one of the functions of the judge is to make  
5 findings and that another function is to be selective and to make findings that are  
6 relevant and necessary for the disposal of the issue. When considering what  
orders would be in the best interest of A at this time, I am not required to make  
findings on every area or issue that has been presented to me for determination or  
which have become apparent during the hearing. I must determine the factual  
issues that have implications for the decisions that I have to take in relation to A.



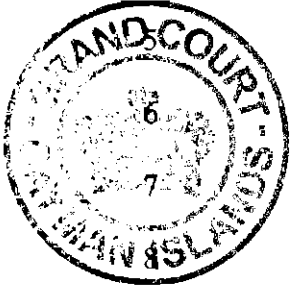
11

12 12. When I consider the background I have regard to the fact that A's welfare is my  
13 paramount consideration. As Lord Fraser said in *Gillick v West Norfolk and*  
14 *Wisbech Area Health Authority and Department of Health and Social Security*  
15 [1986] AC 112 at 170 :

16 *"...parental rights to control a child do not exist for the benefit of*  
17 *the parent. They exist for the benefit of the child and they are*  
18 *justified only in so far as they enable the parent to perform his*  
19 *duties towards the child."*

20

21 13. Following the divorce, F continued to reside in the former matrimonial home.  
22 Importantly, this property has been and remains a consistent and settled home  
23 environment for A. M concedes that A would view F's property as being his



1 home. The significance of this, when considering putting in place ongoing  
2 arrangements in the best interests of A, is elevated by the fact that M for a number  
3 of reasons, some of which have been beyond her control, has been unable to offer  
4 the same vital stability for him. I possess a degree of sympathy for the  
predicament that M has, particularly since the parties' separation, found herself in.  
Despite that, arising from her past issues, I still have some residual concerns  
moving forward in relation to M's proposals for her long term care arrangements  
for A. I do not have such concerns in relation to F. I share Ms. Dilbert's  
9 observation that A has had the most consistent relationship with F.

10  
11 14. F contends that, despite the terms of the 2011 consent order, A has spent most of  
12 the time under his care. F states that on average, from February 2011 to August –  
13 September 2011, A resided with him for five days a week and the balance with M.  
14 F stated that from late 2011 to March 2013, A was almost exclusively residing  
15 with him. F contended that this state of affairs had arisen due to the M's unsettled  
16 personal circumstances, as she had lived at seven or eight different  
17 accommodations during that 18 month period. F had been concerned that M's  
18 living arrangements at that time were not suitable and M had been unable to  
19 provide a "*safe, stable and structured environment*" for A.

20  
21 15. I note that for a three month period from December 2011 to February 2012, to F's  
22 credit, he permitted M to stay at his property after she had informed him that she



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

had nowhere else to live. M agrees that she moved back into F's property as she was "*in dire straits*." F stated that this arrangement came to an end when A, who had been left in the care of M, had been left alone at home when she was out delivering food to her boyfriend. The police were called and a report was filed. F also told the Court of the occasions that the police had to be called due to M's violent conduct towards F and others and also due to the fact that M was vulnerable to violence inflicted on her from her own boyfriend.

16. F told the Court that it was not until 11<sup>th</sup> March 2013 that M sought to revert to the care arrangements set out in the February 2011 order, seeking A to spend equal time with her each week. F contends that he suspects this was done in direct response to the birth of his daughter. F informed the Court that he opposed M's wishes, and that A did not want a return to the arrangements set out in the consent order. M disagreed, stating that A was never reluctant to return to the arrangement.

17. M informed the Court that she wished to revert to the arrangements ordered by the Court, as it became more difficult for her to spend time with A at the former matrimonial home. This is because, from June 2012, F's partner and her son ("E") moved into the property, a time when his partner was pregnant with F's child. M believed that F's partner was uncomfortable with M being present in the household when she was visiting A. M stated that F's partner had told F that she



was not happy with M visiting and she behaved in such a way that made it difficult for M to assist A with his homework at the property. M also stated that she became concerned by the reduction in A's living space caused by the additional persons moving into the household.

5

6 18. M stated that she was concerned after seeing E, in front of A, act discourteously  
7 towards the helper, fight with A and refuse to do his homework. She says that she  
8 was concerned as she was of the belief that E had displayed inappropriate  
9 sexualised behaviour towards A by showing him his penis. When examined by  
10 counsel for M, Ms. Dilbert gave the Court an insight into the inter-sibling  
11 relationship. She stated:

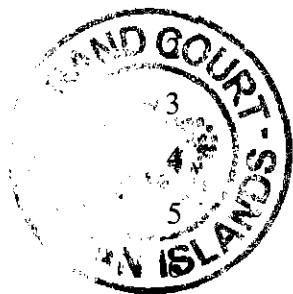
12 *"I see him with (E) and briefly with (C)<sup>3</sup> .... I saw him touch his*  
13 *sister's foot, it was affectionate. E returned after school activity*  
14 *with a helper.... He came in and they immediately started to chat*  
15 *and talk. They appeared to be close. Their relationship is brotherly*  
16 *more than friendly. A perceives his position in the family as a*  
17 *sibling among siblings. He enjoys being with them after school –*  
18 *he says he prefers to be at his father's home during the week."*

19

20 I am satisfied that A's relationship with E and C is a positive and important  
21 relationship for A. I am satisfied that all of the children are treated as equal  
22 siblings within that household and that their relationship is healthy, stabilising and  
23 important.

---

<sup>3</sup> C is the daughter of F and his partner.



1 19. M stated that F's partner:

*"would often laugh at me because she knew that (F) was going to try to take (A) away from me. I have seen where (the partner) has instigated a lot of negative influence in relation to (A), and they have encouraged him to be disloyal to me."*

7 She said that:

8 *"it seemed that in order for (the partner) to get her way, the co-*  
9 *parenting relationship was destroyed."*

10

11 M stated that in her opinion F's partner:

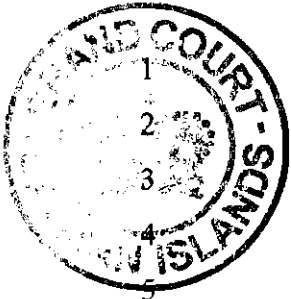
12 *"has contributed negatively to (A's) stability. He is now becoming*  
13 *anxious whenever he has to stay with (F)."*

14

15 M contends that she was upset by F's partner's conduct, which she characterised  
16 as being "*mischievous*" and "*devious for her own self-gratification*", and as a  
17 consequence she started to limit the time and frequency of her visits to the home  
18 but made more contact concerning A with F's helper.

19

20 20. M, in her affidavit evidence, agreed that her arrangements following the making  
21 of the consent order in February 2011 were unsettled. M informed the Court that  
22 this was caused by her business experiencing serious financial problems. M  
23 contends that it was inappropriate for F to use this "*rough patch as a weapon and*  
24 *a weakness to take*" her son. She states that F:



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

*“is aware of my financial stress, but he continues to pressure me, as if I can live as luxuriously as he does. I cannot. If he is suggesting that my living arrangements should be higher, then he should increase his financial contributions, since he now earns huge amounts.”*

M indicated that in November 2011 the parties agreed that A would temporarily live with F until she could sort out her financial affairs. M stated that although she may not have been sleeping at the property at that time, she was still heavily involved in A’s life, spending a lot of time there and often collecting A from school and taking him to ‘play dates.’

21. M stated that she moved to a two bedroom apartment located very close to the former matrimonial home, thereby making it easy for the helper to take A when she was at work and for F to collect A. M said that she could not afford to pay the rent on that property due to her business and resultant financial difficulties, so she left to live at her aunt’s house in West Bay. M then moved to her sister and brother’s three-bedroom townhouse in Prospect. F said that he had not become aware of M living with her sister until the hearing on 8<sup>th</sup> July 2013, as prior to that she had refused to tell him where she was residing although A was in her care for half of the week.

22. In her affidavit sworn on 26<sup>th</sup> July 2013, M made a number of allegations concerning F’s inability to care for A, including him “beating” A “repeatedly.”

1 M also expressed the view that in relation to child care F is controlling and seeks  
2 to provoke arguments with her which have an adverse effect on A's welfare. M  
stated in her affidavit:

*"Ironically, I have not asked the Court to take (A) away from (F),  
despite the problems I have described above that I've witnessed or  
been told about at A's homes."*

8 This approach taken by M tends to show that the circumstances were not as dire  
9 as she sought to portray in her earlier affidavit. Having regard to the above and on  
10 the evidence before me, including the demeanor of A observed by Ms. Dilbert, I  
11 do not accept M's criticism of F's ability to care for A.

12  
13 23. Due to the nature of the issues to be determined and the positions taken by the  
14 parties, the Court ordered that a welfare officer carry out an investigation and  
15 submit a report by 7<sup>th</sup> October 2013. The Welfare Officer was directed in the  
16 referral form to see A in each parent's premises and meet with their partners or  
17 any other relevant person residing in their respective homes. Ms. Dilbert filed her  
18 interim report on 19<sup>th</sup> August 2013. Ms. Dilbert filed two further reports, one on  
19 25<sup>th</sup> October 2013 and the second on 31<sup>st</sup> December 2013.

20  
21 24. In her interim report, Ms. Dilbert commented upon her interview with A, who she  
22 found to be "*a bright and expressive boy.*" She reported that A informed her that  
23 he spent a great deal of time with E. She formed a view that the boys generally





1  
2  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

enjoyed each other's company, viewing each other as siblings. Importantly, he spoke well of F's partner who he said was "like a mother" to him. In her oral evidence on 25<sup>th</sup> November 2013 Ms. Dilbert said:

*"I spoke to (A) about her. Adam spoke well of her. Saying she was (C's) mother. All of his remarks about his father's partner were positive. There were no red flags about the partner."*

This does not mirror some of M's negative statements about the partner's interaction with A, especially those detailed in M's "letter of concern" exhibited to the second welfare report. A's comments do not reflect the type of situation communicated by M to Ms. Dilbert in which F and his partner "argue a lot" creating "a disturbing environment for" A.

25. This third report gave Ms. Dilbert an opportunity to further speak to F's partner, especially in light of M's criticisms of her. In that report, Ms. Dilbert commented upon her meeting with F's partner. Despite M's rather serious allegations concerning the state of the familial relationships in F's household, those were not mirrored by the observations set out by Ms. Dilbert in her report. It appears that the picture portrayed in the report is one of a normal family environment, in which the children and the adults interact in a healthy manner. During examination by M's counsel Ms. Dilbert stated:

*"From my interview with (F's) wife nothing rang alarm bells. We had a thankful and respectful discourse of adult relationships."*



She went on to say that:

*“(A) talk about her and give positive reports.... He said that she is nice to him and helping out with his homework sometimes.”*

4

5 26. Ms. Dilbert’s third report was filed because of the evidence concerning M’s then  
6 recently changed personal circumstances, particularly concerning her  
7 accommodation and employment. The Court invited Ms. Dilbert to investigate  
8 and report upon what bearing these changes may have on A’s routine and upon  
9 her recommendations. Ms. Dilbert was also asked to speak to A’s school, as F  
10 was relying as one of his primary reasons for changing the arrangements, upon his  
11 view that there had been a downturn in A’s concentration and school work caused  
12 by the co-parenting regime. During the November hearing, Ms. Dilbert accepted  
13 that her second report should have included a fuller investigation in relation to the  
14 school and F’s partner.

15

16 27. Ms. Dilbert remarked in her report that A had told her that he wished his parents  
17 would “*get back together*” and he:

18 *“spoke affectionately of his biological father and mother, he spoke*  
19 *of their involvement in his life and the fact that he knows that they*  
20 *love him. However, he did say that he does not like the arguments*  
21 *between his parents ...”*

22

23 Ms. Dilbert reported that A had told her that:



*"he likes having both of his parents involved in his life; and that he likes the arrangement his parents currently have in place."*

4 28. In her conclusions in her first report, Ms. Dilbert commented that she did not have  
5 any immediate concerns about A's welfare, and made recommendations about  
6 family counselling.

7  
8 29. In her second report, Ms. Dilbert, reiterated the following information gleaned  
9 from her interview with M. She noted that M:

10 *"stated that she has always tried to be agreeable with (F's)*  
11 *requests but does not feel that he extends the same toward her. (M)*  
12 *also stated that she wishes for (A) to spend more time with her,*  
13 *gain the necessary financial support from (F) to be able to do this*  
14 *for their son, and to work together for the betterment of the*  
15 *children involved within the blended family."*

16  
17 30. In her second report, Ms. Dilbert, also reported about a visit in October when A  
18 was with M. She remarked that they had *"a healthy parent-child relationship."*  
19 On the evidence before me, I am satisfied that this is the proper conclusion for her  
20 to have reached. I am satisfied that M loves A dearly and that the position taken  
21 by her in these proceedings is genuinely motivated by what she feels is best for A.

22  
23 31. That said, regrettably, it is clear that there are occasions when M is prone to  
24 exaggeration when commenting upon F and A. This may possibly flow from a

1 difficulty in her separating her own emotional needs in relation to A from the  
2 actual needs of A. For instance M told Ms. Dilbert that F should not get “full  
3 custody” as she had “almost died during childbirth.” Having heard from Ms.  
4 Dilbert and based upon the evidence before me, I do not accept M’s comments  
that A:

*“is constantly exposed to deal with a household of negative and  
unpleasant attitude and displayed behaviour from both F and (his  
partner).”*

10 I do not accept that M’s partner acts in “unreasonable and devious ways.”<sup>4</sup> I do  
11 not accept M’s comment that the Ms. Dilbert’s involvement has:

12 *“forced (F) and his partner to control him and now partner  
13 devious ways.”<sup>5</sup>*

14  
15 32. In her second report, Ms. Dilbert recorded her observations of a visit she observed  
16 when A was with F. Ms. Dilbert noted that A informed her that he had changed  
17 his wishes from those set out in her earlier report. She stated in the report that A

18 *“express that he now wishes to spend his weekdays with his father  
19 and weekend days with his mother, ... He articulated that although  
20 he enjoys spending time with his mother, he finds being at her  
21 home “boring”, unless his cousins are there. According to (A), he  
22 would much rather spend his weekdays at his dad’s house where*

---

<sup>4</sup> Allegation of M set out at page 1 of her “letter of concerns” given to Ms. Dilbert.

<sup>5</sup> This is how this sentence is written at page 3 of M’s “letter of concerns”.



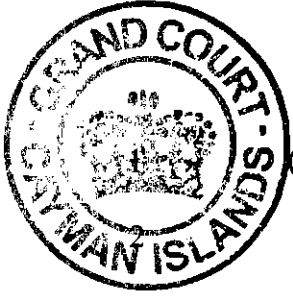
*he is able to play with E and little..., rather than attending tutoring Mondays thru Wednesdays."*

5 This comment caused Ms. Dilbert, in the report, to comment that she felt A's  
6 wishes to be based on social matters rather than upon what she perceived to be his  
7 welfare. I will come back to this later, as the after-school tutoring that has been  
8 put in place by M may be too onerous and tiring for a child of A's age, who may  
9 understandably be communicating through his comments to Ms. Dilbert that he  
10 needs some after-school downtime, the type of time before or after home work  
11 that a child ordinarily requires to "*recharge their batteries.*"

12 33. The recommendation section set out in Ms. Dilbert's second report is not  
13 particularly helpful to the Court. The only recommendations made appear to  
14 reconfirm the content in the interim report concerning counselling. I am not able  
15 to deduce from the second report what the recommendation is in relation to how  
16 A's time should be divided between his parents.

17  
18 34. The third report contains the information given to Ms. Dilbert concerning M's  
19 new employment situation and working hours. The report also sets out M's  
20 request that:

- 21 (i) A undergo a psychological and educational assessment;
- 22 (ii) that A be in her care Monday, Tuesday and Wednesday on alternate weeks  
23 and alternate weekends; or



(iii) that A be in her care to the entire school week on alternate weeks on the weekend that she is on leave from her work.

3

4 35. In her final report, Ms. Dilbert set out the details of her meeting with A's present  
5 and past grade teachers at his school. The impression given is that A is a well-  
6 groomed, thoughtful, socially well-rounded and generally happy child. There  
7 appears to be no evidence that the breakdown in the parents' relationship has had  
8 an unusually detrimental effect on A's participation in school, although the  
9 parents have had to be told that they must not speak negatively about each other  
10 in front of him.

11

12 36. The teachers note that A's homework is always completed and handed in on time.  
13 Ms. Dilbert was informed that, commendably, both parents play an active role in  
14 A's school life. It appears that, throughout his time in the first and second grade,  
15 A has consistently struggled with his schoolwork and that there has been no  
16 noticeable decline in his work during that period. The school's concern revolves  
17 around A's difficulty with focusing and concentrating on his work. The school  
18 recommends that A be assessed by occupational therapists/educational  
19 psychologist in relation to these concerns.

20

21 37. Ms. Dilbert in her final written recommendations suggests that there be a  
22 residence order made to F "*with whom A would live.*" However, Ms. Dilbert then



confusingly stated that an order be made for staying contact with M on alternate weeks when she was working on the 8 a.m. to 4 p.m. shift at every other weekend. Ms. Dilbert also recommended that A spend equal time with each parent during the school holidays. With this type of almost equal division of time between the parents, the report does not make it clear why the arrangement should be termed as being a sole residence order in favour of F and contact order in relation to M.

5

6

7

8 38.

Ms. Dilbert's written recommendations were not necessarily reflected in her oral evidence, and also certain recommendations changed whilst in Court. During her oral evidence given on 25<sup>th</sup> November 2013 Ms. Dilbert stated that F has the financial means to better meet A's needs than M. She went on to say the M does the best she can with what she has and that she was impressed with her interaction and affection towards A, whom she believes can ably care for A. Ms. Dilbert was of the view that M had made some positive changes over the previous couple of months and that this had alleviated some of her initial concerns about M. At the time Ms. Dilbert conceded that she had only been able to arrange about two visits in the case, that she had not spoken to A's school, and that she had not fully considered the after-school tutoring arrangements put in place by the mother for A and the effect that was having on A's bedtime routine.

9

10

11

12

13

14

15

16

17

18

19

20

21 39.

During her evidence on 25<sup>th</sup> November 2013 Ms. Dilbert rightly stated that A needs both of his parents, however she went on to say:

22



1  
2  
3  
4  
5       *"In A's best interest, he needs to have both parents with an active*  
6       *role. If (F) in a position to see to (A's) care, whereby (A's) time is*  
7       *well structured and help needed with homework and is properly*  
8       *supervised (by F) and cared for, it is in A's best interests and*  
9       *routine, going to F's house would be the best available option to*  
10       *the child. I think that (M) is doing her best to provide, but has*  
11       *socio – economic circumstances which have prevented her from*  
12       *doing it, as she has to work two jobs. Just cannot work like some*  
13       *other mothers from 7-3 and pick her child up."*

14  
15       Ms. Dilbert went on to say that:

16               *"A would benefit from the routine of going to one single home,*  
17               *cared for by a responsible parent."*

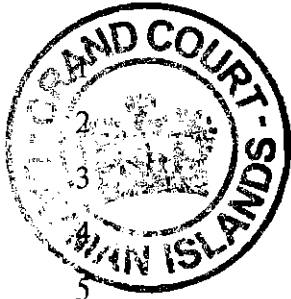
18  
19       40.     When I later go on to consider the welfare checklist and in particular, pursuant to  
20             Section 3(3)(a) of the Children Law (2012 Revision) ("The Law"), the wishes of  
21             A, I will have regard to the following oral evidence given by Ms. Dilbert:

22               *"Bright and expressive boy – spoke to me clearly. He is quite a*  
23               *man.<sup>6</sup> Very intelligent. He is protective of both parents, not want to*  
24               *make either parent uncomfortable. He says what he feels, he means*  
25               *what he says. I had a good rapport with him and he was very open*  
              *with me. He did share with me that he prefers to be at his father's*  
              *as he finds his mother's boring."*

              She continued:

---

<sup>6</sup> Counsel for F note reads *"He is quite the little man."*



2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

*“If going by the child’s wishes and where he more content to live, then that would be at his father’s house... “A would benefit from a routine at father’s house and mother to have contact with him, when the schedules are so. I do believe that A benefits from spending time with his siblings and father and also time with mother and her family as well.”*

8 This tends to show that he has a level of understanding and an ability to freely  
9 express his views to such extent that his wishes should be one of the factors to  
10 take into account when making orders.

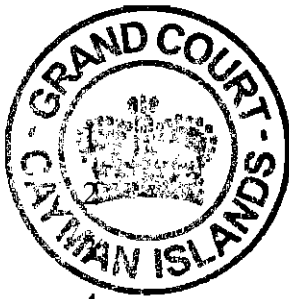
11  
12 41. Ms. Dilbert then went on to say that she had:

13 *“no concerns about (A’s) welfare in either house. If after school*  
14 *(M) could afford to have someone to live with (A) after-school, that*  
15 *would be ideal and Monday to Wednesday could very well*  
16 *happen.”*

17  
18 Ms. Dilbert went on to acknowledge F’s concerns about M’s previous living  
19 arrangements, but said that she felt that M had made positive changes. She stated  
20 that she could not:

21 *“agree that something long-term and limiting to (M) be put in*  
22 *place just in case something that might happen.*

23  
24 Then in her ‘next breath’ Ms. Dilbert seemed to revert to the earlier position when  
25 she stated:



4                    *"A's best interests, but he needs to have both parents, but if the*  
5                    *mother not have the ability, willingness to see to his care just as*  
6                    *well as father, it is more than likely that the father's home be seen*  
7                    *as the more structured and secure placement."*

8  
9                    This is an example of Ms. Dilbert changing her recommendations during the  
10                    hearing.  
11

12                    42.                    During examination by M's attorney, Ms. Dilbert reiterated that A said that he  
13                    enjoyed spending time with his mother, but he prefers being at the F's house  
14                    because that is:

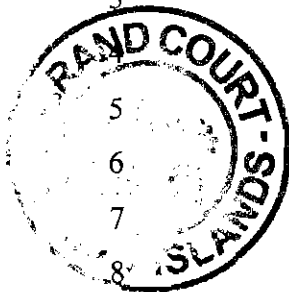
15                                       *"where the fun is."*

16  
17                    She reiterated that A was:

18                                       *"not exposed to anything harmful either household."*

19  
20                    She then went on to say:

21                                       *"...we are looking at A's best interests overall. A is best suited to*  
22                    *go to the residence at which he is more familiar and comfortable,*  
23                    *that provides the structure and supervision during the school week,*  
24                    *and he is to have regular contact with M and sometimes shared*  
25                    *with M. I am now saying that A should go to his father's residence*  
*from Monday to Thursday – time-share arrangement needs to be*  
*made."*

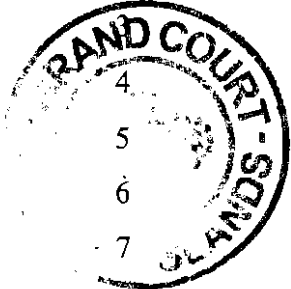


1           When asked by M’s counsel why she kept changing her mind, including departing  
2           from what she said in a written report, Ms. Dilbert stated:

3                           *“I have also formed this new view from the questions asked of me*  
4                           *today and the papers. I have not taken into account that the child is*  
5                           *spending so many hours at tutoring and that this was not time*  
6                           *spent with his mother. The mother is trying to provide care. I did*  
7                           *not focus on the child and mother not spending time together.*  
8                           *Given her financial circumstances, socio -economic situation, she*  
9                           *does the best she can. I believe she is. I do not think that now it is*  
10                          *in the best interests of A as relates to his overall development.*  
11                          *Staying at the father after-school with the mother then to collect*  
12                          *from there around 6.30, as a child should be in bed by 8.00, it*  
13                          *would be moving from one house to the other. No routine. That is*  
14                          *not something that I could recommend. That is unreasonable for*  
15                          *three times a week. I’m having to rethink that and change my view*  
16                          *given the fact that there has been a demonstrative decline, not a*  
17                          *great one, in the child’s performance at school, fact that he*  
18                          *spending more than two hours a day with a tutor and I understand*  
19                          *that he may be not picked up until 7.30 on occasion, that is a long*  
20                          *day for a child. I am totally and very accepting that (M) is making*  
21                          *extended efforts to see for her child’s care. I thought she doing the*  
22                          *very best that she could, she is trying very hard to do well by A. If*  
23                          *that arrangement is to go to the father during the week and enjoy*  
24                          *stability and extracurricular activities, and that is the better*  
25                          *arrangement for the child. By stability I mean routine around*  
26                          *people he knows caring for him, like his siblings and nanny.*  
27                          *People who are familiar to him, going to a tutor is just work. That*  
28                          *is not very nurturing.”*

29

1 43. Ms. Dilbert was then asked by M's attorney whether the Court should prefer her  
2 oral evidence over written evidence. Ms. Dilbert stated in reply:



4 *"In having to listen to the additional information received this*  
5 *morning, such as tutor and occasional pickup times, having seen*  
6 *school reports showing there is a decline, I've had to change my*  
7 *views. I now feel that A is better suited at father's residence. I*  
8 *would therefore have to say, you should prefer my oral over (my)*  
9 *written evidence."*

10 Ms. Dilbert went on to say that when making a recommendation she had to listen  
11 to what A's wishes were, but felt that A saying that it was not fun M's house was  
12 not sufficient reason for him to not spend any time there.

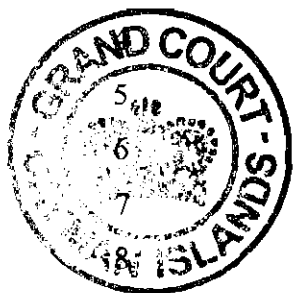
13  
14 44. Counsel for M asked Ms. Dilbert:

15 *"In light of your flip-flopping, do you think your reports are*  
16 *credible?"*

17  
18 Ms. Dilbert replied that she believed her reports to be credible, although there  
19 were certain pieces of evidence brought up during the hearing which she would  
20 like to have included in written contributions.

21  
22 45. On 21<sup>st</sup> February 2014, Ms. Dilbert gave further oral evidence, having by then  
23 submitted her third report. She reiterated that in her previous oral evidence she

1 had recommended that A live with F between Monday and Thursday. She  
2 confirmed that was:



3 *“based on the child’s wishes, familiar in his home, a stable*  
4 *environment- that is his preference and I think he would do better*  
5 *where most comfortable. Routine, consistency and structure.*  
6 *Recommend residence order to (F), his wishes, father had most*  
7 *consistent relationship with child that is not a negative to (M’s)*  
8 *financial situation. Taking child’s wishes into account, he wishes*  
9 *to be with the father at the least five days of the week. Mother who*  
10 *has parental responsibility is not unfit or undeserving of time,*  
11 *arrangement would be that spend five days with father and would*  
12 *have contact with the mother in such a way that would not disrupt*  
13 *his education, that is my primary concern. My preference at the*  
14 *weekend for from Friday night to Sunday night or on the Monday.*  
15 *Second preference is alternate weekends if on 8-4 shift and if she is*  
16 *consistent on that. Planning about that, on information I have, stay*  
17 *father five days and mother given access visitation and possibly*  
18 *spend time with him, not disrupt education in any way. Contact*  
19 *every alternate weekend – she said she have the Saturday/Sunday*  
20 *alternate on leave. Primary concern is stability and consistency*  
21 *there, challenge one week on / one week off basis.”*  
22

23 46. Ms. Dilbert informed the Court that, at the outset of her visit to M’s house, A got  
24 out of his father’s car, came straight over to her when she was getting out of her  
25 car and asked if she remembered him telling her at his father’s house that he  
26 would like to stay with his father during the week and spend the weekends with  
27 his mother. Ms. Dilbert said that she thought this was not typical behaviour from a

1

small child, but she felt A had said it because he did not want to offend his mother. She said that she did not think that what he said was altered from any discussion between him and F. At this time Ms. Dilbert again commented that A:

*“is a forthright child- he says what he means and means what he says.”*

6

7

Ms. Dilbert went on to say that she was still not satisfied about M’s work hours or stability of her plans around that. She reiterated her view that A was:

8

9

*“more comfortable at his father’s home five days a week, provide him with routine he is used to, used to over the long haul. Still at same residence for a number of years, social supports, neighbours and friends. There has been a change, a deterioration in academics since the reinstatement of the shared care arrangement. I recall seeing the previous reports, the kindergarten grade 1 report was positive.”*

10

11

12

13

14

15

16

17

Ms. Dilbert’s final answer to F’s Counsel was:

18

19

*“if ordered 5 day residence with father, would increase the possibility of routine working, including child’s best interest as far as education goes.”*

20

21

22

23

47. Although there are on the face of them conflicting recommendations contained in

24

Ms. Dilbert’s evidence, I am satisfied that these have arisen because she was

25

willing to ‘take on board’ additional evidence and representations that were

26

brought to her attention during the hearing. A welfare officer should not be





criticised for reconsidering and modifying their recommendations in such circumstances. Although I do not agree that this is the case suitable for a sole residence order, I accept Ms. Dilbert's observations that a continuation of the present split weekly arrangement is not in the best interests of A.

5

6 48. When considering the care of A I have to have regard to M's employment  
7 situation. It was only during the hearing on 21<sup>st</sup> February 2014 that greater clarity  
8 was attempted to be given by her. However, M is still in her probationary period  
9 with her employer and I am not satisfied that her working and non-working  
10 schedule is as clear as she sought to present to the Court. M readily accepted that  
11 she was still in training. M told the Court that she was the newest member of staff  
12 and as a consequence her employer, which is a major hotel, could not give her a  
13 final set schedule. I am satisfied that M's employer is willing to endeavour to  
14 work with her in an attempt to arrange her work schedule around her  
15 responsibilities for A. The impression M gave is that she can be guaranteed any  
16 three days of each week off and if needed they can be taken together. M  
17 mentioned that at the time of the hearing she had been given Monday, Tuesday  
18 and Wednesday off, but she would be able to change these days if needed. Despite  
19 this, in the absence of anything concrete from her employer to confirm her  
20 evidence and because she is still at the early stage of this employment, there is  
21 still uncertainty. Long-term this is not in the best interests of A, who is at an age



when a settled routine, geared around his needs and characteristics, should be established.

3  
4 49. I expressed my concerns about the after-school schedule that M had put in place  
5 for A at the time of the first day of this final hearing in November 2013. Although  
6 I commend M for recognising the importance of his progressing education, the  
7 tutoring regime was too onerous for a child of his age. On M's evidence she  
8 indicated that he was getting home on a school night between 7 to 8 o'clock. She  
9 said that on occasion he was going to bed at 8:30 to 9 o'clock. This is too late for  
10 a child to be arriving home. Although after-school academic work is important,  
11 the child should have the opportunity to be in his settled home environment  
12 benefiting from some relaxation time with family members before being put to  
13 bed. Although M does not agree with F's evidence, I am satisfied that A would  
14 ordinarily be put to bed at an established and set time, around 7:30 p.m., in his  
15 property. The tutoring was discontinued between the two dates of the hearing. A  
16 is now cared for by M's helper, or on occasions her sister, until M returns from  
17 work. This change, to M's credit, is likely a consequence of M now recognising  
18 that the tutoring regime she had put in place was too onerous. These new  
19 arrangements do not detract from the need for A, who is struggling to concentrate  
20 at school, to have a settled routine, and this includes having a set base during the  
21 school week.

22



1  
2  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

50. There does appear to be a deterioration in A's grades at school over the past two years and his ability to concentrate in class when compared to his earlier reports. There may be a number of reasons for this, including the nature of the work in Grade 1 and Grade 2 when compared to preschool/kindergarten. However, an unsettled routine is not conducive to a child's development and may be a contributing factor to A's clear inability to fully concentrate at school. I am satisfied, that a settled and less onerous routine, concentrating on A's needs, and taking on board to a degree his wishes, would be in A's best interests and would likely have a beneficial impact on performance during school hours.

51. M and F are both able to meet A's needs. They are both interested in all aspects of A's life and development. They both love A and they both want what they feel is best for him. If a residence order is only made in favour of one parent and a contact order in favour of the other, the parent with contact would assume 'care and control' of the child for the time that the child is in that parent's physical custody. This type of arrangement may be one of the reasons why shared residence orders are now frequently made in England and Wales in Children Act proceedings. The long-term best interests of a child are invariably best protected if, despite the breakdown of the parents' relationship, both parents are able to continue to play an equal role in making the important decisions that will determine the child's upbringing.



1 52. As already mentioned by me herein, this is a case in which I feel that a shared  
2 residence order should be made. I commented upon this type of order in the case  
3 of *KP v JB* 2012 (2) CILR 249. Although, that was a case dealing with an  
4 application to temporarily remove the child from the jurisdiction brought under  
5 the pre-Children Law regime, I commended the modern approach in relation to  
6 residence orders which would be available under the new law. As this is the first  
7 detailed ruling I have given on the issue of shared residence, I feel it is  
8 appropriate to herein repeat some of my observations in that case.

9  
10 53. A residence order is designed to reflect the place of the child's residence and is  
11 not intended to deal with issues of parental status. It is intended to move away  
12 from the old fashioned concepts of custody and care and control and the  
13 psychological effects of such orders. The order may specify the periods during  
14 which the child is to live in the different households. The cases regarding shared  
15 residence are helpful in recognising that both parents have an important role to  
16 play but caution must be had in regarding them as directly applicable to an  
17 application for care and control.

18  
19 54. At paragraph 60 in *KP v JB*, I set out the principles upon which a first instance  
20 judge is to exercise his discretion in deciding what is best for the children which  
21 also helpfully is set out in the judgment of Hale L.J. in *D v D (Shared Residence  
22 Order)* [2001] 1 FLR 495. I noted that Hale L.J. also set out the reasons for the

1 new approach under the 1989 Children Act. I see merit in also setting out herein  
2 in great detail the views of Hale L.J. starting from paragraph [21]:



3 *"[21] In considering these arguments it may be helpful to go back*  
4 *to basics. Before the Children Act 1989 there was a Court of*  
5 *Appeal authority in Riley v Riley [1986] 2 FLR 429, to the effect*  
6 *that a shared residence order, which had been made and worked*  
7 *comparatively well in that case for 5 years, should never have been*  
8 *made at all. It is clear, as the court appreciated in the later cases,*  
9 *that the intent of the Children Act 1989 was to change that*  
10 *decision."*

11 *[22] The background to the Children Act 1989 provision lies in the*  
12 *Law Commission's Working Paper No 96, published in 1986, on*  
13 *Custody, and the Law Commission's Report, Law Com No 172,*  
14 *published in 1988, on Guardianship and Custody. If I may*  
15 *summarise the basic principles proposed, the first was that each*  
16 *parent with parental responsibility should retain their equal and*  
17 *independent right, and their responsibility, to have information*  
18 *and make appropriate decisions about their children. If, of course,*  
19 *the parents were not living together it might be necessary for the*  
20 *court to make orders about their future, but those orders should*  
21 *deal with the practical arrangements for where and how the*  
22 *children should be living rather than assigning rights as between*  
23 *the parents.*

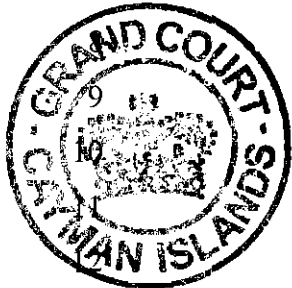
24 *[23] A cardinal feature was that when children are being looked*  
25 *after by either parent that parent needs to be in a position to take*  
26 *the decisions that have to be taken while the parent is having their*  
27 *care; that is part of care and part of responsibility. Parents should*  
28 *not be seeking to interfere with one another in matters which are*  
29 *taking place while they do not have the care of the children. They*

1  
2  
3  
4  
5  
6  
7  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

*cannot, of course, take decisions which are incompatible with a court order about the children. But the object of the exercise should be to maintain flexible and practical arrangements wherever possible.*

*[24] Then dealing with residence orders the Commission said this at paragraph 4.12 of Law Com 172:*

*“Apart from the effect on the other parent, which has already been mentioned, the main difference between a residence order and a custody order is that the new order should be flexible enough to accommodate a much wider range of situations. In some cases, the child may live with both parents even though they do not share the same household. It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children’s benefit. However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged. None of our respondents shared the view expressed in a recent case [Riley v Riley] that such an arrangement, which had been working well for some years, should never have been made. More commonly, however, the child will live with both parents but spend more time with one than the other. Examples might be where he spends term time with one and holidays with the other, or two out of three holidays from boarding school with*





1  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*one and the third with the other. It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order covering both parents rather than a residence order for one and a contact order for the other. Hence we recommend that where the child is to live with two (or more) people who do not live together, the order may specify the periods during which the child is to live in each household. The specification may be general rather than detailed and in some cases may not be necessary at all".*

*[25] It is for those reasons that s 8 (1) of the Children Act 1989 defines 'a residence order' as:*

*"...an order settling the arrangements to be made as to the person with whom a child is to live...".*

*[26] "Person" of course includes "persons" on ordinary principles of statutory construction. It is, therefore, an order about where the children are to live. Section 11(4) of the 1989 Act specifically provides:*

*"Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned".*

*[27] Not long after the Children Act 1989 came into force in October 1991 the matter came before the Court of Appeal, on 1<sup>st</sup> December 1992, in **Re H (A Minor) (Shared Residence)** [1994] 1 FLR 717, Purchas L.J. said at 728:*



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

*“That such an order [which he referred to as a joint residence order] is open to the court, as has been said in the judgment of Cazalet J., is clear from the provisions of s 11 (4) of the Children Act 1989, as was indicated during the debate on the Bill by the Lord Chancellor. But, at the same time, it must be an order which would rarely be made and would depend upon exceptional circumstances.”*

[28] He went on to refer to the case of **Riley v Riley** [1986] 2 FLR 429.

[29] The matter next came before the Court of Appeal, on 3<sup>rd</sup> February 1994 in **A v A (Minors) (Shared Residence Order)** [1994] 1 FLR 669; Butler-Sloss L.J. (as she then was) at 677 said this:

*“Miss Moulder, representing the father, accepts that the conventional order still is that there would be residence to one parent with contact to the other parent. It must be demonstrated that there is positive benefit to the child concerned for a s 11(4) order to be made, and such positive benefit must be demonstrated in the light of the s 1 checklist ..... The usual order that would be made in any case where it is necessary to make an order is that there will be residence to one parent and a contact order to the other parent. Consequently, it will be unusual to make a shared residence order. But the decision whether to make such a shared residence order is always in the discretion of the judge on the special facts of the individual case. [I suspect that when My*



1 Lady used the word "special" she meant  
2 "particular"]. It is for him alone to make that  
3 decision. However, a shared residence order would,  
4 in my view, be unlikely to be made if there were  
5 concrete issues still arising between the parties  
6 which had not been resolved, such as the amount of  
7 contact whether it should be staying or visiting  
8 contact or another issue such as education, which  
9 were muddying the waters and which were creating  
10 difficulties between the parties which reflected the  
11 way in which the children were moving from one  
12 parent to the other in the contact period".

13 [30] She went on to say (at 678):

14 "If a child, on the other hand, has a settled home  
15 with one parent and substantial staying contact with  
16 the other parent, which has been settled, long-  
17 standing and working well, or if there are future  
18 plans for sharing the time of the children between  
19 two parents where all the parties agree and where  
20 there is no possibility of confusion in the mind of the  
21 child as to where the child will be and the  
22 circumstances of the child at any time, this may be,  
23 bearing in mind all the other circumstances, a  
24 possible basis for a shared residence order, if it can  
25 be demonstrated that there is a positive benefit to  
26 the child".

27 [31] It is quite clear that in those words my Lady was moving  
28 matters on from any suggestion, which is not in the legislation, that  
29 these orders require exceptional circumstances. She was also



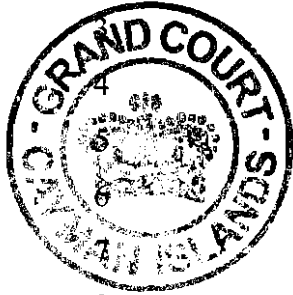
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*recognising that it stands to reason that if it has not yet been determined where the children are to live, how much contact there is to be, or whether or not there is to be staying contact with the parent with whom they are not spending most of their time, then there could not be a shared residence order, because that would be an order that the children were to live with both parents.*

*[32] If, on the other hand, it is either planned or has turned out that the children are spending substantial amounts of their time with each of their parents then, as both the Law Commission and my Lady indicated in the passages that I have quoted it may be an entirely appropriate order to make. For my part, I would not add any gloss on the legislative provisions, which are always subject to the paramount consideration of what is best for the children concerned”.*

55. I noted that in *D v D Butler-Sloss P.*, agreed and at paragraph [39] she added as follows:

*“[39] The approach of the Court of Appeal in the decision of Re H (A Minor) (Shared Residence) [1994] 1 FLR 717 was made, as my Lady has already said, shortly after the implementation of the new Children Act 1989. It looked back at an earlier decision of the Court of Appeal in Riley v Riley [1986] 2 FLR 429 and, of course, a decision made under the old legislation. With hindsight that decision of the Court of Appeal was unduly restrictive. In A v A (Minors) (Shared Residence Order) [1994] 1 FLR 669, decided 18 months later, this court had a more relaxed approach to the concepts of shared residence. Now 9 years later with far greater experience of the workings of the Children Act 1989 it is necessary*



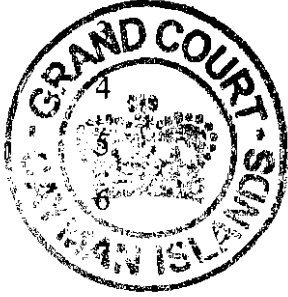
1  
2  
4  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

*to underline the importance of the flexibility of the Children Act 1989 in s 8 orders and, consequentially, that the Court of Appeal should not impose restrictions upon the wording of the statute not actually found within the words of the section."*

*[40] ...A shared residence order is not the standard order and it is helpful to look at the guidance of the Children Act 1989 Guidance and Regulations, Vol 1, Court Orders (The Stationery Office Books, 1991), para 2.2(8) at p 10 and I am taking it for convenience from A v. A (Minors) (Shared Residence Order) [1994] 1 FLR 669, 674 in the judgment of Connell J. He set out there a passage from the Guidance, a very helpful passage and it says at 674E:*

*““...it is not expected that it would become a common form of order partly because most children will still need the stability of a single home, and partly because in the cases where shared care is appropriate there is less likely to be a need for the court to make any order at all. However, a shared care order has the advantage of being more realistic in those cases where the child is to spend considerable amounts of time with those parents, brings with it certain other benefits (including the right to remove the child from accommodation provided by a local authority under s 20), and removes any impression that one parent is good and responsible whereas the other parent is not.””*

*[41] I stand by what I said on 677 and 678, save to say, as my Lady quite correctly said, the word is not “special” facts, I meant on the “particular” facts of the individual case. I am not certain*



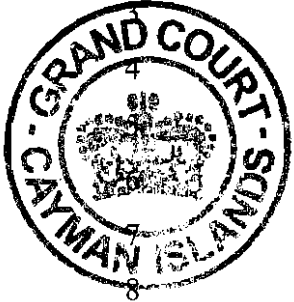
1  
2  
4  
5  
6  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*that one does have to demonstrate a positive benefit to make a shared residence order. One does have to demonstrate that a shared residence order is in the interest of a child in the accordance with the requirements of s 1 of the Children Act 1989.*

*[42] The importance for a judge of first instance is that the guidance that comes from the Court of Appeal, setting out the principles to be followed, is, I hope, valuable for first instance judges but, at the end of the day, it should not inhibit the first instance judge from making the right decision. The right decision is dependant upon the individual facts of each case where the judge exercises his discretion and decides what is best for the children in that particular case."*

56. In ***KP V JB*** I referred to the dictum of Wall J. (as he then was) in ***A v A (Shared Residence)*** [2004] EWHC 142 (Fam), [2004] 1 FLR 1195 at [119]. This has been approved and adopted in a number of Court of Appeal judgments. Wall J. highlighted the developing approach to shared residence orders when he stated:

*"...a shared residence order is an order that children live with both parents. It must, therefore, reflect the reality of the children's lives. Where children are living with one parent and are either not seeing the other parent or the amount of time to be spent with the other parent is limited or undecided, there cannot be a shared residence order. However, where children are spending a substantial amount of time with both their parents, a shared residence order reflects the reality of the children's lives. It is not necessarily to be considered an exceptional order and should be made if it is in the best interests of the children concerned."*



1 57. I adopt my observation expressed at paragraph 63 in **KP v JB** that:

2 *“As the case law has developed, it has become clear that the*  
3 *failure of parents to co-operate does not prevent the Court making*  
4 *a joint residence order. On the other hand, the inability of the*  
5 *parents to work together is not by itself a reason for making the*  
6 *order. It is clear that the time spent in each household does not*  
7 *have to be spread evenly or even close to equally for an order to be*  
8 *made.”*

9

10 58. The residence arrangements that I now intend to put in place will mean that A will  
11 still be spending considerable and rewarding time between his two parents’  
12 households. With that in mind, I have regard to Wall L.J.’s comments at  
13 paragraph [22] in **Re P (Shared Residence Order)** [2005] EWCA Civ 1639,  
14 [2006]:

15 *“Such an order (shared residence) emphasises the fact that both*  
16 *parents are equal in the eyes of the law and that they have equal*  
17 *duties and responsibilities as parents. The order can have the*  
18 *advantage of conveying the court’s message that neither parent is*  
19 *in control and that the court expects parents to co operate with*  
20 *each other for the benefit of the children.”*

21

22 59. There is no requirement for there to be exceptional or unusual circumstances for a  
23 shared residence order to be made. What is required is, as in all cases involving  
24 children, to demonstrate that the order is in the best interest of the child having  
25 regard to the particular facts of the case.



1 60. I am satisfied that it is in A's best interests for a shared residence order to be  
2 made. Residence orders are designed to settle the arrangements to be made to the  
3 person with whom the child is to live, as well as emphasising that parenting is a  
4 continuing and shared responsibility.

5  
6 61. When deciding that there should be a shared residence order and how that  
7 arrangement should operate, I have had regard to the fact that A's welfare is my  
8 paramount consideration as required pursuant to section 3(1) of the Law. This is a  
9 case, in particular having regard to A's age and section 3(2) of the Law, in which  
10 I am satisfied that any further delay in making a decision in relation to his  
11 medium and long-term arrangements, even for an assessment to be carried out in  
12 relation to his educational difficulties, would not be in A's best interests. There is  
13 a need for certainty in his longer term living arrangements and as a consequence,  
14 although considering the no order principle set out in section 3(5) of the Law, I  
15 am satisfied it would be better for me to make an order rather than making no  
16 order at all.

17  
18 62. In determining what orders are in his best interests I have carefully considered the  
19 welfare checklist set out at section 3(3) of the Law.

20  
21 63. Although A is only eight years of age, I am satisfied that I should pay some  
22 regard to his expressed wishes. It is evident from Ms. Dilbert's oral and written



1 evidence that A would prefer to reside at the F's property. It is evident from her  
2 evidence that she is satisfied that A freely expressed this wish and that he was  
3 forthright when doing so. She found that A "means what he says." Although Ms.  
4 Dilbert highlights that one of A's reasons for saying this derives from his view  
5 that it is more fun in F's house, I am satisfied that there are important sibling  
6 relationships in that household.

7

8 64. I have considered A's physical, educational and emotional needs. His emotional  
9 needs are best served by having regular interaction with both parents. However,  
10 this must not interfere with an established routine which is required to best meet  
11 his physical and educational needs. All of these needs will be promoted by the  
12 parents exercising their parental responsibility and being equally involved in all  
13 areas of his life, and fortifies my view that there should be a shared residence  
14 order.

15

16 65. The residence arrangement to be put in place will be a rolling four week cycle. A  
17 will reside with M, subject to her work availability, on three weekends out of  
18 every four during the school term.<sup>7</sup> This will take place from Friday after school

---

<sup>7</sup> Following the circulation of the draft judgment to Counsel pursuant to Practice Direction 1/2004, the Court was asked to clarify this sentence. My order is based on M's evidence that she is able to take any 3 days "off" she wishes during the week. This would make M available for 3 weekends out of 4. If M is wrong about the flexibility of her work schedule, then A should reside with her for at least the 2 weekends for which M should ensure her availability in the 4 week cycle. The intention behind my wording is that A resides with M when she is not working and not that he spend full weekends cared by a helper. If it is a scheduled weekend for A to be with M, but M has to work for a part of the weekend (i.e. Saturday or Sunday) A should reside with M for at least the day on which M is not working.

1

until Monday morning. All other times during term time, A will reside at F's home. A will spend equal time with each parent during his school holidays. I have regard to the likely effect on A of this change in his circumstances. I am satisfied that the stability that this will give during the school week will have a positive effect on A. I am satisfied that it will also reinforce the importance of his relationship with M, with whom he will enjoy positive and regular interaction over the weekends and during school holidays.

6

7

8

9 66.

When considering the change of circumstances, I also have regard to A's regular or seasonal extracurricular activities. Both parents should recognise the importance of these activities to A and ensure that they are maintained during the ordered time that A is under their care.

10

11

12

13

14 67.

I have regard to the fact that A is an eight old male child. It is important for him to have both parents playing a significant role in his life.

15

16

17 68.

I have considered any harm that he has suffered or is at risk of suffering. I do not accept M's allegations about the nature of relationships within F's household and her view about the resulting potential harm to A. I prefer the evidence of Ms. Dilbert that this is a normal warm family household. As highlighted by the school, it is important that both parents act civilly with each other in all matters concerning A, otherwise emotional harm may likely be caused to A. Although the

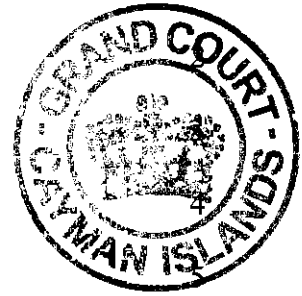
18

19

20

21

22





parents may not be happy with the order now made by the Court, it is vitally important that they do not seek to undermine the arrangements which have been put in place.

4

5 69. I have considered how capable each of his parents are in meeting A's needs  
6 Historically F has always been able to meet A's physical, educational and  
7 emotional needs and I have no concerns about this moving forward. Following the  
8 parents' separation, M has been unable to fully meet these needs to the same  
9 degree. This has been caused by a number of personal difficulties and has been  
10 manifested in her having inconsistent inappropriate living arrangements. I accept  
11 that some of the reasons for her difficulties were caused by factors beyond her  
12 control. I also accept that in recent time M is now working on probation in, what  
13 may turn out to be, long-term stable employment and that she has found more  
14 suitable accommodation. I commend M for doing this and for being able to  
15 address some of her own wider personal difficulties. However, I have residual  
16 concerns about her ability to fully meet A's needs during the school week and to  
17 provide him with a routine tailored to his specific needs. I am satisfied that there  
18 is greater ongoing certainty that F will be able to consistently meet these needs.

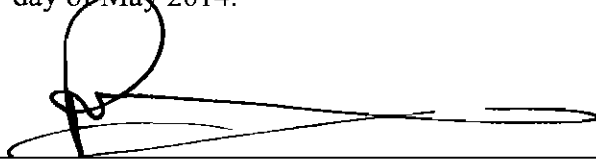
19

20 70. Accordingly I make a shared residence order in favour of both parents in relation  
21 to A. A will, during the school term, reside with M on three weekends out of  
22 every four from after school on Friday to Monday. A will also spend equal time

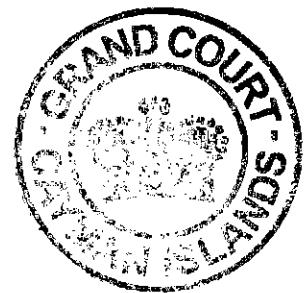
1 with each parent during his school holidays. At all other times, subject to any  
2 agreed variation between the parties, A will reside with F. I will not define which  
3 three weekends these will be in each cycle, as these will have to be arranged  
4 around M's work cycle. I am satisfied that the parents should be able to make  
5 those arrangements between themselves. If M's work pattern permits, this order is  
6 not intended to prevent the parties making an arrangement for A to spend any  
7 additional time with his mother, for example on one day after school during the  
8 week.

9  
10 71. Flowing from this order I will discharge paragraph 6 of the Order dated 19<sup>th</sup>  
11 February 2011, which required there to initially be mediation to attempt to resolve  
12 disputes concerning A. I also discharge paragraph 9 of the said Order, which  
13 required F to make a payment to M towards the cost of her employing a helper. I  
14 am not satisfied that there are grounds for a prohibited order against M and  
15 therefore I do not make the order set out in paragraph 1(b) in F's Summons.

16  
17 Dated this 5<sup>th</sup> day of May 2014.

18  
19 

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



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