

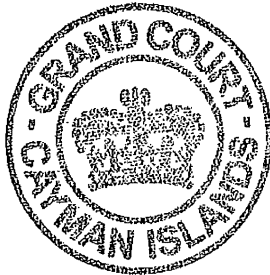
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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION**

CAUSE NO. FAM 177 of 2013

BETWEEN:



CMS

Petitioner

AND

RGS

Respondent

Appearances: Ms. Vanessa Allard of Brooks & Brooks for the Petitioner

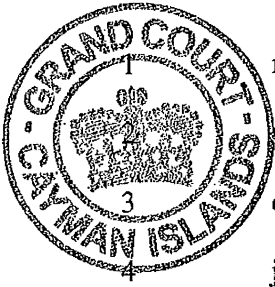
Before: Hon. Justice Richard Williams

Heard: 9th September 2013

EX- TEMPORE JUDGMENT

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

2. Due to the requirement for a prompt decision to be made, I give this in the form of an ex tempore judgment. Regrettably, it may not read as neatly as a written



reserved judgment, but it is designed to enable the parties to immediately understand the reasons for my decision. I will have this judgment transcribed and direct that copies be provided to the parties. Additionally I permit copies of the judgment to be provided to the parties' attorneys in the related Florida proceedings, to the Florida Court in the related proceedings and to the Central Authorities of the Cayman Islands and the United States involved in the ongoing Hague Convention procedure concerning the relevant child.

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9 3. This matter concerns P, a young boy born on 16th March 2012 and who is, therefore, just over one and a half years old. I shall refer to him as P in this judgment. His married parents are CMS (his mother – “M”) and RGS (his father “F”). I shall refer to them as M and F.

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14 4. M and F met in the Cayman Islands, where by July 2013 they had both been residing for approximately seven years. They were married in the Cayman Islands on 26th March 2010. Thereafter they lived together in the matrimonial home in George Town, Grand Cayman.

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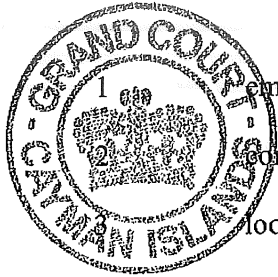
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19 5. Both parties are nationals of the United States of America. F also holds nationality in Canada where the paternal grandfather resides. M has been in secure employment as a Planning Officer with the Department of Planning for the Cayman Islands Government. M indicates that, in around May 2012, F lost his

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employment and that he has since chosen to remain unemployed. As a consequence, M has been the sole financial provider for the family and F has looked after P during the working day.

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5 6. On 26th August 2013 M filed her Petition for Dissolution of the Marriage on the
6 ground of F's unreasonable behaviour. That Petition is still to be served on F. One
7 of the applications before me today is in relation to service of the Petition. In light
8 of the nature of the global proceedings, I am not content to order substituted
9 service by courier on F at this stage. There is no evidence of F seeking to evade
10 service by any process server. M is now represented by attorneys in Florida and
11 should instruct a local process server in Florida and have F served personally with
12 the divorce and children related pleadings in the normal way.

13

14 7. M by her ex-parte application seeks orders as a consequence of the alleged
15 wrongful retention of P by F in the United States since 28th July 2013. M states
16 that the parties agreed that P could be out of the jurisdiction with F from 15th July
17 until 28th July 2013. To confirm this M produces a written travel authorisation
18 signed and witnessed before a notary public on 12th July 2013 in which she states:

19 *I, (name removed)...., give consent to my husband, (name*
20 *removed)....., to travel in sole custody with our son, (name*
21 *removed)....., from Grand Cayman, Cayman Islands to Tampa,*
22 *Florida from July 15 to July 28, 2013 to visit with family in Winter*
23 *Springs, Florida.*



In her Amended Ex-Parte Summons dated 4th September 2013, M seeks an interim residence order in her favour and an order that F return P to the Cayman Islands.

5 9. M contends that F is very controlling. She states that F has been overbearing
6 when it comes to the raising of P and has restricted the time that M has with P. M
7 states that she became depressed and anxious due to her feeling marginalised as
8 P's mother. It is evident that the parties were having difficulties with their
9 marriage and with how they related in relation to the upbringing of P and, as a
10 consequence, they attended counselling. M states that counselling has not been
11 successful due to F seeking to control the sessions and threaten the counsellor,
12 with the consequence that the counselling came to an end in June 2013.

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14 10. M states that, in June 2013, she was physically assaulted by F when he was
15 holding P in his arms. A report of the incident was made to the police by M, who
16 it appears determined that F had placed P and M in harm's way and referred him
17 for psychiatric evaluation. Statements were provided to the Family Support Unit
18 within the Royal Cayman Islands Police Service. It is unclear whether a decision
19 has been taken to prosecute F in relation to this alleged assault. Whilst an
20 assessment was being carried out, P remained in the sole custody of M. M has not
21 been able to obtain a copy of the mental health assessment carried out on P. M has
22 ongoing concerns about F's use of marijuana and alcohol. On the other hand, F



has ongoing concerns about the state of M's mental health and her ability to care for P. F alleges that M has assaulted him and put P at risk.

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4 11. After F's return to the matrimonial home M suggested that he take P for a short
5 family vacation to Little Cayman, the trip having already been paid for. M felt
6 that this would reduce the stress in the household and it would give her the
7 opportunity of seeing an attorney to seek legal advice without F knowing.

8

9 12. F suggested that, rather than going to Little Cayman, he and P visit his mother in
10 Florida, United States. M, despite having some reservations, consented to a
11 temporary removal from 15th to 28th July, as evidenced by the above-mentioned
12 notarised travel authorisation letter. F left to the United States with P in
13 accordance with the parties' agreement.

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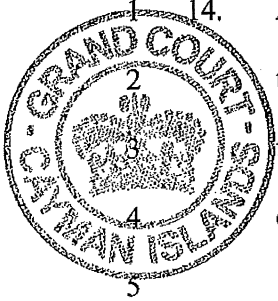
15 13. However, when in the United States, F informed M that he had decided to remain
16 in the United States with P. F emailed M on the morning of his due date of return,
17 28th July 2013, stating:

18 *"We will not be returning to Cayman today. I have notified*
19 *Detective Berns, and the U.S Consulate as to the reasons why."*

20

21 M immediately replied stating:

22 *"I am sorry that is your decision. I was looking forward to having*
23 *P in the house again. I will do what I have to do to as I have not*
24 *given my consent to your extended visit with our son."*



1 14. As P is a child of the marriage, both parents have parental responsibility pursuant
2 to section 4(1) of the Children Law (2012 Revision). It is evident that, although
3 the parties had clearly agreed the dates for P's return, the father did not intend to
4 comply.
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6 15. On 24th July 2013 F wrote to M, expressing concern that M's parents were
7 intending to visit the Cayman Islands. He expressed the view that he had "*limited*
8 *rights*" in Cayman because of his "*inability to work*" and that he felt "*very*
9 *vulnerable*" because of "*threats*" which he said had been made by M to have him
10 "*thrown off*" the Island. F also outlined in the email an allegation that M had
11 physically assaulted him by hitting him in the chest. Following receipt of that
12 email M wrote to F stating:

13 *"If you and P do not plan to return on Sunday as agreed, I will*
14 *seek my legal rights as a parent to have him returned to Cayman."*
15

16 16. On 26th July 2013 F filed an "Emergency Verified Petition for a Temporary
17 Injunction to Prevent Removal of Minor Child" in the Circuit of the Eighteenth
18 Judicial Circuit, in and for the Seminole County, Florida. The Petition was
19 accompanied by a standardised "Uniform Child Custody Jurisdiction and
20 Enforcement Act (UCCJEA) Affidavit" sworn by F on 26th July 2013.

21
22 17. On 31st July 2013 F emailed M stating:



5 “Until I know that at a permanently safe, happy and stable home
6 life exists for P and I in Cayman, we will be remaining in Florida.
7 I explained in an earlier email what this entailed. I would like to
8 know that you have started psychiatric treatment before visiting,
9 and are taking the appropriate medication for your depression v.
10 the anti-anxiety.”

11
12 F failed to make any mention in the email that he had instructed an attorney and
13 that he had filed proceedings in a Court in Florida and that a hearing was
14 scheduled for that very day.

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17 18. On 1st August 2013 F wrote to M primarily seeking child support payments from
18 M. He also reiterated his view that, if M sought to have contact with P in Florida,
19 it would have to be on his terms, and on condition that she received psychiatric
20 assistance.

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22 19. On 31st July 2013 an “*Ex Parte Order on Emergency Verified Motion To Prevent
23 Removal of the Minor Child*” was made by a Circuit Judge at Sanford, Seminole
24 County. The Learned Judge ordered:

- 25 (i) that the emergency verified motion to prevent the removal P be granted;
- 26 (ii) that M shall not remove P from the state of Florida, and shall not be
27 allowed to obtain a new passport for P;
- 28 (iii) that under the laws of the state of Florida, the Court had jurisdiction over
29 the parties and the subject matter;



- (iv) that the ex-parte order shall remain in full effect, unless changed by another order of the Court; and
- (v) that M be served with a copy of the order at that a hearing shall be coordinated with H's counsel's office.

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6 I note that Ms. Whitehead, Judicial Assistant, on page 2 of the Court's order
7 signed a "Certificate of Service" stating:

8 *"I hereby certify that a true copy has been furnished to: Eneid*
9 *Bano, Esq. and Colleen Stoetzel-Singh."*

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11 In fact, the order was not served on M.

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13 20. Ex-parte orders of this nature are draconian and are ordinarily made only in
14 exceptional circumstances, based on sufficient evidence filed by the Applicant. A
15 determination is made by the Judge based on the evidence placed before him by
16 an applicant in the absence of any representations from the other party. Therefore,
17 an applicant has a clear duty to assist the Judge and provide the Court with full
18 and frank disclosure of the evidence, in other words, he has a high duty of
19 candour. A failure to do so would ordinarily be grounds for a discharge of the
20 order. An applicant at an ex parte hearing should, if aware of it, outline to the
21 Judge any defence the respondent would likely argue if they had been in
22 attendance. For example in this case F should have shown the Florida Court the
23 emails from M as well as the notarised authorisation travel letter signed by her



4 which, to a degree, set out her position. One can understand why the Learned
5 Judge may have formed a certain view about P's residency based on the
6 misleading contents of F's incomplete pleadings and in the absence of the
7 aforementioned documentary evidence.

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10 21. When I today consider M's ex-parte application before me I am acutely aware of
11 the obligation placed upon the applying party and the Court at such hearings.
12 Mostyn J. in *UL v BK [2013] EWHC 1735 (Fam)* sets out his concerns about the
13 overuse of ex-parte applications and the duty placed on the applying party.
14 Although that is a case dealing with freezing injunctions made within divorce
15 proceedings, the general principles arising out of his review of the case law are
16 insightful when considering Children Law applications. I note that M has
17 provided two sworn affidavits in support of her application and that the second
18 attaches 180 pages of exhibits. Having carefully considered the affidavits and
19 exhibits I am satisfied that M has provided me with information sufficient to
20 enable me to deduce what F's case would likely be if he were before me, thus
21 enabling me to carry out a more balanced determination.

22 22. At paragraph 5 of his Petition F states that it must be heard ex parte because if M
23 were given notice he:

24 *"fears based on repeated threats from the wife that she would*
25 *immediately leave the state of Florida and the country with the*
26 *minor child."*



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As the application was made ex parte, as already mentioned herein, F would have been under an obligation to provide the Florida Court with copies of all of the emails that had been sent between the parties concerning his wrongful retention of P. If he had, the Learned Judge would have seen in M's email of 24th July 2013 that she stated that she will

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"seek my legal rights as a parent to have him returned to Cayman."

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Later in the same email M states:

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"Based on how I feel our situation is progressing, yes, I have been doing my research to know my rights and how I can protect myself and P. That has involved contacting attorneys, the U.S Embassy, Immigration, FSU, therapists and other mothers, that is what I have been doing, if I was truly the problem, would I be doing all this work?"

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M went on to say in the email that she was *"willing to work with"* F. The written evidence in F's possession at the time of the ex parte hearing which F had a duty to place before the Florida Court on an ex parte application reflects that M was not intending to immediately take the child from the state of Florida, but was intending to use the appropriate legal options that were open to her.

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23. In addition, M appropriately contacted the Central Authority for the Cayman Islands under the Hague Convention on the Civil Aspects of International Child Abduction ("The Convention"). As a consequence, the Central Authority wrote to

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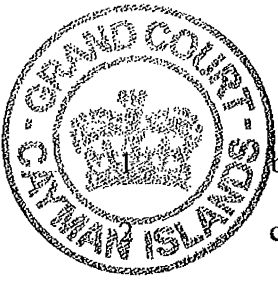
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the Director of the Office of Children's Issues at the US Department of State on 8th August 2013 attaching a formal written "Application for Assistance under the Hague Convention on Child Abduction" as well as a factual background letter signed by M. The Application was made by the Central Authority pursuant to Article 8 of the Convention on the basis that P had been wrongfully retained in accordance with Article 3. Assistance was sought from the United States Central Authority for the return of P to M in the Cayman Islands. It appears that application is still being processed by the Central Authority in the United States.

24. Despite the contents of paragraph 6 of the order made by the Florida Court, F lamentably failed to serve M with a copy of the pleadings or the order, or to ensure that a hearing date was provided for an on-notice consideration of his application. Astonishingly, F even failed to provide M with notice of the Petition or the order when he knew that she was in Florida seeking him to return the child in August 2013. The existence of the injunction was only brought to M's attention when she was informed by the Royal Cayman Islands Police that had F had told them about the injunction when he was enquiring about the status of their investigation into the allegations of domestic violence inflicted against M.¹ This inaction by F makes it questionable whether the application was in fact a genuine emergency requiring the making of an ex-parte injunction, for the order is not

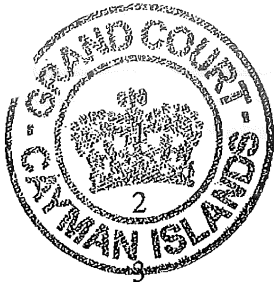
¹ See paragraph 10 above.



binding until served, or whether it was simply an example of a unilateral and controlling measure concerning the child's upbringing taken by him.

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4 25. M's Florida attorney was eventually able to obtain copies of the pleadings and the
5 order by requesting the same from F's Florida attorneys, having obtained the
6 particulars from the Seminole County Domestic Relation Clerk's Office on 28th
7 August 2013. As F is acutely aware of M's whereabouts, it is inexcusable for him
8 to have failed to serve a copy of the injunction and pleadings on her during the
9 considerable period of time that followed the making of the order. It is also
10 troubling to note that in the Notice of Related Cases filed on 26th July 2013 in the
11 Florida Court and signed by F's attorney there appears to be a Certificate of
12 Service indicating that on 26th July 2013 a copy of the Notice "has been furnished
13 via US mail" on M. Despite the contents of the attorney's signed certification, M
14 has to date not received the Notice through the mail. One questions whether a
15 copy was actually sent and whether there should be a requirement for personal
16 service in proceedings such as these. The fact that M instigated the Hague
17 Convention procedure and had instructed US attorneys for advice as to how to
18 have P returned to this jurisdiction, even prior to any knowledge of there being an
19 injunction in place or proceedings instigated by F in the Florida Courts, shows
20 that she seeks to follow the appropriate legal channels, and counters the assertions
21 to justify an ex parte hearing made in paragraph 6 of F's Petition. M continues to
22 use the appropriate legal channels for P's return to the jurisdiction and this Court



has this morning been shown the “Motion to Modify Ex-Parte Order on Petitioner’s Emergency Verified Petition to Prevent Removal of Minor Child and Request for Expedited Hearing” filed in the Florida Court on 6th September 2013

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5 26. I note when I consider the content of F’s pleadings that his Petition and
6 supporting affidavit contain the following affirmation signed to by him.

7 *“I understand that I am swearing or affirming under oath to the*
8 *truthfulness of the claims made in this verified motion and that the*
9 *punishment for knowingly making a false statement includes fines*
10 *and/or imprisonment.”*

11

12 27. F, at paragraph 2 in his Petition, indicated that P had been resident in Orange
13 County, Florida, since “2013.” Similarly, in the section headed “*Child’s*
14 *Residence for the past five years*” in his affidavit filed with the Florida Court, F
15 failed to set out the dates during which P has been staying in the Winter Spring’s
16 property in Florida. The incomplete way in which the affidavit has been drafted
17 gives the impression that P has only been living in Cayman, from 2012 until an
18 undisclosed date in 2013. It is most regrettable that F and his attorneys failed to
19 record the precise date therein, namely 15th July 2013, which would have
20 informed the Florida Court that P had been in Florida for only 11 days prior to the
21 filing of the Petition. One may ask whether the Petition and the affidavit were not
22 completed properly or in full to deliberately mislead the Florida Court, thereby
23 giving the Court the wrong impression that P had been in the jurisdiction for an

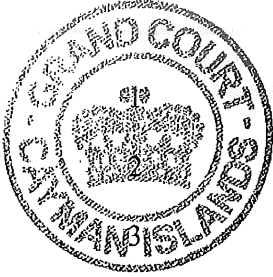


extended period of time. What F failed to mention in his Petition is that the parties had been residing in the Cayman Islands for approximately the last seven years and that P had been habitually resident in the Cayman Islands since his birth. I note with great interest that Fla. Stat. 61.503(7) provides that:

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5 *"Home state means the state in which a child lived with a parent*
6 *or a person acting as a parent for at least six (6) consecutive*
7 *months immediately before the commencement of a child custody*
8 *proceeding."*

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10 Clearly, Florida was and is not P's home state, and the Florida Court would have
11 been made aware of this if the pleadings had not been incomplete and F had given
12 full and frank disclosure to the Learned Judge.

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14 28. In the Petition at paragraph 4a, F states that the parties are currently separated.
15 He therein states that M lives in the Cayman Islands and that P was born during
16 the marriage and lives in Seminole County. Despite his responsibility to give full
17 and frank disclosure F fails to mention that, in fact, the parties were cohabiting in
18 the former matrimonial home until 15th July 2013. F therein fails to mention that
19 the parties had agreed, upon his request, that P would accompany him for a visit
20 to Florida limited to the period between 15th July 2013 and 28th July 2013. It
21 appears that F failed to mention to the Court that M had provided a notarised
22 written travel authorisation permitting him to remove P from the jurisdiction for
23 the said visit during that specific period. F had a duty at the ex parte hearing to



produce that written authorisation to the Learned Judge. His attorney, as an Officer of the Court, would of course have a duty to advise and ensure that this and all relevant documentary evidence in his client's possession was disclosed to the Learned Judge, especially if it had been shown it by his client.

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29. When one reads paragraph 4a. of F's Petition one may be given the wrong impression that P had been residing for a period greater than 11 days in Florida and that M was seeking to disrupt the status quo. One may gain the impression from the contents of F's Petition that P was a resident in Florida, rather than being there on a temporary visit between 15th July and 28th July 2013. This impression is reinforced when F states that M had made

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"repeated threats to the husband that she would take the minor child out of the state of Florida and keep him permanently in the Cayman Islands."

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He goes on to say that he fears that M

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"is willing and capable of taking the minor child out of the state of Florida and not bringing him back here."

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These statements are inconsistent with the status quo regarding the place of P's residence which has been in place in the Cayman Islands throughout his life until 15th July 2013. It is F not M who has unilaterally sought to vary the status quo that has existed for this young child.



1 30. In the pleadings F makes serious allegations concerning M's ability to care and
2 actual care in relation to P. F also indicates that P is likely to "*suffer irreparable*
3 *harm*" if taken to the Cayman Islands as M's behaviour could lead "*to serious*
4 *bodily harm or death*" for P. He wrongly indicates that he would be denied any
5 contact with P if he returned to this jurisdiction. I note with interest that, despite
6 the gravity of some of his allegations, at no time did F seek to draw them to the
7 attention of the Department of Children and Family Services in the Cayman
8 Islands or to make appropriate applications to the Courts in the Cayman Islands. I
9 also note that F made no mention of the fact that the parties had been attending
10 counselling up until June 2013 to try to address marital and parenting issues.

11
12 31. F's allegations, of course, may require careful deliberation by this Court if P is
13 returned to the jurisdiction. The Court in the Cayman Islands would likely order a
14 detailed investigatory welfare report to be prepared by a social worker if an
15 application were brought. The Court could consider exercising its inherent
16 jurisdiction and make P a ward of court. The appropriate jurisdiction in which
17 these factual issues and resulting orders should be considered is the Cayman
18 Islands, the place where P is habitually resident. The Cayman Islands has modern
19 and comprehensive private and public Children Laws, which provide that where
20 the Court determines any question with respect to the upbringing of a child that
21 the welfare of the child shall be the Court's paramount consideration² and that a

² Section 3(1) of the Children Law (2012 Revision).

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child has a right to family life. The Laws ensure that each parent is treated with parity (no matter what their future immigration status may be) and recognise that they both have an ongoing important role to play in a child's development. F is entitled to make an application for a residence order in the Courts in the Cayman Islands. F is entitled to apply for any contact for M with P to be supervised. F is also entitled to make an application for leave to permanently remove P from the jurisdiction. However, F is not entitled to circumvent the laws of this jurisdiction and wrongfully retain a child habitually resident in the Cayman Islands, a country which is a signatory to the Hague Convention, in the United States of America.

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11 32.

It appears that F failed to give full and frank disclosure to the Florida Court at the ex parte hearing. This is particularly troubling as F was represented by an attorney and is therefore unable to contend that he was unaware of his duty to the Court to so do. I am informed that M's attorney in Florida has filed a Motion with the Court and is requesting an expedited inter-partes hearing for consideration of the injunction at which the Court will now have the benefit of receiving both parties' contentions concerning the background to this case.

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19 33.

F, in an email dated 29th August 2013, indicated that he had become aware that M had instructed attorneys in Florida to contest the injunction proceedings. In the email he indicated that:

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"It is not my preference that we fight this in court, for only one reason, I fear divorce is next, and that is not what I want."

4 Later in the same email F states:

5 *"Despite everything you have done to me, I still love you, and I do*
6 *not want a divorce."*

8 These are interesting statements for F to have made because at paragraph 4a of his
9 Petition he pleads differently in support of his application for an injunction.
10 Therein he stated that he:

11 *"anticipates filing an action for dissolution of marriage in*
12 *Seminole County."*

14 Therefore, by making these statements in his email dated 29th August 2013 F
15 either earlier misled the Florida Court at the ex parte hearing or now seeks to
16 mislead M.

17
18 34. Thereafter, further emails have been exchanged between the parties. In the emails
19 F states a willingness to return to this jurisdiction, as long as his parental rights
20 are protected and the parties attend counselling. He had indicated that he would be
21 willing to return today, but in an email sent on Friday, 6th September 2013 he
22 states he wishes to further delay any return. Interestingly, F also wishes to clarify
23 whether he will be prosecuted for the alleged domestic violence incident already
24 mentioned herein. As a consequence, one may ask whether this potential criminal



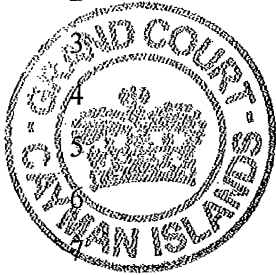
charge was a motivation for his failure to return to the jurisdiction on the due date with P. One may ask whether F is using P to put pressure on M concerning her position in relation to the domestic violence investigations. F also seeks to impose conditions for his return and requests M to sign an agreement before he instructs his Florida attorneys to apply to discharge the injunction. One of the conditions sought is that M agree to an order granting F sole custody of P should he be unable to remain in the Cayman Islands.

9 **Habitual Residence**

10 35. I am aware of the following case law although it was not mentioned by counsel
11 for M during her submissions. It is the habitual residence immediately before a
12 wrongful removal or retention that is the determining factor when considering
13 habitual residence: *RE S (A Minor) (Abduction)* [1991] 2 FLR 1 & *Re F*
14 *(Minors) (Abduction: Habitual Residence)* [1992] 2 FCR 595.

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

19 *"2. Habitual residence is a question of fact to be determined by the*
20 *trial judge. He or she should normally stand back from the*
21 *evidence and take a general view, rather than conducting a*
22 *microscopic search. An appreciable period of time and a settled*



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intention will be necessary to enable a person to become habitually resident in country B as opposed to country A.

3. The requested period of time is not fixed and will depend upon the facts of each case. Bringing possessions, doing everything to establish residence before coming, having a right of abode, seeking to bring family, durable ties with country of residence or intended residence and many other factors have to be taken into account. Habitual residence may be acquired despite the fact that a move may only have been temporary or on a trial basis. A month has been held to be 'an appreciable period of time' though that has been described as 'the high watermark' in a case where the Court of Appeal upheld the trial judge's finding that six weeks was sufficient to result in the acquisition of a new habitual residence.

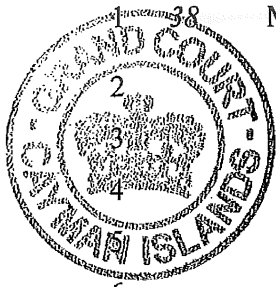
4. In relation to 'settled intention' it has been said that there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general.

5. The habitual residence of young children of married parents all living together as a family is the same as the habitual residence of the parents themselves and neither parent can change it without express and tacit consent of the other or order of the court."³

22 37. ***In Re J (A Minor) (Abduction: Custody Rights)*** [1990] 2 AC 562, Lord
23 Donaldson MR stated:

24 " ... *in the ordinary case of a married couple... It would not be*
25 *possible for one parent unilaterally to terminate the habitual*
26 *residence of the child by removing the child from the jurisdiction*
27 *wrongfully and in breach of the other parent's rights.* "

³ My emphasis



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

“Where both parents have parental responsibility, neither of them can unilaterally change the habitual residence of the child wrongfully and in breach of the other party’s rights: Re J. at 572 and 449 respectively per Lord Donaldson, MR.”

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7 39. In the Court of Appeal decision of *ZA & Anor v NA* [2012] EWCA Civ 13

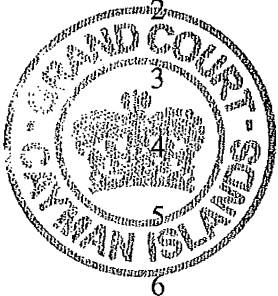
8 Patten L.J. said at paragraph 52:

9 *“... Whether one treats both parents or only the mother as having*
10 *the care and control of the children, it is well established that the*
11 *habitual residence of the children cannot be changed by the*
12 *unilateral action of one parent, which is not consented to, or*
13 *acquiesced in by the other. This would be a charter for abduction.*
14 *The forced retention of the children in Pakistan cannot therefore*
15 *found the basis of a claim that by passage of time and their*
16 *inevitable involvement in family life and education in Pakistan the*
17 *older children have ceased to be habitually resident in England.”*

18
19 40. M and F have both resided in the Cayman Islands for approximately seven years.

20 They married in the Cayman Islands and P has resided in the Islands throughout
21 his life. It is clear, from an objective view of the facts of this case, that before F’s
22 unilateral actions in relation to P after 28th July 2013, and his application to the
23 Florida Court issued only 11 days after P’s departure from the Cayman Islands,
24 that both parents and P were and are habitually resident in the Cayman Islands.

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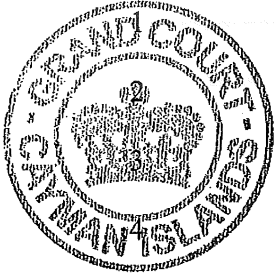


1 41. P's habitual residence cannot change unless both of the parents create a change,
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41. P's habitual residence cannot change unless both of the parents create a change, for instance that they arranged for the child to live in settled circumstances in the United States, or for example themselves both moved to the United States for a settled purpose. What is important is that they changed the habitual residence voluntarily. It is important not to elevate the test into a domicile of quasi-domicile test because habitual residence is a question of fact. Consent, agreement, acquiescence, acceptance of each of the parents is crucial because of the requirement that residence must be "voluntary" to be habitual. If it is not voluntary, it cannot be said to have been settled.

42. M's agreement for P to visit the USA with F in July 2013 for only two weeks does not amount to a voluntarily agreeing to a change of residence, and P's residence there cannot be regarded as being habitual. Parents have joint parental responsibility and F cannot change the habitual residence of P unilaterally, as the parents did not have a common intention to change his residence. Accordingly, admittedly only on the evidence currently before me and without having the benefit of hearing from F, I find that P remains habitually resident in the Cayman Islands.

43. I also find that P has been wrongfully retained past the agreed date of 28th July 2013 by F. On the evidence before me, M did not consent to the retention of P after 28th July 2013. Accordingly, I order that forthwith P be returned to the



Cayman Islands pursuant to the Hague Convention and that F facilitates this return. M intends to travel to Florida to bring P back into the jurisdiction. I order that there be a prohibited steps order stating that thereafter F is not permitted to remove P from the Cayman Islands without the consent of M or an order of the Court. I order that that F hands over P's passport to M. I order that a penal notice be attached to each of these three provisions.

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8 **Interim Residence**

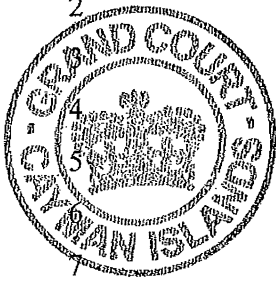
9 44. I am satisfied that the wrongful retention of P, on the evidence before me, falls
10 into one of those exceptional circumstances for the making of an ex parte order
11 interim residence order mentioned by Butler – Sloss L.J. in *Re G (Minors) (Ex*
12 *parte interim residence order)* (1993) 1 FLR 910 at 912D when she stated:

13 *“In my judgment, it is very rare indeed that it is necessary to have*
14 *an ex parte interim residence order. The only situation I can think*
15 *of is where there is a “snatch” situation – child abduction. There*
16 *obviously will from time to time be other exceptional*
17 *circumstances in which it is necessary for the protection of the*
18 *children that there should be an ex parte order.”*

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20 45. When considering whether to make the prohibited steps order mentioned in
21 paragraph 43 above and the interim residence order, I have considered the
22 contents of the welfare checklist set out in Section 3(3) of the Children Law (2012
23 Revision). In particular, I have regard to the following:

24 (i) P is too young for the Court to ascertain his wishes and feelings.



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(ii) I am satisfied that, in the interim, P’s physical and emotional needs can be met by M. M has informed the Court this morning that arrangements have been made with friends for P to be cared for when she is at work by their nannies pending long-term arrangements for child care being put in place. However, it may well be that F is able to meet these needs as well, as I recognise that he appears to have undertaken the majority of the care for P during his short life. The unlawful retention of P is detrimental to his emotional needs.

(iii) Prior to 15th July 2013 the status quo had been that P resided in the matrimonial home in the Cayman Islands. I am satisfied that the effect on P, reverting to those circumstances, would be beneficial for him.

(iv) I have regard to P’s very young age and find that it would be in his best interests to maintain a strong relationship with his mother, at this time in the Cayman Islands.

(v) I am unable on the fairly limited evidence before me to make findings in relation to allegations of physical harm, if any, that P may have suffered. However, there is a risk of P suffering emotional harm as a consequence of his unilateral retention by F in Florida and the effect that will have on his bond, at his tender age, with his mother.

46. Having regard to all of the circumstances of this case, including the fact that it is wrongful retention case, I am satisfied that an interim residence order and the aforementioned prohibited steps order are required to give certainty which would be in the best interests of P, which are paramount. I have considered the no order principle contained in section 3(5) Children Law (2012 Revision).

1 47. Accordingly I make an interim residence order in relation to P in favour of M.

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3 48. Costs are to be reserved

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6 Dated this 9th day of September 2013.

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

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

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

