

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

3
4 **CAUSE NO. FAM 240 OF 2013**

5 **IN THE MATTER OF Y AND X**
6

7 **Appearances:** Mr. David McGrath and Mr. Conor Fee of Samson & McGrath for F
8 Ms. Cherry Bridges of Ritch & Connolly for Aunt
9 Ms. Sheridan Brooks for the children through their Guardian Ad Litem –
10 Mrs. Maggie McCormac
11

12
13 **Before:** Hon. Justice Richard Williams

14
15 **Heard:** 13th, 16th and 23rd December 2013
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18 **Draft Ruling Circulated:** 10th January 2014
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20 **Judgment Delivered:** 15th January 2014
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24 **JUDGMENT**
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26 At the close of the hearing I informed the parties of my decision. I indicated to the parties
27 that, due to the nature of the issues, I was not in a position to deliver an Ex Tempore
28 Ruling and that my reasons would be provided in a written judgment which would
29 follow. I now provide that written judgment. I permit copies of this judgment to be
30 provided to the parties' attorneys and the Court in any related proceedings that may be
31 brought in the United States of America.
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1 **The Children, Their Parents and Parental Responsibility**

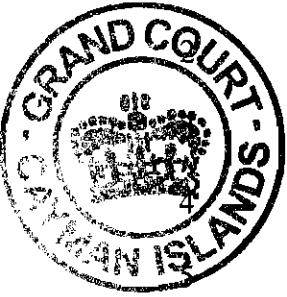
2 1. This matter concerns X (male) and Y (female), eight year old twins born on 2nd
3 June 2005. They are both American nationals. They will be referred to as “*the*
4 *children*” in this judgment. The children’s father, F, passed away on 23rd
5 November 2013. The children’s right to residency in the Cayman Islands derives
6 from them being dependents of F. There is a live issue as to whether their right to
7 residency has ceased upon F’s passing and uncertainty as to their right to continue
8 residing in the Cayman Islands.



9
10 2. F, an American and Jamaican national, was an extremely successful property
11 developer in Orlando, Florida, USA and latterly in the Cayman Islands. He built
12 and owned four major malls in this jurisdiction. It is estimated that his estate is
13 valued in the region of \$ million. F’s immigration status in the Cayman Islands
14 was one of permanent residency as a person of independent means.

15
16 3. F’s wife, also an American and Jamaican national, resided in Orlando whilst the
17 children resided with their father in the Cayman Islands. The children visited her
18 in Orlando and she “*accepted them and looked after them.*” Aunt states that F and
19 F’s wife had a “*very unorthodox relationship.*” F’s wife passed away on 30th May
20 2010.

21



1 4. The children were born in Jamaica through a surrogacy arrangement with BM,
their biological mother. A copy of the surrogacy agreement has not been provided
to the Court. The biological mother, who it is believed now resides in the
Philippines, has played no role at all in the children's lives. At this time, she has
not been located and is thus unaware of these proceedings.

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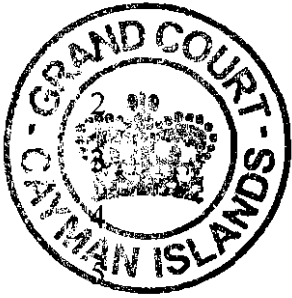
7 5. This appears to have been a common surrogacy arrangement where the children
8 are the genetic children of the surrogate mother, rather than a gestation or
9 surrogacy where there is no such genetic connection. It appears from the affidavit
10 evidence of Aunt that the sperm used in the in-vitro fertilisation process was that
11 of F, the commissioning father. The children are unaware that they are not the
12 biological children of both F and F's wife.

13

14 6. In the Cayman Islands there is no law similar to the Human Fertilisation and
15 Embryology Act 2008 ("HFEA") enacted in England and Wales. As a
16 consequence, in the Cayman Islands there is uncertainty and greater complication
17 in determining issues in relation to a child's parents, especially where the child is
18 born through an overseas surrogacy arrangement.

19

20 7. I noted in my Ex Tempore Judgment given at the conclusion of the ex-parte
21 hearing on 3rd December 2013 that:



6 *“Under the Children Law (2012 Revision) the birth mother always*
7 *has parental responsibility for the child. In England the HFEA*
8 *provides the means by which the parental responsibility of the*
9 *birth mother is removed and all parental rights vested in the*
10 *commissioning couple equally by means of a parental order. The*
11 *most appropriate mechanism is for the commissioning parents to*
12 *formally adopt the child, at which time the parental responsibility*
13 *in the biological surrogate mother would come to an end. In law,*
14 *the child would then be the child of the adopters and not of any*
15 *other person. The surrogate mother, save for the exceptions set out*
16 *in HFEA, is not able to transfer her parental responsibility for the*
17 *child. Nothing would prevent her from delegating or arranging for*
 another person to exercise the parental responsibility for the child.
 Then, of course, any person who had looked after the child for
 three years could, with the leave of the Court, apply for a
 residence order and thereby acquire parental responsibility....”

18 8. There is no evidence placed before me to establish that the parental responsibility
19 vested in the birth surrogate mother has been formally brought to an end. Both
20 parties indicate that they do not believe that the children were formally adopted.
21 In the absence of such evidence, I approach the hearing today on the basis that
22 they have not been adopted and that no order similar to a parental order has been
23 put in place. This means that, in law, the surrogate mother may still be regarded as
24 a parent who retains parental responsibility. Neither party has sought to argue that
25 this is an incorrect conclusion to reach applying the facts of this case to the law.



The parties should continue to make further investigations in relation to adoption and/or any parental orders.

3

4 **K, Initial Applicant**

5 9. These proceedings started by an application brought in a rather confusing manner
6 by F, aged 46. The children are K's half-siblings, as he shares the same biological
7 father with the children. F's wife was K's mother. K is F's eldest son and there is
8 also a younger full-sibling, DJr, who was born in 1968.

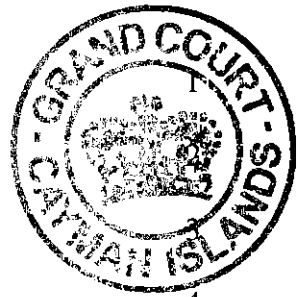
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10 10. K currently owns and resides in a five bedroom, four bathroom house in Orlando
11 with his wife who is aged 28, along with their children J aged 6, KR aged 5 and B
12 aged 2. K and his family are all American nationals. His family attends the St.
13 Luke's United Methodist Church in Orlando, but his house is located less than 2
14 miles away from the Holy Family Catholic Church.

15

16 **The Ex-parte Application of K heard on 3rd December 2013**

17 11. K's ex-parte application heard on 3rd December 2013 was regrettably supported
18 only by unsworn affidavits from himself, U and N that were devoid of the therein
19 mentioned exhibits. At the outset of the hearing, it was evident that K's then
20 attorneys were uncertain as to what application they were actually making or
21 could make. The oral ex-parte application then being made appeared to be for a
22 residence order coupled with a specific issue order requiring the children to be



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placed into the care of K and returned to reside in the Cayman Islands. Although the application was made in this rather unsatisfactory manner, a manner in which the Court might be entitled to decline to entertain the application, I found that the children's welfare dictated that the Court exercise its inherent jurisdiction thereby enabling it to take immediate control and to give some structure to the children's uncertain situation. This decision was reached whilst being conscious of the view of Waite J. expressed at page 59 in *Re T (A Minor) (Wardship: Representation)* [1994] Fam 4 at 59, which is summarised at paragraph 40 of the transcript of my Ex Tempore Judgment where I stated:

"I will review the wardship on Friday, 13th December at 9:30 a.m. It is important that the future of these children, if it cannot be agreed, is approached in an informed manner by the Courts and that due process is followed. K needs to place before the Court in a very timely manner evidence to clarify a number of issues raised, especially confirmation as to whether the children were formally adopted. The wardship will provide, at this time, the structured framework for such careful consideration to take place and enable all interested parties to make representations."

12. At paragraph 33 of the transcript of the judgment I stated that:

"...On the evidence before me it appears that the children have been settled here for the past five years. I am conscious that this is a traumatic and unsettled period for them and that, on the information before me,¹ it is in their best interests to remain, at least for the short term, in familiar surroundings. This would enable

¹ My subsequent underlining.



them to attend their school, remain in the company of their friends and be cared for by their long-term carers U and N.”

4 13. At paragraph 35 I concluded that:

5 *“In all the circumstances of this case, including the uncertainty at*
6 *this stage as to who has parental responsibility and what orders*
7 *may be available to the Court under the Children Law, I am of the*
8 *view that the Court should exercise its inherent jurisdiction and*
9 *make both of these children wards of court. The Court needs to*
10 *exercise its parental jurisdiction and, at least for the short term,*
11 *until there is greater evidential clarification, ensure that ultimate*
12 *responsibility for the children rests with the Court.”*

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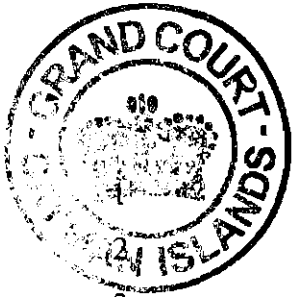
14 14. Based solely on the limited content of the unsworn affidavits and the very brief
15 submissions made by K’s counsel, I found at paragraph 30 of the transcript of my
16 judgment that:

17 *“...The children have resided in the Cayman Islands since aged 3,*
18 *for approximately five years, with their deceased father. It is clear,*
19 *from an objective view of the facts of this case, that before Aunt’s*
20 *unilateral actions in relation to the children that they were and are*
21 *habitually resident in the Cayman Islands.”*

22

23 15. I commented at paragraph 31 of the judgment that:

24 *“The children’s habitual residence cannot change unless all of*
25 *those with parental responsibility create a change, for instance*
26 *that they arranged for the children to live in settled circumstances*
27 *in the United States, or for example themselves move to the United*



States for a settled purpose. What is important is that they changed the habitual residence voluntarily...”

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4 I then went on to conclude that:

5 “...admittedly only on the evidence currently before me and
6 without having the benefit of hearing from Aunt, I find that the
7 children remain habitually resident in the Cayman Islands.

8

9 16. Paragraphs 25 to 29 of the transcript of the judgment contain my brief analysis of
10 the law applicable to the circumstances of this case. I have regard to this analysis
11 and do not intend to rehearse the same herein. On the information currently before
12 me, including the content of the oral and written submissions made by Counsel, I
13 remain satisfied that the Cayman Islands remains as the children’s place of
14 habitual residence.

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16 17. At paragraph 37 of the judgment I set out my direction that:

17 “...the wards must be returned forthwith to the jurisdiction of their
18 habitual residence, namely the Cayman Islands.”

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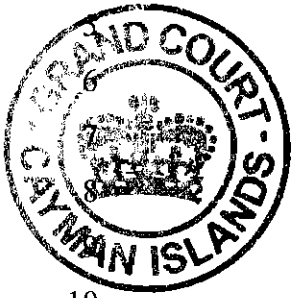
20 I then added that:

21 “In the interim, having regard to the apparent intention at
22 paragraph 4 of the Will², I place the wards in the interim care of
23 K. I am informed that K will be attending the funeral of F on 4th
24 December 2013 in Florida and I order that the wards be returned
25 to his care immediately upon service of this order, preferably in a

² My subsequent underlining.

1 child sensitive manner³ when the parties meet in the United
2 States.”

3 18. At paragraph 38, to assist the parties to understand the effect of wardship, I stated
4 that:



10 “For the avoidance of doubt, I wish to make it clear that the
11 removal of a ward of court from the Cayman Islands without the
12 leave of the Court is prohibited. Any such removal would be
13 regarded as a breach of the custody rights of the Court. The
14 parties must now be aware that the judge becomes the guardian
15 for the children and responsible for making all decisions which
16 seriously affect the children’s life and welfare.”

13 **Information Placed Before the Court by K at the Ex-parte Hearing on 3rd December**
14 **2013**

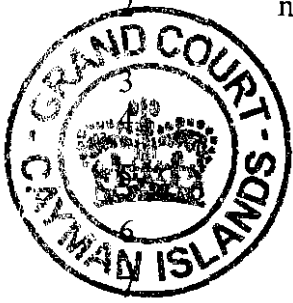
15 19. When I considered the ex-parte application, I reminded myself at paragraphs 23
16 and 24 of my judgment of the high duty of candour placed on an applicant
17 requiring him to give full and frank disclosure of the evidence to the Court. Aunt
18 contends that K failed to discharge such a duty.⁴

19
20 20. At the ex-parte hearing, K informed the Court that he had been appointed as the
21 testamentary guardian of the children in F’s Will executed on 1st November 2013.
22 The Court pointed out to K that the Will actually stated he was “the primary

³ My subsequent underlining.

⁴ At Tab12 of the Bundle D has provided the Court with a list of 10 undisclosed facts.

1 guardian” and that Aunt was to “continue to act as their secondary Guardian.” I
2 noted in my judgment that:



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8 *“These appointments phrased in this manner, are not as clear as*
9 *one might ordinarily wish, but it appears that the intention of the*
10 *deceased may have been that K would be the primary decision*
11 *maker concerning matters relating to the children. It may well be*
12 *that the deceased intended that be done in consultation with Aunt.”*

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This uncertainty still exists.

21. In his then draft affidavit K informed the Court that Aunt was F’s sister. He said that a copy of the Will was provided to her on 24th November 2013. He stated in the affidavit that Aunt was advised by an attorney at Campbells as to the existence of the Will by him reading the content to her over the telephone and asking if she understood and accepted the same. K stated that Aunt responded that she understood the Will and that she was told by the attorney that she had nothing further to do with the estate. I noted, at paragraph 9 of the transcript of my judgment that I commented:

“That may have been an inaccurate impression to have given to her, as F intended her to act as the secondary guardian. I note that Section 7(10) Children Law (2012 Revision) makes it permissible for there to be two or more persons to be appointed as guardians acting jointly. Therefore, it may be argued that both K and Aunt were appointed as guardians, and if this appointment has taken



effect that they both have parental responsibility under the Children Law (2012 Revision)."

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4 22. In my ruling I noted that:

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"To date there has been no grant of probate on F's Will. The November 2013 Will appears to have superseded an earlier Will entered into by F in which he appointed only his sister, Aunt, as guardian for the children."

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I reached this conclusion based on the lack of detailed information that there was an issue, and why there was an issue, in relation to the validity of the Will. The draft affidavit placed before the Court on 3rd December 2013 only indicated that to date there had been no grant of probate and acknowledged that there had "apparently" been an earlier Will, which K was not in possession of, which provided that Aunt was to be appointed testamentary guardian of the children. The affidavit did not expressly state that there was an ongoing live issue in relation to the Wills; it gave the impression by relating the content of Aunt's conversation with the attorney that she was accepting the November 2013 Will as being valid.

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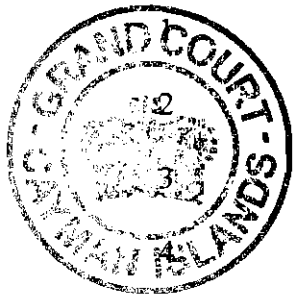
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23. I have seen at Tab 1 of Bundle A Magistrate Foldats' note in relation to an ex-parte hearing before him pursuant to an application made by K on 29th November 2013. Therein the Learned Magistrate records that K stated "*he was aware of previous Will, but not the content.*" The note reflects that he formed the



impression that Aunt intended "*a permanent removal.*" Importantly, the note also records that K had told the Learned Magistrate that Aunt "*had expressed an opinion that the Will was a forgery.*" It is a pity that, although the Court indicated it had reviewed the Summary Court file, K's attorney did not draw this Court's attention to these notes at the ex-parte application, especially having regard to my concerns set out at paragraph 34 of the Judgment.

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8 24. K stated in the draft affidavit that he had informed Aunt that it had been F's wish
9 that the children should continue to reside in and be educated in the Cayman
10 Islands. On the evidence that has since been produced, and it appears also agreed
11 between the parties, there is no issue that F wished the children to remain in the
12 Cayman Islands, remain at their school and have a Roman Catholic upbringing. It
13 is also accepted that, prior to the November Will, F's wish was for Aunt to move
14 to the Cayman Islands to care for the children.

15

16 25. K also stated in the draft affidavit that he was present when his father passed
17 away on 23rd November 2013 and that shortly thereafter, on 25th November 2013,
18 he returned to the United States. In the said affidavit, K stated that he had
19 informed Aunt that the children could attend a memorial service in the Cayman
20 Islands scheduled for 30th November 2013, but he felt it was not in their interests
21 to attend their father's funeral, due to be held in Orlando on 4th December 2013.
22 In the draft affidavit, K stated that he had a concern that Aunt was going to



remove the children on 1st December 2013 and as a consequence he made the
aforementioned ex-parte application to the Summary Court.⁵

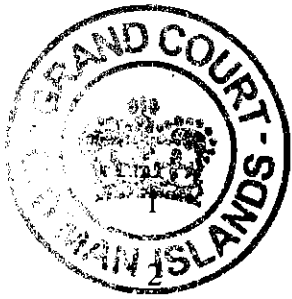
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4 26. In his draft affidavit K informed the Court that the Learned Magistrate made a
5 prohibited steps order preventing any person from removing the children from the
6 Cayman Islands without order of the Court. Also that the Learned Magistrate
7 ordered that Aunt or any other person in possession of the children's passports or
8 other travel documents deliver the same to the Royal Cayman Islands Police
9 Service, for onward delivery to the Clerk of Courts as soon as reasonably
10 practicable. Aunt was personally served with a copy of the Order at around 10:55
11 a.m. on 30th November 2013. The draft affidavit also informed the Court that a
12 copy of the Order was provided to the Immigration Department at the Owen
13 Roberts International Airport at 7:30 p.m. on 29th November 2013. However, the
14 Immigration Department advised that the children had already departed from the
15 jurisdiction in the company of Uncle, the husband of Aunt, earlier in the day on
16 the 7:50 a.m. flight.

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18 27. K stated in his draft affidavit that he believed that the children were initially
19 residing with Uncle at Aunt's property in Windermere, Florida. K was later led to

⁵ The written application which brought the parties before the Summary Court was one issued by the Department of Children and Family Services, seeking an emergency protection order. The Summary Court permitted K to make an oral prohibited steps application at that hearing.



believe that the children had then been moved from that address to an undisclosed motel.

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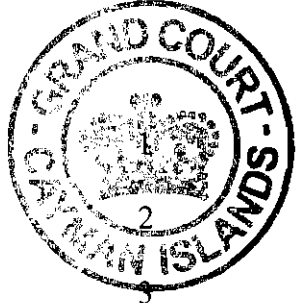
4 28. In his draft affidavit K informed the Court that the children had resided at F's
5 property in Crystal Harbour since August 2008. The children are in Grade 3 at an
6 established private school in Grand Cayman, at which K contends they are
7 flourishing and have many friends.

8

9 29. The Court was informed in K's draft affidavit that the children had been cared for
10 over the last five years by F's 55-year-old cousin, U, and for the last four years
11 also by N, their nanny. K stated in his draft affidavit that towards the end of F's
12 life he had to spend greater periods of time seeking treatment for his illness in the
13 United States and during his absence the above carers looked after the children.

14

15 30. K stated in his draft affidavit that he believes that in the short-term, especially at
16 this difficult time for the children, that they should remain in Cayman. He
17 contended that this would enable there to be some continuity in their life,
18 involving long-term carers, schooling and friends. Although K resides in the
19 United States, he declared his intention to come back to the Islands for a few days
20 each week to be with the children. K indicated in the draft affidavit and at this
21 hearing that he wished for his wife and family to spend the Christmas holidays at



1 the Crystal Harbour property in Grand Cayman with the children.⁶ K stated and
2 still maintains that in the long-term he will act in the children's best interests and
3 that he will treat them as his own children.

4

5 31. K also placed before this Court at the ex-parte hearing the unsworn affidavit of U.
6 U therein stated that she had worked for F, her cousin, since June 2006. U said the
7 children arrived at the Cayman home on 15th August 2008, when they were only
8 three years old. She indicated that F's wife did not accompany the children and
9 she could not recall her visiting the Cayman Islands.

10

11 32. U indicated in the draft affidavit that she had been caring for the children for the
12 past five years and they had developed a close and loving bond. She gave details
13 of the children's integration into the community and indicated that both of the
14 children enjoy living here. U stated that the children used to visit their mother in
15 Florida. The content of U's unsworn affidavit is consistent with the content of the
16 unsworn affidavit of N. I also noted in my Ex Tempore Judgment that, although
17 not contained in the draft affidavits, the Court was informed that the children have
18 stayed with Aunt in Florida.

19

20 33. It is rightly submitted on behalf of Aunt that at the time of the ex-parte hearing
21 that the Court was not adequately informed about:

⁶ They were planning to be at the property from 19th December 2013 to 13th January 2014.



- 1 (i) the uncertain immigration status of both U and N. At this time it appears
2 that, as they are Jamaican nationals, their work permits will have lapsed
3 upon the death of F;
- 4 (ii) the uncertain immigration status of the children who may have lost their
5 right to reside in the Cayman Islands following F's passing; and
- 6 (iii) K not having Cayman status or residence, and that he could only enter the
7 Islands on a tourist visa and how that might affect the viability of his
8 expressed intention to visit the Islands for a few days each week to see the
9 children.

10

11 34. Of particular importance is the fact that K, by himself or through his witnesses,
12 failed to provide sufficient detail to the Court about the lack of contact and the
13 nature of the rather distant relationship between K and the children. Of at least
14 equal importance is the lack of sufficient detail concerning the nature of the
15 significant relationship between the children and Aunt and Uncle. As a
16 consequence, the Court was not left with the impression at the ex-parte hearing
17 that Aunt and Uncle had thereto played an important role in the children's lives
18 and that K had played such a minimal role.

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20 35. At the ex-parte hearing, the Court was also not informed of the apparent very
21 close and supportive relationship between F and Aunt and of the rather distant
22 relationship that existed between K and his father. The nature of their relationship



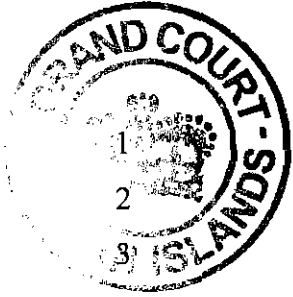
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may be deduced from the evidence of the Guardian who at paragraph 24 of her report notes that K stated to her that: “...in the last few months, there had been a lot of talk about reconciliation” between him and his father.

36. Knowledge of some or all of the relevant information set out in paragraphs 33 to 35 may have affected what orders, if any, should have been made at the ex-parte hearing before me.

37. The Court was also not informed about the existence of a number of relevant documents which NC, F’s Property Manager and a Notary Public, would have had knowledge of. NC is a potential witness from whom one might have expected K to have sought an affidavit to ensure that the full and balanced circumstances were being presented to the Court. NC is potentially a significant figure in these proceedings, as he notarised/witnessed a number of important documents in which F expressed a historically consistent approach identifying Aunt as being the person who should care for his children and administer his estate and affairs. For example, there is a significant document dated 4th July 2013 signed by F and witnessed by NC, in which F states:

*“To whom it may concern:
This letter serves to confirm my appointment of (Uncle) and (Aunt)
as guardians of my two minor children (Y) and (X).*



1 *Mr. and Mrs. C, will be allowed to travel with them, attend*
2 *medical exams and procedures, in both the Cayman Islands and*
3 *the United States of America.*

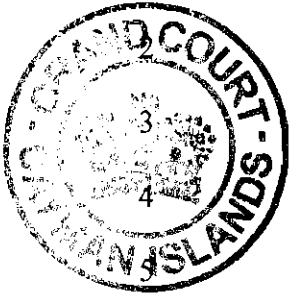
4 *Please allow them all guardian rights and privileges as me⁷ be*
5 *necessary.”*
6

7 38. NC is the person who is said to have witnessed and then found/produced the
8 disputed November 2013 Will which, on the face of it, is a drastic departure from
9 F’s previously expressed and/or transcribed consistent wishes. NC would likely
10 have been aware of Aunt’s considerable involvement in the children’s lives, as
11 well as the fact that K’s had been, at best, minimal. It appears that NC has an
12 interest in the contentious probate proceedings due to his involvement and income
13 derived with business entities that form a part of F’s estate. It is submitted by
14 Aunt that NC’s interests will be more secure if the November Will is found to be
15 valid and that as a consequence his involvement requires careful review.
16

17 **Hearing Held on 6th December 2013**

18 39. On 6th December 2013, a Summons for Stay, Discharge of Order and
19 Appointment of a Receiver was issued by Aunt. An order was sought staying all
20 proceedings under the ex-parte order pending the ordered return date on 13th
21 December 2013. Paragraph 1 of the said Summons also put the Court and K on
22 notice that Aunt would be applying to seek a discharge of the ex-parte order.
23

⁷ Presumably should be “may” rather than “me”.



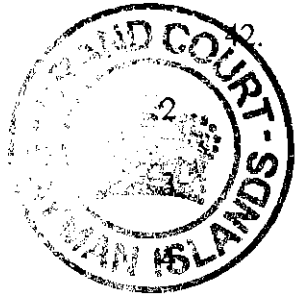
1 40. The Court agreed to hear at 4:00 p.m., at the conclusion of its daily list on Friday,
6th December 2013, the ex-parte on notice application brought by Aunt. At the
3 hearing, the only parts of the earlier ex-parte order stayed concerned the
4 immediate return of the children to the jurisdiction and the placement of them in
5 the care of K. The Court ordered, without opposition from Aunt's attorneys at the
6 hearing, that the children be returned by Aunt to the jurisdiction by midnight on
7 Thursday, 12th December 2013. The intention of the Court on 6th December 2013
8 was that the children would be seen by a social worker on the morning of 13th
9 December 2013 and the Court would be able to have the parties, as well as their
10 attorneys, in attendance when it reviewed the children orders and the wardship on
11 13th December 2013. The Court declined to hear the application in relation to the
12 appointment of a receiver.

13

14 **Events and Applications Made During the Period Between 6th December 2013 and**
15 **This Hearing**

16 41. In the intervening period between the hearings, the Court, in line with paragraph
17 41 of the Ex Tempore Judgment, decided that it was appropriate to appoint a
18 Guardian Ad Litem for the children. Accordingly, on Monday, 9th December
19 2013, Mrs. Maggie McCormac was appointed to be the children's Guardian Ad
20 Litem. On 17th December 2013, Ms. Sheridan Brooks agreed to be appointed as
21 the attorney for the children.

22



In breach of the Court's Order of 6th December 2013, Aunt failed to return the children to the jurisdiction. Aunt, through her attorney, contended that the children should be seen by their Guardian Ad Litem in Orlando before any return to the Cayman Islands.

5

6 43. Regrettably, Aunt failed to attend the hearing on 13th December 2013, citing
7 instances of harassment from the Authorities and persons affiliated to K which
8 she said caused her to fear mistreatment if she were to return to the Cayman
9 Islands. The facts relied upon by Aunt to form the reasoning for her concerns are
10 keenly contested by K. It is not appropriate for me to make findings of fact on the
11 affidavit evidence without the opportunity for the parties to be cross-examined. I
12 do note that the Guardian, following her interviews with Aunt, has formed the
13 view that Aunt is genuinely fearful. All I wish to indicate at this stage is that for
14 the Court to properly determine the issues before the Court and to endeavour to
15 make orders in the best interests of the children, both Aunt and Uncle will have to
16 play a proper role in these proceedings by giving oral evidence.

17

18 44. A letter dated 11th December 2013 was sent to the Court by Aunt's attorney
19 seeking approval for the Guardian to see the children in Orlando and, to a degree,
20 rehearsing their client's case on the substantive child related issues.
21 Unfortunately, the correspondence did not make it clear that permission was being
22 sought for the Guardian to travel to see the children prior to and in preparation for



the 13th December 2013 hearing. If this had been clear in the correspondence, time permitting prior to the hearing, it is highly likely that I would have granted permission as I was and am still of the view that the Guardian's recommendations and insight are of great importance in these proceedings.

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6 **Proceedings Issued by Aunt in Florida, United States of America**

7 45. On 9th December 2013 Aunt presented Petitions to the Circuit Court for Orange
8 County, Florida for:

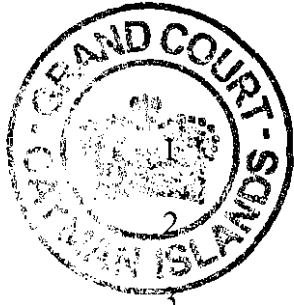
- 9 (i) the appointment of Guardian Ad Litem/Attorney to represent the interests
10 of the children and for an order for emergency temporary guardian; and
11 (ii) for appointment of Guardian of Minor (Guardianship of Person and
12 property).

13

14 Most regrettably, the attorney for Aunt in Florida failed to set out adequate details
15 within the Petitions concerning the ongoing proceedings in the Grand Court of the
16 Cayman Islands. The attorney failed to exhibit a copy of this Court's Order or the
17 transcript of the Ex Tempore Judgment from the 3rd December 2013 hearing.

18

19 46. I was compelled to comment upon a similar inappropriate approach involving a
20 lack of candour in relation to disclosure taken by an attorney in the recent case of
21 **CMS v RGS** FAM 177/2013. The case involved an application for an Emergency
22 Verified Petition for a Temporary Injunction to Prevent Removal of Minor Child



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in the Circuit of the Eighteenth Judicial Circuit, in and for the Seminole County, Florida. In that case, I reviewed the general principles in relation to the duty owed by parties and their attorneys to give full and frank disclosure at ex-parte hearings. I trust that the Courts in Florida are as concerned as Courts are in the Cayman Islands about this type of approach by a legally represented party to litigation, especially in a case in which that same party seeks to rely upon material non-disclosure in the proceedings before me. The Petition states that the father was “domiciled” in the United States and that the children were and are resident in the United States, failing to give any detail that they have actually been living in the Cayman Islands since 2008 and that the Grand Court has found the children to be habitually resident in the Cayman Islands. The Petitions give the impression that the children have had no significant connection with the Cayman Islands. Whatever the merits of the case before me may be, and whether it later transpires that the Florida Court is content to accept jurisdiction in relation to applications made in relation to the children, and if it is that the Cayman Islands Court is then persuaded that it should stay these proceedings based on a *forum conveniens* argument and cede jurisdiction, this does not justify a party failing in its duty to give full disclosure on information within their knowledge to the Florida Courts at this stage.

47. On 10th December 2013, K filed his objection to Aunt’s Petitions in the Florida Court.



The date is still to be provided for the hearing of the Petitions before the Florida Court. This Court was informed that the hearing would not be heard before the close of 2013.⁸

5 **This Hearing, 13th December 2013**

6 49. On 12th December 2013 Aunt filed a Summons returnable on 13th December 2013
7 seeking a direction that the Guardian visit the children in Orlando and then
8 prepare an interim report. The Summons sought a discharge of the ex-parte orders
9 made on 3rd December 2013

- 10 (i) placing the children in the interim care of K;
11 (ii) for their return to the Cayman Islands; and
12 (iii) prohibiting thereafter their removal from the Cayman Islands.

13
14 An order was sought placing the children in the care of Aunt and Uncle in
15 Orlando, Florida.

16
17 50. At the hearing on 13th December 2013, K strenuously opposed any further
18 variation to the order concerning the children's return to the jurisdiction and the
19 placing of them in his care. He argued that the terms of the ex-parte order should
20 be restored. It was submitted that Aunt, as a consequence of her non-compliance
21 with this Court's order and issuing of less than frank Petitions in the Florida

⁸ Whilst preparing this written Judgment the Court has been informed that the date for the hearing is 8th January 2014.



Courts, has “*demonstrated minimal regard for the authority or standing*” of the Grand Court.

3

4 51. K contended, and still contends, that the children should be returned to the
5 property in Crystal Harbour pending a more informed determination of the issues
6 by the Court at a hearing in possibly January 2014. He argues that this is the
7 natural and most suitable setting for the Guardian Ad Litem to carry out her
8 investigation and represent the children’s best interests. This would mean that
9 they could return to their current school and be looked after by what he views as
10 being their “*long-term carers.*” The Guardian indicated, when asked by K’s
11 attorneys during the presentation of her oral report given on 13th December 2013
12 (which was prior to her visit to see the children in Orlando), that there were no
13 welfare issues preventing the children returning to Cayman and that there was
14 some merit in her conducting her investigations with them in their “home”
15 environment in Cayman.

16

17 52. K’s plan for post-Christmas 2013 is for his wife and children to remain in Orlando
18 until the end of the current school year and that they will then all relocate to the
19 Cayman Islands. K proposes that in the interim he will be predominately placed
20 in Grand Cayman, spending most of the week here, and sharing care of the
21 children with U and N.

22

1 53. Aunt, who is the younger sister of F, is aged 66. She has been living in Orlando
2 since 1987 and it appears that she has had a close relationship with F throughout.
3 She married Uncle, aged 58, in April 1992. From the evidence before the Court,
4 they appear to have a supportive relationship. They have a unified approach to the
5 care of their nephew and niece, namely that they will care for the children in
6 Florida. They reside in a very comfortable property in an up-market area of
7 Orlando.

8
9 **Guardianship and the Relevant Evidence Regarding Appointment**

10 54. As I recorded at paragraph 8 of the transcript of my Ex Tempore Judgment
11 delivered at the ex-parte hearing:

12 *“It is important to understand what the status of a guardian is. A*
13 *Guardian may be appointed for a child by his parent or parents or*
14 *by the Court in the event of the death of one or both of his parents.⁹*
15 *That appointment must be in writing, dated and signed by the*
16 *person making the appointment or in a case of a will there may be*
17 *exceptions, as long as it is signed at the direction of the testator.¹⁰*
18 *When effective, the appointment vests in the guardian parental*
19 *responsibility for the child in place of the deceased parent or*
20 *parents.¹¹ In other words, he steps into the shoes of the deceased*
21 *parent in the event of that parent’s death. Such an appointment*
22 *will not take effect until there is no surviving parent with parental*
23 *responsibility.¹²”*

⁹ Section 7(3) Children Law (2012 Revision).

¹⁰ Section 7(5) Children Law (2012 Revision).

¹¹ Section 7(6) Children Law (2012 Revision).

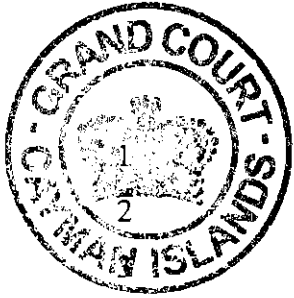
¹² Section 7(7) Children Law (2012 Revision).



1 55. I went on to say in my earlier ruling that if the surrogate mother has still retained
2 her parental responsibility she is arguably a surviving parent with parental
3 responsibility. In turn, this will mean that the testamentary appointment of either
4 K or Aunt would not be effective, even after F's passing. If not effective, it means
5 that they do not have parental responsibility and would not be able to exercise a
6 guardian's right to apply for Section 10 orders, pursuant to Section 12(4)(a). This
7 restricts the applications that may be made under the Children Law. It would also
8 mean that, in the vacuum, the Court would inevitably be required to make an
9 order appointing the appropriate person(s) as guardian(s) for the children.

10
11 56. Following the ex-parte hearing, there has been a considerable amount of evidence
12 filed. There is great factual dispute between the parties on a number of the issues
13 and the parties' positions are polarised. There has not been an opportunity for the
14 parties to give oral evidence and be cross-examined. With this in mind, I am
15 conscious of the following guidance given by Butler-Sloss L.J. in **Re F (A Minor)**
16 (**Child Abduction**) [1992] 1 FLR 548 at 553, when stating:

17 *"If a judge is faced with irreconcilable affidavit evidence and no*
18 *oral evidence is available or, as in this case, there was no*
19 *application to call it, how does the judge resolve the disputed*
20 *evidence? It may turn out not to be crucial to the decision, thus not*
21 *requiring a determination. It (if) the issue has to be faced*
22 *undisputed non-oral evidence, the judge has to look to see if there*
23 *is independent extraneous evidence in support of one side. That*
24 *evidence has, in my judgment, to be compelling before the judge is*



entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it.”

4

5

6 57. It is not appropriate for me to make findings of fact on these keenly contested
7 issues at this stage of the hearing.

8

9 58. However, from the produced documents, I am able to find that on 5th September
10 2008 F made a Will bequeathing his property to the children and appointing Aunt
11 as the Executrix, appointing her to be the sole guardian of the children and
12 making the children the beneficiaries of the estate.¹³ The will was witnessed by
13 NC and two others.

14

15 59. Although it would be inappropriate for me to endeavour to make a finding that K
16 and his wife removed a significant number of F’s wife’s belongings immediately
17 following her passing on 30th May 2010, I am satisfied that, on 31st May 2010, F
18 signed a comprehensive Power of Attorney appointing Aunt.¹⁴ At paragraph 1 of
19 the document F authorised Aunt to “*perform any action necessary to safeguard*
20 *the welfare and promote the continued well-being*” of the children. This
21 document was notarised by NC.

¹³ Tab 10, page 13 Bundle A.

¹⁴ Tab 10, pages 14-17 Bundle A.



1 60. I note that Aunt has produced a letter dated 6th December 2013 from Pohl &
2 Short, F's attorneys in Florida.¹⁵ The attorneys carried out the preparation of
3 estate planning documents for F. Pohl & Short indicate that at that time F did not
4 want K or DJr filling in any "*fiduciary positions or other positions under his state*
5 *planning documents.*" They indicated that he did not wish them to receive assets
6 under his estate planning documents other than a distribution at a maximum of
7 \$100,000 each annually. The rest of the assets were to be held in trust for the
8 children and that Aunt was to be the Trustee of these. The attorneys confirmed
9 that F executed a Will nominating Aunt as the children's Guardian (and JH, her
10 son, as the successor Guardian), a revocable trust and other estate planning
11 documents on 1st July 2012.

12
13 61. On 24th January 2012, F executed, before a Notary Public in Florida, a detailed
14 enduring Power of Attorney in Aunt's favour.¹⁶

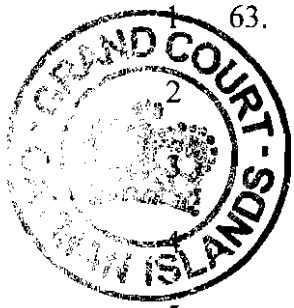
15
16 62. On 1st June 2012 F signed a Designation of Healthcare Surrogate.¹⁷ This is a
17 further document which was notarised by NC, it was also witnessed by U and one
18 other.

19

¹⁵ Tab 10, pages 31-32 Bundle A.

¹⁶ Tab 10, pages 18-29 Bundle A.

¹⁷ Tab 10, pages 33-34 Bundle A.



1 63. On 1st June 2012 F executed a further Will.¹⁸ This comprehensive Will was
2 prepared by Pohl & Short. The Will appointed Aunt as custodian and guardian of
3 the children and, in default, JH. Article 4 of the Will specifically stated that, if an
4 order for custody was required for the children, then it should be made in favour
5 of Aunt. Again, this Will was notarised by NC and witnessed by U.

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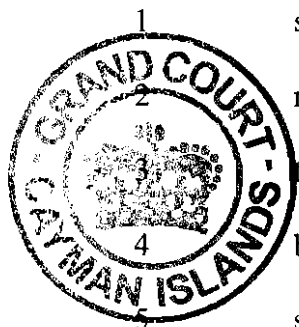
7 64. Following F's above-mentioned letter dated 3rd July 2013 appointing Aunt and
8 Uncle as the guardians¹⁹, on 14th October 2013, 16 days prior to execution of the
9 November 2013 Will produced by K, F's Living Trust as amended was restated.²⁰

10 At paragraph 9 F appointed Aunt as the successor Trustee of all the trusts created
11 by the agreement or, failing that, JH as successor Trustee. K is given no role in
12 relation to the trust and he was only entitled to a discretionary distribution not to
13 exceed \$100,000 annually. This document was also notarised by NC and
14 witnessed by U and N. No mention of this document or any of the above-
15 mentioned documents witnessed by them was made by U or N in their draft
16 affidavits presented to the Court in support of K's application at the ex-parte
17 hearing on 3rd December 2013.

18

19 65. At pages 6 to 17 of Tab 13 in Bundle A are copies of twelve Shareholders and
20 Directors Written Action in Lieu of Meetings for F's company's documents

¹⁸ Tab 10, pages 35-44 Bundle A.
¹⁹ See paragraph 31 above.
²⁰ Tab 10, pages 46-80 Bundle A.



1 signed by F all dated 1st October 2013. The effect of those documents is that they
2 remove all directors of the companies and appointed Aunt as the sole director of
3 the companies with immediate effect. The effect of this would be that NC would
4 be removed from any companies of which he was a director. Aunt indicates that
5 she has concerns about the integrity and the manner in which NC operated as F's
6 Caymanian partner and about his involvement with the November Will which she
7 believes may have been forged. It is not appropriate for me to make any findings
8 based on affidavit evidence alone, especially as NC has not had the opportunity to
9 address the same.

10
11 66. On 19th November 2013 a temporary work permit was applied for by F and issued
12 for Aunt to cover the period 21st October 2013 to 19th April 2014 to enable her to
13 act as Director/Manager of Bodwin Investments Ltd, one of F's Cayman
14 Companies. Aunt invites the Court to note that Aunt is a custodian of the
15 company and refers to the Information Return of US Persons with Respect of
16 Foreign Disregarded Entities at pages 82 to 86 of Bundle A.

17
18 67. Despite the content of Pohl & Short's letter, K contends that Aunt exercised a
19 considerable influence over F in the period leading up to his death. K also infers
20 that Aunt failed to update him about his father's condition and was not happy for
21 him to see his father close to his passing. Although, cognisant of K's above views,
22 it is with this background of structured estate planning, some of which is very



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recent, that one sees the one page contentious Will dated 1st November 2013. The content of the Will greatly differs from the consistent wishes illustrated by the content of the relevant above-mentioned documents. I note that this Will was witnessed by NC and notarised by another. I also note that the application for probate dated 23rd November 2013 states that the Will was "*found in the offices of the deceased in the custody of (NC).*" I further note that the content of the Will, which was known to NC, was not communicated to Aunt until 24th November 2013, despite the fact that NC was acutely aware of F's earlier estate planning as evidenced by the documents he had signed and his removal by F as Director of twelve companies. This background coupled with the admittedly untested evidence of two handwriting experts, based on their analysis of only a photocopy of the November Will, that the signature purporting to be that of F was likely fraudulent, inevitably means that the validity of 1st November 2013 is still in question. The investigation into the validity of that Will is not a matter for me to make findings about at this hearing. However, it would be inappropriate for me to approach this matter on the basis that the Will establishes to a sufficient degree of certainty the purported changed wishes of F in relation to who should be appointed as the guardian of the children and his care.

1 **The Guardian Ad Litem**

2 68. Although the Court does not approve of Aunt's failure to comply with the terms
3 of its orders, I must be careful to have the children's best interests as the
4 paramount consideration when considering what orders I should make. It is not
5 my role to indirectly punish the children by reaching an uninformed decision in
6 reaction to Aunt's inability to comply with Court orders. However, moving
7 forward, all parties should be clear that the Court expects complete adherence to
8 its orders. Therefore, having regard to the content of the Guardian's oral evidence
9 given on 13th December 2013, although not agreed by K, and of additional
10 material brought to the Court's attention post the making of the order at the ex-
11 parte hearing on 3rd December and the hearing on 13th December, I felt it
12 appropriate for her to visit the children in Orlando. This has enabled the Court to
13 now have more background information and a more informed recommendation
14 from her concerning the immediate future of the children.

15
16 69. Accordingly, arrangements were put in place for the Guardian to travel up to
17 Orlando at the beginning of the week of this hearing to enable her to speak:

- 18 (i) to the children alone;
19 (ii) to Aunt and Uncle in their home; and
20 (iii) to K and his family in their home.

21

1 70. As I indicated to the parties at the hearing on 13th December 2013, having then
2 had the opportunity to hear a limited report from the Guardian Ad Litem²¹, the
3 preferable course would have likely been for the children to be in Crystal Harbour
4 property in the Cayman Islands for the beginning of the Spring school term, cared
5 for primarily by Aunt, assisted by U and N. The placement with Aunt is because,
6 at the hearing, it became very clear to the Court that Aunt plays a consistent and
7 important role in the children's lives, especially in recent times. However, the
8 Guardian at paragraph 35 in her Report noted:

9 *"Shortly before (F) died, (Aunt) had promised him she would care*
10 *for the children, and return them to Cayman and be with them, so*
11 *that they could continue their education at.... . The plan had been*
12 *to have them enrolled at a High School in US when they were 10-*
13 *12 years old. She originally had wanted to bring them back early*
14 *in December, so they could have time with their friends, and*
15 *gradually have closure. They would then spend Christmas in*
16 *Orlando, and she would bring them back to Cayman early in*
17 *January for the beginning of the new term. However, due to all the*
18 *problems immediately after the death, and at the funeral, she says*
19 *she is very scared to return here and never again wishes to come*
20 *to Cayman. Accordingly, she is looking into enrolling the children*
21 *into a school in Orlando. She was obviously very distressed that*
22 *she has not been able to fulfill her promise to her brother and to*
23 *the children."*
24

²¹ The detail of the Guardian's oral report given was repeated and elaborated upon in her written report dated 21st December 2013.

1 71. The Guardian indicated that, from her discussions with U and N that in the past
2 they would take the children to their school if Aunt was not staying at the
3 property. The children's close relationship with Aunt was vividly portrayed when
4 the Guardian stated that:



10 *"I asked them (U and N) where the children slept. They both
11 smiled and said that they have their own rooms, but they never
12 sleep in them. They chose to sleep with their father or their aunt
13 (Aunt) when she is staying." She went on to say that they told her
14 that "the children love to play with her uncle (Uncle), who play
15 sports with them."*

16 They informed the Guardian that:

17 *"When the aunt was visiting, she always sat with the children and
18 they have family meals and these included the two carers in the
19 home. She said that the aunt always sits with the children and that
20 the children are very fond of her."*

21 The Guardian said that:

22 *"The impression I gained from the carers is that the visits from
23 (Aunt and Uncle) were very regular, (they) not say how many times
24 they visited, but the children were delighted to see them."*

25 72. This should be compared with the Guardian's evidence that U and N told her that
26 they had never seen any other relative of F before the funeral. The Guardian said
that they said they did not know if the children had seen anyone else or visited
anyone in Orlando, saying that the children never talked about it and the children



never mentioned any other members of the family in the United States. This tends to support Aunt's contention that they, unlike with her, had no significant relationship with K or his family.

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4

5 73.

The Guardian reported that the school informed her that their point of contact for any problems over the last few months was with Aunt and nobody but her. They stated that no secondary contact name had been given. The Guardian reported that the school confirmed that Aunt used to come with F to various communions and school meetings and that she would collect the children from school when she was in Cayman. The Guardian said that Mrs. L, who was the children's original teacher in 2009, told her that Aunt used to visit the children and F each month. The frequency of both Aunt and Uncle's visits and their interaction with F and the children is illustrated by the Timeline of Trips at Tab 6 in Bundle B and the extracts from the relevant passports at Tab 7 in Bundle B. The Guardian reported that Mrs. L informed her that F had wanted Aunt to obtain residency in Cayman so that the children could stay on at the School. Mrs. L said that the children had been unsettled by what was happening to the father and, following a request from Aunt, counselling had been set up at the Wellness Centre.

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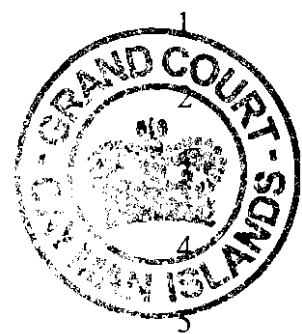
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20 74.

Mrs. L told the Guardian that she had not met any other family members before F died and that she first met K when he flew into the Islands the night before his father's death. Mrs. L told the Guardian that she had never heard F talk about K

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22



1 having any input in the children's care and education. This is consistent with the
2 evidence of U and N, and is a further indicator that K has hitherto not been a
3 significant figure in the children's lives. The Guardian also reported that Mrs. L
4 told her on the day that she first met K that he asked her: "*Do you know what my*
5 *Dad wanted for the children?*" And that he went on to say: "*I wonder what aunt*
6 *is going to do with the children.*" If this is accurate, it shows a belief on behalf of
7 K that Aunt was likely to play a significant role in the children's lives.
8

9 75. Father S told the Guardian that he had meals with the family which included
10 occasions when Aunt was visiting. He indicated that the children were well loved
11 by Aunt and that F had never mentioned any other son, including K, to him. He
12 stated to her that F was clear that he wanted the children to have a Catholic
13 education.
14

15 76. This interaction with the school and the church led the Guardian to conclude that
16 those who she spoke to:

17 *"were all fully aware of the involvement of (Aunt) in the life of the*
18 *children, none had any understanding that (K) and (M) played any*
19 *part in their lives."*
20

21 77. Following her visit to Orlando, the Guardian provided the Court with a written
22 report dated 21st December 2013. In that report she concluded that the children
23 had a "*strong and long standing relationship*" with Aunt and Uncle who she



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concluded were “*fit and healthy*” and “*very willing to undertake the role of parents.*” The Guardian reported that she had closely observed the relationship between the children and Aunt and Uncle. She noted her observation that X was “*always wanting to hold his uncle’s hand when we were out together.*” She reported that X and Uncle’s interaction appeared “*very natural and relaxed.*”

78. The Guardian reported that when she spoke alone with the children she asked them where they “*would like to live if they were able to wish for anything.*” She noted that “*without hesitation*” the children informed her that they wanted to live with Aunt and Uncle. The Guardian reported that the children told her that “*they had never visited K’s home and that they did not want to live with him.*” She later asked them where in the World they would like to live if they were able to live anywhere. She further noted that in reply, again without any hesitation, they said they wanted to live in Orlando, not in Cayman. Despite concerns arising out of the psychological report placed before the Court by Aunt that the adults involved may have made derogatory remarks concerning K in the presence of the children, the Guardian was satisfied that the children’s answers were “*genuine.*”

79. The Guardian reported that, following her visit to K’s home, she concluded that it was “*a lovely home, very child-centered and showing many signs of a loving family.*” However, she stated that it was clear to her that:



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“the contact (K) and (his wife, M) have had with the children has been relatively short; neither child seems to have any significant recollection of (K) and (M), although they could recall the treasure hunt spent together last Easter.”

80. The Guardian stated in her report that the children had thrived in the Cayman Islands where they had enjoyed school and life generally. She reported that the children told her that they missed N and U and spoke about their friends. Despite this, she felt that there was no reason why they could not adjust readily to any change. She felt that in Orlando, if living with Aunt and Uncle, they would be in a familiar home, *“with adults with whom they are familiar and comfortable”* and where appropriate schooling could be found for them.

81. Having regard to her observations, the Guardian is of the view that it is in the best interests of the children to maintain a relationship that they have with Aunt and Uncle and to remain in their care. Accordingly, the Guardian recommends that the Court makes orders enabling the children to reside with them in Orlando where they should attend school. I am of the view that the Guardian has, as best she can in the limited time available, delivered an informed recommendation. The Guardian’s recommendation is one with which I am in agreement, as it is in the best interests of the children to be cared for at this time by loving adults with whom they have a strong and loving bond. I accept that the children have expressed a firm view to the Guardian that they wish to be cared for by Aunt and



4 Uncle. I also note that the children have expressed a firm wish, whilst at the same
5 time acknowledging their positive attitude to their time in and persons familiar to
6 them in Cayman, to be cared for in Orlando rather than in Cayman. This is not
7 evidence that was before me at the ex-parte application when my decision was
8 partly based on my then held view that at that time they would likely wish to be in
9 Cayman and that they would likely feel more secure and settled:

- 7 (i) in Cayman; and
- 8 (ii) under the care of U and N.

10 **The Parental Jurisdiction of the Grand Court under Wardship – The Psychiatric**
11 **Report Filed By Aunt**

12 82. I am most concerned that the law firm of Pohl & Short deemed it appropriate to
13 refer the wards to Mr. Kyle Goodwin, child psychiatrist, in Florida without first
14 seeking leave of this Court. From the face of the resulting Psychological Report
15 dated 11th December 2013 it appears that Hampson and Company, Aunt's then
16 attorneys in this jurisdiction, had knowledge of the intent to refer as the report is
17 also addressed to them. If this is right then Hampson and Company, as officers of
18 this Court, had an obligation to inform Pohl & Short and Aunt about the legal
19 consequences flowing from the children being made wards of this Court.

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21 83. Attorneys involved in wardship proceedings should be aware that it is trite law
22 that no important step must be taken in the child's life without seeking leave of



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the Court. Once a child is made a Ward of Court, the ultimate responsibility for the child rests with the Grand Court. The Court is responsible for making all the decisions which seriously affect the child's life and welfare.²² One of those important steps is the child receiving a psychiatric/psychological examination and/or treatment.²³

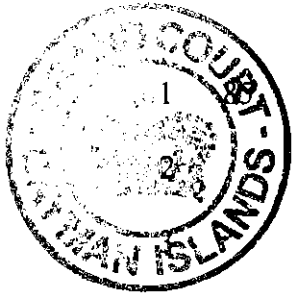
84. The Practice Direction [1985] 3 All ER 576, [1985] FLR 355 from England and Wales provide helpful guidance as to when it may be appropriate for a psychological examination to take place. The Practice Direction provides that leave for such an examination should normally be given by the Court only where:

“the child is simply represented, and his representative supports the application, or the application is supported by the local authority which has the care or supervision of him”

and where:

“there is, or are suspected to be, a specific an identifiable problem or potential problem on which the court needs assistance, which can only, or most conveniently be provided by qualified psychiatrist or psychologist.”²⁴

²² Re R (Minors) (Wardship: Jurisdiction) (1981) FLR 416 at 419E - Paragraphs [1057]-[1059] Hershman & McFarlane, “Children Law and Practice”.
²³ Re S (Infants) 1967 1 All ER 202 at 209C; Re R (PM) (An Infant) [1968] 1 All ER 691 at 992D: England and Wales helpful Practice Direction [1985] 3 All ER 576, [1985] FLR 355.
²⁴ Paragraphs [1060]-[1062] Hershman & McFarlane, “Children Law and Practice”.



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It was therefore highly inappropriate for this referral to have been made in relation to the wards. I am aware that, where leave has not been obtained, I have the discretion to refuse to admit the report.

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86. However, I have considered the report but the weight to be placed on it is not considerable. I note that at the outset it wrongly indicates that Aunt and Uncle currently have the guardianship of the children. The report indicates that the children would prefer to reside with Aunt and Uncle whom the children indicate to the reporter have played a frequent role in their lives. I am content to accept that this is what the children told the psychologist. I note that it is consistent with what they have told the Guardian.

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87. Of concern in the report is the expression by both children of the factual issues which one might ordinarily not expect them to be aware unless that information has been given to them by an adult. For example, on page 4 of the report X referred to K as "*the bad one*" indicating that K wanted custody of him and to take his father's money. A further example is found on page 6 of the report where Y described having problems with her older brothers and that K wanted her and her brother to go to their father's funeral to "*trap*" them.

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88. I agree with the Guardian's sentiment that it is highly inappropriate for adults to involve children of this age in the proceedings by providing them with such

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1 information. The attorneys for K are rightly concerned if Aunt and Uncle are
2 seeking to influence the children in this way. When I have considered the
3 expressed views of the children to the Guardian I have regard to my concerns
4 arising out of this report. That said, having read and heard the Guardian's
5 evidence I am still satisfied that their wishes expressed to her are genuine, and I
6 have regard to them when reaching my decision.
7

8 **Conclusions**

9 89. In all the circumstances of this case, including the uncertainty at this stage as to
10 who has parental responsibility and as a direct consequence the probability that
11 any testamentary provision purportedly appointing K or Aunt as guardians for the
12 children is not effective, I am of the view that the Court should exercise its
13 inherent jurisdiction and confirm the wardship for these children. The Court needs
14 to exercise its parental jurisdiction in the vacuum and, at least for the short-term,
15 ensure that ultimate responsibility for the children rests with the Court.
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17 90. In wardship I am not limited to deciding issues raised between the parties to the
18 proceedings and I may decide on a course which is not advocated by the parties. I
19 am satisfied that it is in the children's best interests for them to be placed under
20 the interim care of Aunt and Uncle. I am also satisfied that it is in their best
21 interests for them to be cared for at this time in Orlando, Florida. I say this with
22 the knowledge that the children will have to attend a new school in Florida for the



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upcoming term. I am satisfied that the children are of such an age, having regard to the Guardian's conclusion that they are mature enough to express such views, that the Court should have regard to their wishes at this time. They wish to reside with Aunt and Uncle in Orlando. It is important at this traumatic time for them that they be in a safe and settled environment, especially if it is one in which they express a wish to be at.

91. I am satisfied that the Guardian has rightly concluded that the children's physical and emotional needs will be better met at this time by them being cared for by Aunt and Uncle in Florida. Although it may have been better for their educational needs to have continuity at their school in the Cayman Islands, I am satisfied that high-quality private schools are being investigated in the Orlando area. When I balance the children being cared for by the family members Aunt and Uncle with whom they have a strong bond against the effects of change of educational establishment, the former is of more importance at this time. When I say this I recognise that the school in Florida will not be a Church school and there will likely be a break in their religious education. I am satisfied that the effect of the change of circumstances for the children will not be detrimental, due to their close relationship with Aunt and Uncle, coupled with the familiarity of their home and their expressed wishes for the change. I am satisfied that the children are not at risk of suffering harm in the care of Aunt and Uncle. However, they may suffer emotional harm if unable, against their wishes, to be cared for by Aunt and Uncle



at this unhappy time. I am satisfied, especially after having heard from the Guardian, that Aunt and Uncle are capable of meeting the children's emotional and physical needs.

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5 **Making the Children Parties to the Proceedings**

6 92. At the hearing I informed the parties that I was considering making the children
7 parties to these proceedings. There was no objection to the Court taking such a
8 course. I am satisfied that it would be appropriate in this case for these children to
9 be made parties to the proceedings. I am satisfied that this separate representation
10 will result in minimal, if any, delay in the resolution of the proceedings as their
11 Guardian Ad Litem and attorney have already been appointed. When I make this
12 order, I am cognisant of the helpful guidance given in the President of the Family
13 Division of England and Wales' Direction (Representation of Children in Family
14 Proceedings Pursuant to Family Proceedings Rules 1991, Rule 9.5) [2004] 1 FLR
15 1188.²⁵ The Direction provides:

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"...

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[2] Making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases...

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[3] The decision to make the child party will always be exclusively that of the judge, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of

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²⁵ Duplicated at Practice Direction 16A, Part 4.

1 *guidance, a circumstance which may justify the making of an*
2 *order:...*
3 *[3.7] where there are international complications outside child*
4 *abduction, in particular where it may be necessary for there to be*
5 *discussions with overseas authorities or a foreign court.”*
6

7 **Order**

8 93. Accordingly, I:

- 9 (i) confirm the wardship;
- 10 (ii) place the wards in the interim care of Aunt and Uncle in Orlando, Florida;
- 11 (iii) make the children parties to these proceedings;
- 12 (iv) list the matter for a mention hearing on 23rd January 2014 at 9:00 a.m. to
- 13 enable there to be informed directions given and timetabling of the
- 14 proceedings; and
- 15 (v) reserve costs.



17 Dated this 15th day of January 2014.

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

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

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