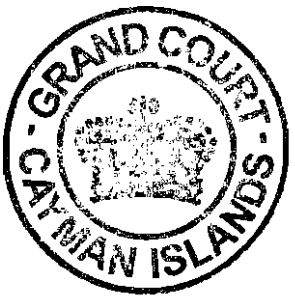
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM 240 OF 2013

IN THE MATTER OF Y AND X



Appearances: Mr. James Austin-Smith of Campbells for F

Before: Hon. Justice Richard Williams

Heard: 3rd December 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. A copy of this oral ruling will be transcribed and copies provided to the parties. Additionally, I permit copies of the judgment to be provided to the parties' attorneys and the Court in any related proceedings that may be brought in the United States of America and to the Central Authorities of

the Cayman Islands and the United States involved in any Hague Convention procedure concerning the relevant children.

3. This matter concerns X (male) and Y (female), twins born on 2nd June 2005 and who are, therefore, aged 8. I shall refer to them as *"the children"* in this judgment. The children's father was F who passed away on 23rd November 2013. The children were born through a surrogacy agreement with their biological mother and were born in Jamaica. A copy of this agreement has not been provided to the Court and should be obtained. F's wife, appeared to take on the role of mother, although the children never resided with her for any great length of time. F's wife passed away on 30th May 2010.

4. The fact that the children are born of a surrogacy arrangement must not be ignored in these proceedings. It may have a bearing on what applications can be made, by whom and who should be informed about the proceedings.

5. This appears to have been a traditional surrogacy where the children are the genetic children of the surrogate mother, rather than a gestation or surrogacy where there is no such genetic connection. It is believed that the sperm was that of F, the commissioning father. However, this requires clarification. In the Cayman Islands there is no Law similar to the Human Fertilisation and Embryology Act 2008 ("HFEA") in England and Wales. This means that there is uncertainty and

greater complication in determining issues in relation to a child's parents, especially where the child is born through an overseas surrogacy arrangement.

6. Under the Children Law (2012 Revision) the birth mother always has parental responsibility for the child. In England the HFEA provides the means by which the parental responsibility of the birth mother is removed and all parental rights vested in the commissioning couple equally by means of a parental order. The most appropriate mechanism is for the commissioning parents to formally adopt the child, at which time the parental responsibility in the biological surrogate mother would come to an end. In law, the child would then be the child of the adopters and not of any other person. The surrogate mother, save for the exceptions set out in HFEA, is not be able to transfer her parental responsibility for the 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. There is no clear information before me to show that the parental responsibility vested in the birth surrogate mother has been brought to an end, although I am being asked to speculate that an adoption has taken place. I am not willing to do that.

7. The applications are brought by K, aged 47. He shares the same biological father as the children and F's wife was his mother. K was appointed as the *"primary guardian"* of the children in K's Will dated 1st November 2013. In the same paragraph in the said Will Aunt was to *"continue to act as their secondary Guardian."* These appointments phrased in this manner, are not as clear as one might ordinarily wish, but it appears that the intention of the deceased may have been that K would be the primary decision maker concerning matters relating to the children. It may well be that the deceased intended that be done in consultation with Aunt. 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.[1]

8. It is important to understand what the status of a guardian is. A Guardian may be appointed for a child by his parent or parents or by the Court in the event of the death of one or both of his parents.[2] That appointment must be in writing, dated and signed by the person making the appointment or in a case of a will there may be exceptions, as long as it is signed at the direction of the testator.[3] When effective, the appointment vests in the guardian parental responsibility for the child in place of the deceased parent or parents.[4] In other words, he steps into the shoes of the deceased parent in the event of that parent's death. Such an

[1] A copy of this will has not been shown to the Court.
[2] Section 7(3) Children Law (2012 Revision)
[3] Section 7(5) Children Law (2012 Revision)
[4] Section 7(6) Children Law (2012 Revision)

appointment will not take effect until there is no surviving parent with parental responsibility.[5] Therefore, it is important to consider whether the surrogate mother has still retained her parental responsibility, for if she has she is arguably a surviving parent with parental responsibility. In turn, this will mean that the appointment of K and possibly Aunt is not effective. If it is not effective, it means that they do not have parental responsibility and would not be able to exercise a guardian's right to apply for section 10 orders, pursuant to section 12(4)(a). This will restrict the applications that may be made under the Children Law.

9. A copy of the 1st November 2013 Will was provided to Aunt on 24th November 2013. In addition, the contents of the new Will were read out to Aunt over the telephone by Mr. Wolf, a partner at K's attorneys. K indicates that by the close of the conversation Aunt understood that she now had no role to play in relation to F's estate. That may have been an inaccurate impression to have given to her, as DJ 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).

[5] Section 7(7) Children Law (2012 Revision).

10. K states that he informed Aunt that the children could attend their father's memorial service to be held in Grand Cayman on 30th November 2013, but that it would be in the children's best interests for them to remain in the Cayman Islands and not to attend his funeral in Orlando, Florida to be held on 4th December 2013. He stated that he also informed Aunt that it had been F's wish that the children would reside in and be educated in the Cayman Islands.

11. Following F's passing, K returned to the United States on 25th November 2013. He had *"an inclination"* that Aunt would remove the children from the jurisdiction on 1st December 2013, after he had been informed that Aunt had instructed U, the children's carer, to pack the children's bags as they were attending the funeral in Florida on 4th December 2013. As a consequence, on his return to the Cayman Islands, ex parte applications were made to the Summary Court initially by the Department of Child and Family Services ("DCFS") and during that hearing by K.

12. I have reviewed the Summary Court file. For reasons best known to the Department of Children & Family Services ("DCFS") the application made was for an Emergency Protection Order. I am told that at the hearing K made an oral application for a Prohibited Steps Order. This is what was considered by the Learned Magistrate, who no doubt still requires the written application to be filed. The written detail given to the Learned Magistrate was rather brief and no

statement of evidence was filed in support of the applications. Paragraph 5 of the still unsigned C11 Form would have given the impression that this was a case in which the children were being permanently removed from the jurisdiction and did not raise the possibility, which may turn out to be the case, that they may have been removed solely to attend their father's funeral in Florida. In addition, the application did not make it clear what enquiries the DCFS was seeking to carry out in relation to the welfare of the children.

13. Despite the nature of the application, it appears that the Learned Magistrate took a pragmatic approach, having had the opportunity to review the content of F's Will dated 1st November 2013, receive live evidence on oath from K and hear submissions from Mr. A-S on behalf of K. The Learned Magistrate made a Prohibited Steps Order preventing any person from removing the children from the Cayman Islands without order of the Court. The Learned Magistrate also ordered that Aunt or any other person in possession of the children's passports or other travel documents deliver the same to the Royal Cayman Islands Police Service, for onward delivery to the Clerk of Courts as soon as reasonably practicable. The return date of 19th December 2013 was given for further consideration of the Children Law application. The process server was unable to serve Aunt on 29th November 2013. Aunt was personally served with a copy of the order at around 10:55 a.m. on 30th November 2013.

14. A copy of the order was provided to the Immigration Department at the Owen Roberts International Airport at 7:30 p.m. on 29th November 2013. However, the Immigration Department advised that the children had already departed from the jurisdiction in the company of Uncle, the husband of Aunt, earlier in the day on the 7:50 a.m. flight. This meant that the children were not able to attend their father's memorial service held in the Cayman Islands.

15. K believes that the children were initially residing with Uncle at Aunt's property in Windemere, Florida. K was later led to believe that the children have since moved from that address to an undisclosed motel.

16. K contends that the children are habitually resident in the Cayman Islands, where they have resided at the same address since August 2008. The children are in Grade 3 at a reputable private school in Grand Cayman, at which K contends they are flourishing and have many friends.

17. The Court was informed that the children have been cared for over the last five years by F's 55-year-old cousin, U, and for the last four years also by their nanny, N.

18. F was a successful businessman and used to travel between the Cayman Islands and the United States. Towards the end of his life he had to spend greater periods

of time seeking treatment for his illness in the United States and during his absence the above carers looked after the children.

19. K states in his unsworn affidavit that he believes that in the short term, especially at this difficult time for the children, that they should remain in Cayman. This would mean that there would be some continuity in their life, involving their long-term carers, their schooling and friends. Although K is based in the United States he indicates an intention to come back to the Islands for a few days each week to be with the children. He indicates that he, his wife and family will be spending the Christmas holidays in Grand Cayman with the children. He states that in the long term he will act in the children's best interests and that he will treat them as his own children. He accepts that a decision will have to be made going forward as to where the children will reside for the long term. It is submitted today that if there is disagreement about this, then that is something which should be dealt with in the Courts in the Cayman Islands where it is contended that the children are habitually resident.

20. I have read the unsworn affidavit of U. She indicated that she has worked for K, her cousin, since June 2006. She said the children arrived on 15th August 2008, when they were only three years old. She indicated that F's wife did not accompany the children and she could not recall her visiting the Cayman Islands.

21. U indicated that she has been caring for the children for the past five years and they have developed a close and loving bond. She gives details of the children's integration into the community and indicates that both of the children enjoy living here. She stated that the children used to visit their mother in Florida. The content of her unsworn affidavit is consistent with the content of the unsworn affidavit of N. I should add that it has been brought to the Court's attention that the children have also stayed with Aunt in Florida.

22. K by his ex-parte oral application seeks orders as a consequence of the alleged wrongful removal and retention of the children in the United States since 29th November 2013. There is no written application before the Court and initially an ex parte s.10 residence order was sought coupled with a specific issue for the return of the children to the care of K and to the Cayman Islands.

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

Judge any defence the respondent would likely argue if they had been in attendance. For example, if K had knowledge that Aunt intended to return the children to the Cayman Islands after their father's funeral on 4th December 2013.

24. When I today consider K's ex parte application before me I am acutely aware of the obligation placed upon the applying party and the Court at such hearings. Mostyn J. in ***UL v BK*** [2013] EWHC 1735 (Fam) sets out his concerns about the overuse of ex-parte applications and the duty placed on the applying party. Although that is a case dealing with freezing injunctions made within divorce proceedings, the general principles arising out of his review of the case law are insightful when considering Children Law applications. I note that K has provided his unsworn affidavit and two unsworn affidavits from children's carers in support of his application. Ordinarily I would not consider the content of affidavits handed up to the Court in this form. However, I do so in this case due to the apparent urgency. However, I accept an undertaking from Counsel that sworn copies will promptly be filed.

Habitual Residence

25. I am aware of the following case law. Due to the urgency of the situation, I herein set out my review of the case law in my recent decision in ***CMS v RGS*** Fam 177 of 2013. Therein I stated that it is the habitual residence immediately before a wrongful removal or retention that is the determining factor when considering

habitual residence: ***RE S (A Minor) (Abduction)*** [1991] 2 FLR 1 & ***Re F (Minors) (Abduction: Habitual Residence)*** [1992] 2 FCR 595.

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

> *"2. Habitual residence is a question of fact to be determined by the trial judge. He or she should normally stand back from the evidence and take a general view, rather than conducting a microscopic search. An appreciable period of time and a settled 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."[6]

27. ***In Re J (A Minor) (Abduction: Custody Rights)*** [1990] 2 AC 562, Lord Donaldson M.R. stated:

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

28. 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."*

29. In the Court of Appeal decision of ***ZA & Anor v NA*** [2012] EWCA Civ 13 Patten L.J. said at paragraph 52:

> *"....Whether one treats both parents or only the mother as having the care and control of the children, it is well established that the habitual residence of the children cannot be changed by the unilateral action of one parent, which is not consented to, or acquiesced in by the other. This would be a charter for abduction. The forced retention of the children in Pakistan cannot therefore*

[6] My emphasis.

found the basis of a claim that by passage of time and their inevitable involvement in family life and education in Pakistan the older children have ceased to be habitually resident in England."

30. Even if it can be argued that Aunt is also a guardian with parental responsibility, she is not able to take unilateral action to remove the children from the Cayman Islands. The children have resided in the Cayman Islands since aged 3, for approximately five years, with their deceased father. It is clear, from an objective view of the facts of this case, that before Aunt's unilateral actions in relation to the children that they were and are habitually resident in the Cayman Islands.

31. The children's habitual residence cannot change unless all of those with parental responsibility create a change, for instance that they arranged for the children to live in settled circumstances 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. It is important not to elevate the test into a domicile or quasi-domicile test because habitual residence is a question of fact. Consent, agreement, acquiescence, acceptance of each of those with parental responsibility 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. Accordingly, admittedly only on the evidence currently before me and without having the benefit of hearing from Aunt, I find that the children remain habitually resident in the Cayman Islands.

Orders

32. For the reasons stated above, in the absence of clear evidence, I am unable to determine who has parental responsibility. In the absence of any evidence verifying a formal adoption of the children by their deceased parents, I am uncertain whether the surrogate mother's parental responsibility has come to an end. If it has not come to an end, then the written appointment of a guardian may not be effective. This causes problems with the type of orders, the Court may make today.

33. However, these are children who I have found to be habitually resident in the Cayman Islands. 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, it is in their best interests to remain, at least for the short term, in familiar surroundings. This would enable them to attend their school, remain in the company of their friends and be cared for by their long-term carers U and N.

34. I am also conscious, that the children's father has left a substantial estate, it is in the region of million US dollars. For an estate of this size the one page Will has less detail than one might hope to see. Importantly, I note that in the Will F bequeaths all his property to the two children. I am not sure how that varies from the terms of his previous Will, which I have not seen. But what is clear, is that the

children are significant beneficiaries of his estate. There is, in such circumstances, a concern that the relevant adults may be positioning themselves with one eye on the benefit they may receive if they were to take over the care of these beneficiaries. With that in mind, I am acutely conscious that the Court has a duty to ensure the paramouncy of the children's interests and welfare.

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

36. I take this approach being conscious that, following the implementation of the Children Law, there has been a substantial curtailment of the powers of the Grand Court under its inherent jurisdiction in areas previously dealt with in wardship. I have regard to the case of ***Re T (A minor) (Wardship: Representation)*** [1994] Fam 4 at 59 in which Waite J stated:

> *"The courts undoubted discretion to allow wardship proceedings to go forward in a suitable case is subject to their clear duty, in loyalty to the scheme and purpose of the Children Act legislation, to permit recourse to wardship only when it becomes apparent to*

the judge in any particular case that the question which the court is determining in regard to the minor's upbringing or property cannot be resolved under the statutory procedures in Part II of the Act in a way that secures the best interests of the child; or where the minor's person is in a state of jeopardy from which he can only be protected by giving him the status of a ward of court; or where the court's functions need to be secured from the effects, potentially injurious to the child, of external influences (intrusive publicity, for example), and it is decided that conferring on the child the status of ward of court will prove a more effective deterrent in the ordinary sanctions of contempt of court which already protect all family proceedings."

37. With that in mind, I order the wards must be returned forthwith to the jurisdiction of their habitual residence, namely the Cayman Islands. In the interim, having regard to the apparent intention at paragraph 4 of the Will, I place the wards in the interim care of K. I am informed that K will be attending the funeral of F on 4th December 2013 in Florida and I order that the wards be returned to his care immediately upon service of this order, preferably in a child sensitive manner when the parties meet in United States.

38. For the avoidance of doubt, I wish to make it clear that the removal of a ward of court from the Cayman Islands without the leave of the Court is prohibited. Any such removal would be regarded as a breach of the custody rights of the Court. The parties must now be aware that the judge becomes the guardian for the

children and responsible for making all decisions which seriously affect the children's life and welfare. If required, this will include making all the necessary applications pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

39. I am conscious that there are ongoing proceedings in the Summary Court with the return date scheduled for 19th December 2013. Due to the international element in this case and the fact that these proceedings are now under the residual inherent jurisdiction of the Grand Court, the proceeding should now be assigned to the Grand Court. The Summary Court should be notified so that they may vacate the date. I am aware that the DCFS were notified about today's proceedings and that they have explained to K's attorneys that they do not wish to be involved.

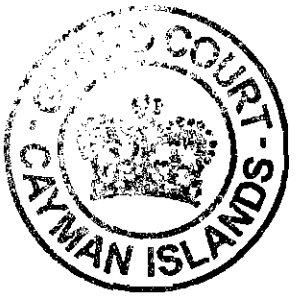
40. I will review the wardship on Friday, 13th December at 9:30 a.m. It is important that the future of these children, if it cannot be agreed, is approached in an informed manner by the Courts and that due process is followed. K needs to place before the Court in a very timely manner evidence to clarify a number of issues raised, especially conformation 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.

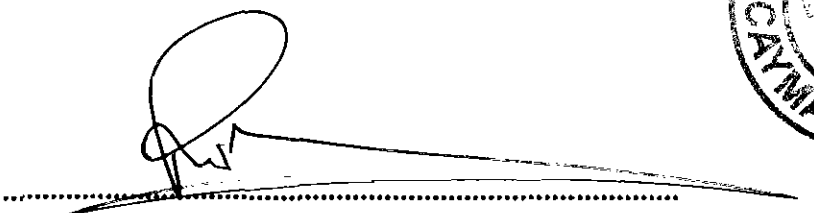
41. In this jurisdiction, we do not have an Official Solicitor. Although these are not specified proceedings, I will consider whether it is appropriate to appoint a Guardian ad litem to represent the children's interests and see if special dispensation can be made to fund that appointment, along with an attorney. If I am unable to secure such funding, I may have to consider making the children a party to the proceedings and permitting them to then instruct a Guardian ad litem and attorney.

42. I respectfully suggest that K and Aunt should 'take a step back' from their apparent current polarised positions. They may wish to urgently reflect on the fact that, by naming them as primary and secondary guardians at paragraph 4 of his Will prepared very shortly before his passing, F recognised at a time when his life was drawing to a close that they both may have an important role to play in stabilising and thereafter developing his young children's lives. F would no doubt have been greatly saddened to see the conflict surrounding the children which has emerged so soon after his passing, at a time when the children are at their most vulnerable and in need of consistent familial support. The last thing the children need is to become embroiled in the uncertainty that emerges from this type of family in-fighting, especially so soon after losing their father. The current state of affairs casts a shadow over F's wishes and is clearly not in the best interests of the children. F would have been entitled to expect that all of the family members, in particular K and Aunt as he named them in his Will, would unite to work together

to both play a productive role in the children's lives, thereby acting in the best interests of his children

Dated this 3rd day of December 2013.





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

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

The judgement in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the 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.